



SANT'ANNA LEGAL STUDIES

STALS / PANOPTICA BOOK REVIEW

Maria Dicosola,

**Stati, nazioni e minoranze. La ex Jugoslavia
tra revival etnico e condizionalità europea**
Giuffrè, Milano, 2010

reviewed by G. Delledonne

Sant'Anna School of Advanced Studies
Department of Law

<http://stals.sssup.it>

ISSN: 1974-5656

Maria Dicosola, **Stati, nazioni e minoranze. La ex Jugoslavia tra revival etnico e condizionalità europea, with a preface by F. Palermo**, Giuffrè, Milano (2010)

Reviewed by

Giacomo Delledonne¹

The book I am going to review deals with a multi-faceted topic. It might be seen as a study on conditionality, thereby meaning all those principles with which candidate countries have to comply prior to their admission to the European Union. It is a book on constitutional transitions in a particularly turbulent area of Central and Eastern Europe – the so-called Former Yugoslavia. Lastly, it is a book on a “classic” subject of Italian (domestic and comparative) public law scholarship, lying at the crossroads between constitutional and international law – the protection of minorities².

The first section of the book (“States, nations, minorities and conditionality in Europe”) reflects its complex nature as it tries to lay down some fundamental conceptual assumptions before presenting the troubled legal landscape of the countries on which the analysis is focused.

Chapter 1 contains a general outlook of the concept of conditionality, encompassing “a kind of political action which characterizes the programmes for development cooperation of many States and international organizations”³, e.g. the International Monetary Fund or the World Bank. Within the EU legal system, conditionality presents some particular features, because “internal conditionality” is the key concept in the relation between the enlargement of the EU and the preservation of the deep nature of the integration process itself and the founding principles of European constitutional law – the “widening v. deepening dilemma”⁴. It is also worth mentioning a “European conditionality in a broad sense”⁵, which is essentially dependent on the activities of the Organization for Security and Co-operation in Europe, the Council of Europe, and – within the latter – the European Commission for Democracy Through Law (Venice Commission)⁶.

Chapter 2 is about the idea of nation in the European context. Its most significant point is that it attempts at reconsidering Hans Kohn’s renowned distinction between a (mostly Western) nation as *demos* and a (mostly Eastern) nation as *ethnos*: “history confirms that it is impossible to make a definitive distinction between a subjective idea of nation and an objective one”⁷. Thus, the

¹ PhD candidate in Constitutional Law, Sant’Anna School of Advanced Studies, Pisa, Italy; STALS assistant editor. Email address: giacomo.delledonne@gmail.com.

² The most obvious reference is A. Pizzorusso, *Le minoranze nel diritto pubblico interno*, Pisa, Pacini, 1967.

³ See p. 14.

⁴ See p. 24.

⁵ See p. 28.

⁶ See also C. Pinelli, “Conditionality and Enlargement in Light of EU Constitutional Developments”, 10 *European Law Journal* (2004), 354-362.

⁷ See p. 61.

legal questions related to the constitutional protection of minorities should not be simplistically seen as concerning just the “new” Member States of the EU. Chapter 3 contains an overview of the legal instruments for the protection of minorities in the European legal system in broad sense (OSCE, Council of Europe, and EU). As previously shown with respect to conditionality, this is another aspect where an evolutionary path from an international logic to a rather supranational and constitutional one can be observed: “the ‘neutral’ approach of the EC institutions with respect to the protection of minority rights underwent a radical change as the Cold War ended and the enlargement process began”⁸.

The second section of the book (“States, nations, minorities and conditionality in the Former Yugoslavia”) provides a comprehensive analysis of the *constitutional law of minorities*⁹ in the States resulting from the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) in the early 1990s – Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Kosovo, Montenegro, and the Former Yugoslav Republic of Macedonia (FYROM). Apart from the historical and cultural framework, some main points are considered in detail: constitutional provisions concerning minorities, their linguistic and cultural rights, their political rights, and their *actual* implementation in the light of a possible admission of the considered country into the EU.

