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A Comparative Overview On The European Microstates Constitutionalism

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ABSTRACT

The European microstates offer a notable lesson for both constitutional law and, generally speaking, the theory of state. The article analyzes this typology of state with a comparative method about constitutionalism of them. Indeed, in the 19th century, the concept of state was related, according to these disciplines and Hegel's thought, not only to power, i.e. state power itself but also to "outward power", that is authority at the international level. It is well known that our understanding of state power has changed since then. But, if a key factor in guaranteeing independence at the international level occurred to be might rather than power, something microstates are not familiar with. The result of the contribution is that European microstates teach us a precious lesson: the state is not only a question of power but also of might, the last one understood as the power to perform at the international level.

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1. 1. Introduction: The Case of European Microstates

Microstates exist at both European and worldwide level. Particularly, the European continent counts five microstates (Andorra, Liechtenstein, Monaco, San Marino, and Vatican City)[1], without considering the bigger microstates of Luxembourg and Malta, which belong to the European Union (EU)[2].

First, the microstate phenomenon should be contextualized within the broader process of federalization, typical of German-speaking countries: Austria, Germany, and Switzerland.

The political communities of these countries stand out for their keen sensitivity to federalism. The German Federation consists of subordinate governmental entities, some of which are relatively small, such as the city of Bremen. Switzerland counts some small states making part of the Swiss Confederation. Likewise, Austria has its micro-Länder.

Under these premises, it is clear that the concept of microstate is particularly familiar to the German federalist thought, as well as to all these legislations inspired by the German model[3].

Nowadays, the concept of the microstate takes on particular significance at the European level. Regardless of the size- small, medium, large, all European countries, indeed, seem so small compared to countries such as the US, Russia, China, Brazil, or India. Therefore, European countries ought to act as microstates, following the pattern of those already existing on the European continent[4].

In view of the above-mentioned premises, I intend to comment on three different problems:

1. on the statehood of microstates;
2. on the comparative-constitutional issue arising from the existence of microstates;
3. on the peculiarity of some microstates, as they attract the interest of larger states and their legal systems.

1. See Fiorenzo Toso, Frammenti d'Europa, (Milan: Giuffré, 1996) 145.
2. See Guido Guidi (ed), Piccolo Stato, Costituzione e connessioni internazionali, (Turin: Giappichelli, 2003).
3. See Guarino, La nozione di microstato nel diritto internazionale e nell'ordinamento internazionale, (1 Diritto e giurisprudenza, 1971), 19–20.
4. See Zbigniew Dumienski, 'Microstates as modern protected states: towards a new definition of micro-statehood', (2014), Centre for Small State Studies, Institute of International Affairs.

Analysis of European microstates shows a peculiarity they all have in common, i.e. their Catholicism. This has piqued the interest of ecclesiastic law's scholars to closely study microstates in respect of their common Catholic trait. However, legally speaking, the Catholic character of all these microstates does not produce any significant impact. At this point, the theory could be put forward that microstates historically arose in the attempt to extend a balance of decayed foreign policies governed at a distance: a sort of platform for the exercise of powers elsewhere already banned. This might be the case of Liechtenstein, somehow of Vatican City, and, for some time, of Malta as well[1].

Nowadays, however, it seems that this no longer is the case when it comes to microstate governmental strategies. All European microstates, indeed, are not "governed at a distance" anymore, they are no more, so to speak, hetero-governed: on the contrary, governmental power is firmly rooted in the relevant territory of each microstate[2].

A specific problem regards Vatican City, in so far as there is this knot to untangle concerning the question whether it can be considered a state or rather a sovereignty platform for the Catholic Church. In other words, the question revolves around whether the Holy See, as a subject of public international law, and the State of Vatican City, as a subject of international law as well, can be seen separately from one another.

Without a doubt, recent events rather emphasize the dissociative option, so to say. However, in my opinion, this leads to two sets of problems. On the one hand, it has always been assumed that the Holy See, that is the Catholic Church, is the one to be the actual subject of international law, as properly pointed out in the so-called Law of Guarantees, after the annexation of St. Peter's estate. On the other hand, the assumption has also always been that the territory of the Vatican City serves as a mere ecclesiastic sovereignty platform. Exactly with this in mind, the popes claimed the sovereignty of Vatican City during the Risorgimento.

International public law's scholars have always endorsed this view. I see, therefore, no reason to quit this approach to the Vatican's particular case. Vatican City remains a both significant and ancient subject of international law that deserves a *sui generis* treatment.

