LA TRANSIZIONE COSTITUZIONALE DELLA BOSNIA ED ERZEGOVINA

Dall’ordinamento imposto
allo stato multinazionale sostenibile?


The process of constitutional transition of Bosnia-Herzegovina is at the heart of this book’s analysis. Due to its extraordinary complexity, this country can be considered as a paradigmatic case for the greater regional context of the Western Balkans. The main focus of research is on the role and the function of pluralism as a constitutional principle during transition, in particular of territorial and socio-cultural pluralism. How can, after a conflict, the living-together of different groups on the same territory and in the same State be guaranteed by constitutional means?

To this extent, the author looks into the application of the main principles of Western legal tradition as applied in the Western Balkans, examining their adequacy for the specific context, in particular in the situation of Bosnia’s post-war reconstruction. The constitutional State and its main features have indeed become the main point of reference and standard in the process of transition, first in Central and Eastern Europe, later in South Eastern Europe. After the opening of a perspective of membership in the European Union, this has also become true from a normative and prescriptive point of view, as the criteria of Copenhagen and their concrete implementation in the Stabilization and Association Agreements demonstrate. However, the question is raised, whether the criteria for membership developed in a different context for the CEE States are also adequate in the specific and complex situation of the Western Balkans, and Bosnia-Herzegovina in particular.

Numerous actions and interventions of external actors (various international organizations, States and the European Union) have strongly and directly influenced the processes of transition in the whole Balkan region. Bosnia-Herzegovina can be considered as a paradigmatic case in this regard, too: due to the duration and to the intensity of international intervention as well as due to its important constituent role for the post-war institutional system which has been established by the Dayton Peace Agreement. Thus, the direct or indirect external intervention into the constitutional systems of the new States of the Western Balkans and its effects is one of the main subjects of the analysis.

From a legal point of view, the phenomenon of the political and constitutional process of transition regards, above all, the breaking with the old constitutional order and the foundation of a new one. However, in some States
of the Balkans it is quite difficult to determine this exact moment as their transition is a rather long and staged process. This is also true for the case of Bosnia-Herzegovina, where it is possible to distinguish three major phases of transition since the Dayton Peace Agreement: the first implementation of the Agreement was followed by a second phase of “corrections” through judgments of the Constitutional Court and numerous interventions by the High Representative of the International Community. The goal of European integration characterizing the third phase requires Bosnian institutions and politicians to assume more local “ownership” of the process as well as an adjustment of the delicate balances of the post-war Dayton system.

The legal recognition of pluralism in society and its constitutional and legal rules cannot be analyzed without taking into account the factual and political situation. Thus, the constitutional analysis necessarily has to consider political and extralegal issues as well as the debate in other disciplines, such as history, sociology and political sciences, without renouncing, however, on the methods, instruments and concepts the legal scholar is familiar with. Therefore, for instance, the author illustrates and discusses some important extralegal concepts already in the introduction, such as “nation”, “ethnic group” and “multiethnic society” in order to better understand the legal concepts which are based on them. The latter are in fact an expression of the legal recognition of the former, i.e. of extralegal factors and facts, such the “multiethnic” or “multinational constitutional order” as legal recognition (and institutionalization) of ethnic diversity in society.

In Chapter One a comparative analysis of the concept of constitutional transition is carried out. The main focus is on the application of the concept to South Eastern Europe, on the distinction between endogenous and exogenous factors of transition as well as on the historical continuity of the principles guaranteeing diversity, such as the federal principle in former Yugoslavia. Chapter Two illustrates the theoretical framework discussing different constitutional approaches for organizing the living-together of an ethnically diverse population as well as theories and instruments of Power Sharing and consociational democracy. This is followed by an illustration of the use of the territorial dimension as an element for the proceduralisation and legal regulation of conflicts, in particular through federalism and regional autonomy.

These concepts and premises are used in Chapter Three for the illustration of their application in the specific context of the Dayton Peace Agreement (DPA). The main features of the constitutional system imposed by the International Community together with the DPA are analyzed: the peculiar federal system, in particular the relations between “State” and “Entities” (the two constituent territorial units), as well as the various forms and guarantees of institutionalizing ethnicity. Mainly following a logic of stabilization after a violent conflict, the Bosnian variant of consociational democracy has resulted in the creation of an extraordinarily complex and dysfunctional institutional
system. In addition, numerous and far-reaching veto powers for the protection of ethnic interests have frequently been used for blocking this system. From the beginning, however, these static guarantees are counterbalanced by the (political) objective of restoring the multiethnic society. This is to be achieved in particular by the effective exercise of the refugees’ right to return, a process which can be considered as the dynamic element in Bosnia’s constitutional order.

Chapter Four (“Constitutional Corrections”) is therefore analyzing the changes which have been made in order to fully implement the DPA and to overcome the contrasts between its static and its dynamic elements. The corrections at the Dayton Constitution have been carried out by two actors in different forms: by means of “correcting” judgments of the Constitutional Court, the constitutional institution embodying the final guarantee of the whole constitutional system, and by the High Representative of the International Community. As the key institution for the implementation of the Peace Agreement, the latter has been vested with special and extraordinary powers of direct intervention and substitution (Bonn Powers). With their corrections, both institutions considerably exceed the text of the Constitution and rather refer to a substantial understanding of constitutional law, based upon a systematic, internationally open and teleologic interpretation of the entire Dayton Peace Agreement.