Some theoretical and practical difficulties can be observed in every country in the area, e.g. which groups qualify as minorities, and how they can be identified. To answer these questions, traditional scholarship elaborated a quite simple distinction: a *people* is entitled to self-determination under public international law, whereas a minority is just entitled to *internal self-determination* within a state legal system¹⁰. However, the Former Yugoslav landscape is much more complex: according to the so-called Tito’s Formula, there were “nations” (Serbians, Croatians, Slovenians, etc.), “nationalities” (e.g. Albanians in Kosovo and Macedonia, Italians in Croatia and Slovenia, Hungarians in the Province of Vojvodina, etc.), and “other nationalities and ethnic groups” (e.g. Vlachs or Roma)¹¹. That scheme became even more complicated after the dissolution of the SFRY, when many persons belonging to a nation but residing in another Republic lost their national citizenship – a problem which was particularly serious in Slovenia before a judgment of the Constitutional Court in 1999¹². Furthermore, the comparative analysis seems to show that such a widespread problem – how to deal with minorities in historically diverse and fragmented polities – has been coped with by means of similar instruments. Thus, according to constitutional provisions,

⁸ See p. 113.

⁹ The expression is drawn from F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Padova, Cedam, 2008.

¹⁰ For a critical assessment see F. Palermo and J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, p. 22.

¹¹ See pp. 139 ff.

¹² See pp. 159 ff.

Minority Councils and National Councils for Minorities should have been established throughout the area – which, in fact, did not always happen¹³.

An important methodological warning is recurrent throughout the book: “law in the books” issues have always to be compared with law in action – or, in a slightly different perspective, constitutional provisions do not necessarily reflect the actual (legislative or political) arrangements concerning the treatment of minorities in a given legal system. Moreover, constitutional charters have often been modified in order to get more favourable observations in the Progress Reports periodically issued by the European Commission¹⁴. This aspect is particularly striking in Kosovo, where the Constitution and the implementing laws “do not propose original solutions to the ethnic question – they just confirm the proposals laid down in the Ahtisaari Plan. Thus, in Kosovo the conditioning influence by the international community and the European institutions ... manifests itself in its most extreme form: the very possibility of considering the constitutional text as an expression of a constituent power and of classifying the corresponding legal system as a sovereign one appears to be questionable”¹⁵.

Apart from the observable common traits, every legal system presents distinct problems.

In such a multinational State as Bosnia and Herzegovina, for instance, the main challenge for the international constituent power was to find out a sustainable constitutional settlement concerning its constituent peoples – Bosniaks, Serbs and Croats. By contrast, those peoples and minorities labelled as “other” have been relevantly overlooked by constitutional arrangements. Thus, they are not entitled to take part in the Presidency of Bosnia and Herzegovina¹⁶. Therefore, quite oddly, the recognition and protection of minorities might prove more difficult in an assumedly multinational State. Moreover, immediately after the Dayton Agreement the federal structure of Bosnia and Herzegovina was intended so as to allow its two constituent Entities to draft “national” Constitutions for themselves. In the end, a historic decision of the Constitutional Court declared those provisions of the Constitutions of the Entities as illegitimate for violating the Constitution of Bosnia and Herzegovina¹⁷. Apart from the rather peculiar case of Bosnia and Herzegovina, in fact, all the States in the Balkan area have been characterized by “national” ambitions.

Quite similar problems can be observed in the FYROM, which was first conceived as a national Macedonian State and was subsequently transformed into a multinational State. Properly speaking, however, the FYROM should be considered as a binational State, since minority rights

¹³ See e.g. pp. 203 ff (concerning the Council for National Minorities in Bosnia and Herzegovina).

¹⁴ See e.g. pp. 253 ff.

¹⁵ See p. 242. See also G. Bianco, “And nothing else matters. The ICJ’s judicial restraint in its Opinion on Kosovo’s independence”, *Perspectives on Federalism*, vol. 2, issue 2 (2010), N 24-34.

¹⁶ See also judgment U-13/05 of the Constitutional Court of Bosnia and Herzegovina (26 May 2006).

¹⁷ See pp. 193 ff (referring to judgment U 5/98, 1 July 2000).

are granted only to those groups whose numeric size is more than 20 percent of the population – which is only the case of the Albanian community.