That being said, the attempts to separate the Holy See from the State of Vatican City, carried out also by the Holy See, represent a source of risk for the Holy See itself, the Papacy, and the Catholic Church. In the event of the imposition of European regulatory requirements, problems could arise concerning Vatican City's state organization in terms of democratic principles, separation of powers and protection of human rights. All these aspects could prove problematic for the Catholic Church. Hence, I exclude the possibility of legal recognition of two different subjectivities at international level – the Holy See and the State of Vatican City.

Microstate experts have often expressed their positive opinion on research opportunities offered by constitutional comparative law, suggesting that results obtained in this field can be certainly applied to the study of microstates as well.

However, the method of constitutional comparison, whenever applied to the microstate

1. See Wouter Veenendaal (ed), 'Politics and Democracy in Microstates: a Comparative Analysis of the Effects of Size on Contestation and Inclusiveness', (2013), Vol. 8, No. 2, Island Studies Journal, 321;
Soamiely Andriamananjara & Maurice Schiff, 'Regional Groupings among Microstates', (1998), Washington: World Bank.
2. See Jorri Duursma, Self-determination, Statehood and International Relations of Micro-states: the Cases of Liechtenstein, San Marino, Monaco, Andorra and the Vatican City, (Leiden: University of Leiden 1994).

case study, has turned out to be a winding road for scholars who took the risk to go it down, similar to the case of the well-known method of comparative private law. This is due to all the challenges the study of microstates entails.

Some of them can be briefly summed up as follows:

Constitutional comparison applies to major legal entities characterized by a high degree of cohesion, excluding micro-comparison phenomena due to their high specialization level. Indeed, constitutional comparison explores entire legal systems, since constitutions include the whole vastness of state legal systems they refer to, either in the case of major states or minor ones. It has been proved that the study of the constitutions of European microstates was the result of a long historical path, full of specific features that cannot be easily compared with each other.

By way of example, the history of Malta is so different from San Marino's or Andorra's that it can be stated that to compare such different state patterns, poses serious difficulties. As a result, this suggests that the path of constitutional comparison should be set aside.

Lastly, it is fundamental to remind that constitutional comparative law focuses on political systems, not on human nor economic affairs occurring within those systems. For example, commercial transactions always take place following the same procedure that is covered by a specific set of rules, whether we are talking about China or San Marino. Issues arising from the study of trading mechanisms can be easily pinpointed, then treated separately not only from the legal order they function in, but also from civil law. Constitution, instead, is the direct result of political will, hence it has nothing to do with socio-economic influence factors.

The study of microstates, though being apparently so similar to each other, at least in terms of size, allowed to shed light on the importance of all the above-mentioned peculiarities. It follows that comparative scholars are required to pay particular caution[1].

2. 2. The European Microstates Constitutionalism: A Comparative Perspective

Notwithstanding that, the question arises, what European major states can learn from microstates.

Firstly, scholars have asked themselves if microstates can be considered as a sort of constitutional laboratory for the analysis of impacts produced by the model of major European countries on minor ones, but also for the experimentation of innovative solutions in a politically quiet and, therefore, favorable atmosphere.

Nevertheless, major countries holding the rank of reference model do not always offer innovative insights. Reception phenomena are, as a matter of fact, often observed in the study of microstates. It is undoubtedly the case of Malta with respect to England, Andorra with respect to Spain, Monaco with respect to France and, eventually, San Marino with respect to Italy, but there is more to it. Another common phenomenon regards the tendency of major member states to put forward requests and pleas claiming that microstates shall comply with the same solutions they had previously adopted as a prerequisite for EU accession or for the drafting of association agreements.

1. See Elisa Bertolini, 'The Constitutional Identity of European Micro States and the Continental Integration Mechanisms. The Influence of the Diminutive Size', (2020), ICL Journal, vol. 14, no. 2, 133.

The proof of this receptive phenomenon is the frequent recourse to constitutional review in almost all microstates. It results at European level, therefore, that major member states drag minor ones.

Microstates are often prone to acknowledge the European Convention on Human Rights (ECHR), this, in turn, put them in the position to account for instances of democracy, separation of powers, guarantee schemes for the safeguard of the rule of law, also by means of constitutional supervision.

Monarchy based countries, such as Liechtenstein and Monaco, are particularly struggling with the ever-increasing parliamentarization ambition of their national institutions.

There is no way not to praise these achievements of modern constitutionalism. Though, the question must be asked whether we are all experiencing, including us constitutionalists, a sort of euphoria, the euphoria of success. In the wake of emperor's Wilhelm II early 20th century enthusiasm, we are now similarly tricked by the belief that "we have achieved democracy, separation of powers" etc., but we should rather question this false certainty. This is a valuable lesson also for microstates; all too often, they have uncritically and passively embraced foreign constitutional achievements.