The consequences of these corrections are subject of Chapter Five. At first, the relations between the numerous Bosnian as well as international institutional actors are illustrated and their respective coordination and responsibility examined. The issue of responsibility, in particular, has given rise to widespread criticism, as the High Representative’s far-reaching coercive measures are neither matched by any significant limits nor subject to constant and effective control (“international protectorate” and “European Raj”). As a kind of intermediate conclusions at the end of the chapter, territorial and institutional segregation as a means for stabilization is critically discussed as well as the consequences of the constitutional corrections, in particular the violation of the right to political participation through the continuous exclusion of the “Others” from an institutional system based exclusively on the equal representation of the three major groups (i.e. the constituent peoples: Bosniaks, Croats and Serbs).

Discussing the changes on all levels of government, in Chapter Six the question is raised whether and how local self-government might provide positive examples for the difficult balances between opposing objectives and contrasting rights. Can positive change be expected or even produced bottom-up? After an overview over the different legal regulations of local government in the Entities and Cantons, a deeper look is offered into two significant cases (Mostar e Brčko) which are very different in their political approach as well as their institutional setting.
In the last years, the perspective of European integration has clearly become the central goal of the whole process of transition, also meaning that the States in the Western Balkans have to respect and to fulfill concrete conditions set up by the EU. These conditions are the translation of principles (such as the Copenhagen criteria) into specific and detailed parameters which have to be met and implemented, while the process of implementation is assisted and monitored by the EU institutions. Chapter Seven is dedicated to this “conditionality” and to the necessary dialogue between the institutions of the Western Balkan States and of the EU. Without such a dialogue, the risk is a limited and formal adherence of the States to the principles through the mere adoption of legislation while, however, its effective implementation in practice and its penetration in the legal and administrative system cannot be guaranteed. By contrast with the previous phase of transition, when the reception of the principles and the related reforms have been determined by outside forces and actors, in the current phase of the Stabilization and Association Process, authentic and convinced adherence is required.

This is summarized in the concept of local ownership: its content and consequences are examined thoroughly in Chapter Eight. The transition from an externally imposed to a generally accepted constitutional system can be considered as the true moment of definition for Bosnia-Herzegovina in the process of transition. This moment should be formally marked by a constituent act, such as the adoption of a new Constitution or amendments of the Dayton-Constitution, legitimated by the people. First attempts in this direction, such as the unsuccessful April-Package (2006) are analyzed.

In the conclusions, Chapter Nine, the experience of Bosnia-Herzegovina’s “guided” transition is critically reflected. The main questions refer to the sustainability and to the legitimacy of each endogenous change as well as the paradox raised by the EU that multinational Bosnia has to become a “normal” State (i.e. similar to the Nation-State model) in order to become a promising candidate for membership, while, once a member, it will be possible and even necessary to limit sovereignty. However, the mere perspective of EU integration will not be sufficient as a substitute for clear ideas on the purpose and the principles of Bosnia’s statehood. Thus, the EU will have to adapt strategy and instruments for preparation of membership to the specific situation of a multinational State as well as to actively promote and facilitate the process of constitutional reform.

Like in a Kaleidoscope the analysis of the processes of constitutional transition in the Balkan region and in particular of Bosnia-Herzegovina raise all important issues of constitutional law. There are even similarities with the developments in Western Europe after WW II, such as the diversity characterizing Europe as well as the Balkans, the democratic transition after violent conflict and the strong military, economic and political intervention from outside. Therefore, the analysis of the transition process in South Eastern Europe
might lead to some interesting conclusions for the process of European integration, too.

Based upon the individual protection of Human Rights and – as a general tendency – upon a “civic”, ethnically neutral conception of people as “demos”, a liberal and individualistic approach is predominant in Western Europe (despite differences due to history in some States). By contrast, all States in the Western Balkans show important exceptions from this general approach by institutionalizing ethnicity in a variety of forms; as in the case of Bosnia-Herzegovina, these “corrections” of liberal democracy are sometimes far-reaching and characteristic of the whole system.

Of course, it would be impossible to neglect the social importance of ethnicity in the specific context. However, its strong institutionalization bears two main risks: on the one hand, the emergence of territorial claims, which might endanger the existence of the new States, still (pre)occupied with their consolidation, on the other, the blockade of important decisions within these States due to the obstructionist use of guarantee-mechanisms for the protection of single groups, in particular the “vital interests”-veto. These risks have become concrete and evident in Bosnia-Herzegovina. Consequently, the term “ethnic democracy” highlights the critical tendency towards an absolute dominance of ethnicity in the political and institutional system, also vis-à-vis individual Human Rights and other principles of the Constitutional State. While this cannot be accepted, it is also impossible to simply substitute it with a “civic” concept of democracy, neutral in ethnic terms.

The aim of peacefully living-together in a multiethnic society and the integration into a multinational constitutional order require corrections of the democratic principle (in its narrow sense). These corrections in favour of groups and of respect of the cultural as well as ethnic diversity must neither, however, limit individual rights disproportionately, nor question or challenge the very foundations on which the multinational system is built upon, i.e. the equal standing of the groups and the loyalty towards the common institutions.

In the case of Bosnia-Herzegovina, the illustrated difficulties result from the necessity to create a sustainable multinational constitutional order: after a war and for a “State without a Nation”. This raises the more general question, whether and how a “normalization” in ethnic terms is possible (i.e. a gradual reduction of the institutional importance of the ethnic factor), and which counterweights and balancing operations are necessary in order to guarantee, at the same time, both: the respect of diversity and a certain ethnic laïcité.

These are important questions for the further consolidation of the States in the Western Balkans and their complete European integration. But they are also decisive for the future of the European Union itself; after all it has become much less homogenous with the last two rounds of enlargement.

Like in a laboratory, these questions are condensed in the constitutional transition of Bosnia-Herzegovina.
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[Translation]

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