As far as the constitutional evolution of the Balkan countries is concerned, two kinds of conditionality can be identified: a first one, more properly inherent in the concept of constitutional transitions, is related to the democratization of some of these countries, as happened e.g. in Croatia after Franjo Tudjman's death or in the (then) Federal Republic of Yugoslavia after Slobodan Milosevic's fall. The second form of conditionality, in turn, is more closely related to the "Europeanization" of those countries, as documented by the subsequent Progress Reports issued by the Commission.

To conclude, this book offers convincing evidence of how difficult an effective implementation of the "constitutional law of minorities" is. As said, each of the relevant points is liable to raise a debate and entails significant legal and political controversy.

Secondly, it provides a detailed account of the transformations of constitutional law since the 1990s within an area which had largely been alien to liberal-democratic constitutionalism. Moreover, even conceding that Bosnia and Herzegovina is a quite exceptional case, this is an area where many "paradoxes of constitutionalism" may be found¹⁸.

Thirdly, even if every country in the area has introduced sophisticated legal tools to protect its own minorities, one should never forget that the other side of every analysis of the legal landscape is the "ethnic revival" to which the title of the book makes reference: the dissolution of the SFRY led to the establishment of six (or seven, including the Republic of Kosovo) independent States which were – and partially are – primarily set to be the State for a single nation¹⁹. Here lies one of the most striking paradoxes in the constitutional arrangements in the Balkans.

Lastly, the last chapter raises some more general questions putting them into a European context. The standards with which candidate countries have to prove their compliance prior to their admission to the EU are significantly higher than the minimum standard of protection of minority rights in the "old" Member States. Many of them, including Italy and France, have not ratified the European Charter for Regional or Minority Languages so far – suffice to mention the peculiar French approach to the question of regional languages²⁰. The Italian case raises some problematic issues, as well: its focus is on *linguistic* minorities. However, these are only entitled to minority

¹⁸ See M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford, OUP, 2007.

¹⁹ See e.g. the Preambles of the Constitutions of Macedonia (before the signature of the Ohrid Framework Agreement, in 2001) and Croatia.

²⁰ See A.-M. Le Pourhiet (ed.), *Langue(s) et constitution(s)*, Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2004. See also the *décision* no. 2011-130 QPC of the French *Conseil constitutionnel* (20 May 2011): "Article 75-1 of the Constitution provides that 'regional languages are part of the French heritage'; this Article does not establish any rights or freedoms protected by the Constitution".

protection pursuant to a specific constitutional or legislative recognition, as happened with the special *Statuti* of some Regions or, more recently, with the law no. 482/1999²¹.

On the other hand, it has been claimed that “double standards” of protection are justified by the greater stability of the Western European countries. However, the book is very convincing as it shows that the “rigid dichotomy between an idea of nation as *demos* ... and an idea of nation as *ethnos* ... is more apparent than real”²².

Some related questions remain open: after the enlargement in 2004-2007, which link might exist between conditionality and the procedure of Article 7 TEU²³? Think, for instance, of the legal problems arising from the new Hungarian Constitution of 2011, which reflects an ethnic view of the Magyar (rather than Hungarian) nation and contains controversial provisions on national citizenship.

Thus, the book may be recommended because it provides a valuable comparative insight of a relevant number of topics of European and national constitutional laws, choosing to test them within a very challenging field, such as the inextricable scenario of Former Yugoslav countries.

²¹ See Article 2 of the Law no. 482/1999: “... the Republic protects the language and culture of the Albanian, Catalan, Germanic, Greek, Slovenian and Croatian populations and of those speaking French, Franco-Provençal, Friulan, Ladin, Occitan or Sardinian”. In accordance with this piece of state legislation, the Italian Constitutional Court declared the constitutional illegitimacy of a regional law of Piedmont recognizing Piedmontese as a regional language, as such entitled to protection under Article 6 of the Italian Constitution (*sentenza* no. 170/2010). See also *sentenza* no. 88/2011 (note by A. Anzon Demmig, “La Corte apre a ‘nuove minoranze’?”, at <http://www.rivistaaic.it>, 19 July 2011).

²² P. 275.

²³ This procedure has been defined as an expression of the “attitude of federalist mimesis” of the EU (F. Palermo, *La forma di stato dell’Unione europea. Per una teoria costituzionale dell’integrazione sovranazionale*, Padova, Cedam, 2005, p. 187).