As to separation of powers, it can be easily proved that all three of them are going through a serious crisis. As regards legislative power, the crisis of this branch has almost become a constitutional triviality. Administrative power, the second state power, is no more than a bunch of heterogeneous absolutism remainings, whose traces are difficult to spot in the wake of nowadays' reconstructive-oriented dogmatism. As a matter of fact, no one can say exactly what administration is nowadays. Even less successful is the search for criteria that could help defining it.

As to judiciary power, we are surely proud of the independency of todays' judiciaries, yet almost every country suffers from, in some cases severe, obstruction to the independence of their judges.

It is thus appropriate to make an appeal for prudence to all European microstates, in the hope that they will not fall victim to highly praised constitutional triumphs.

Lastly, I would like to emphasize a positive aspect that European microstate constitutionalists consider as a real accomplishment. This especially concerns the courage of microstates in terms of remaining faithful to their own traditions, on the one hand, while on the other they keep assimilating foreign constitutional insights, turning them later into own sources of law.

This is particularly true of San Marino, where the so-called "traditional Constitution" and the written one successfully coexist next to each other[1].

Andorra[2] and Liechtenstein[3], in turn, preserve their own juridical tradition, likewise Malta keeps some elements of English origin, though adjusted to the Maltese tradition.

Therefore, it would be desirable for European microstates if they held to their own tradi-

1. See Guido Guidi (ed), Un collegio garante della costituzionalità delle norme in San Marino, (Rimini: Maggioli 2000).
2. See Viñas Farré, 'La ley sobre la nacionalid andorrana. Repercusión de la sentencia del Tribunal constitucional del 15 de marzo de 1994', (1994) Revista jurídica de Catalunya, 1057–67; Valls, 'La nova constituciò d'Andorra', (1993), Andorra La Vella: Premsa Andorrana; Vilar, 1984-1985. Vers un nouveau statut juridique des vallées d'Andorre: la réforme constitutionnelle du 15 janvier 1981, Aix-en-Provence: Mémoire I.E.P. Aix-en-Provence.
3. See Rita Mazza, 'Microstati e principio di eguaglianza nella riflessione sulla membership del Liechtenstein all'ONU', (2011). In: Vassalli di Dachenhausen (ed), Atti del Convegno in memoria di Luigi Sico: il contributo di Luigi Sico agli studi di diritto internazionale e di diritto dell'Unione europea, Naples: Editoriale Scientifica, 387–406.

tions, to which, incidentally, the European juridical thought is also closed. By doing so, they would avoid being eventually absorbed by bureaucratic jurisprudence.

In a desirable scenario, microstates should also turn away from the model of European major countries in which common law has been gradually replaced with both application and interpretation of written law. Another phenomenon typical of microstates and directly related to their traditionalism, as previously discussed, is their marked tendency towards federalism.

A quick look at the inner organization of microstates seems to confirm a famous ancient Greek saying, according to which there is no limit to the smallest.

Though microstates are tiny countries on their own, they are additionally characterized by the trend of splitting up themselves into increasingly smaller entities: cantons, parishes, castles, districts etc.

From this viewpoint, microstates represent a full-fledged federalism laboratory[1]; on the one hand, it seems there are no limits to juridical subdivision, on the other exactly thanks to this fragmentation tendency it was possible for microstates to preserve ancient traditions[2].

In this regard, microstates can provide valuable lessons to constitutionalists that focus on major countries, to whom I would like to address a piece of advice: one should be aware that federalism has always been at the center of a thwarted love. Federalism, indeed, is praised precisely in these countries that luck it most. In Germany, for instance, antifederal, i.e. centralizing trends are frequently the subject of collective discourse. Yet, precisely Germany could be considered as a model for European federalism[3].

Microstate federalism is a real treasure that should be safeguarded with determination.

Lastly, microstates offer a notable lesson for both constitutional law and, generally speaking, for the theory of state. In the 19th century, the concept of state was related, according to these disciplines and Hegel's thought, not only to power, i.e. state power itself, but also to "outward power", that is authority at international level.

It is well known that our understanding of state power has changed since then. Indeed, a key factor in guaranteeing independence at international level occurred to be might rather than power, something microstates are not familiar with. Once again, microstates teach us a precious lesson: state is not only a question of power, but also of might, the last one understood as power to perform at international level[4].

The questions that spontaneously arise regard the progress that has been made up to now by microstates and the direction in which they are moving with consideration of the historical development of our constitutionalism[5]. An important benchmark in this process is offered by the new constitutional framework that has established not only at supranational level, but also at a federal one – based, anyway, on pluralism. Such a framework has replaced the cohesive role played once

1. See Peter Häberle, 'Federalismo, regionalismo e piccoli Stati in Europa', (1994). In: Zagrebelsky (ed), Il federalismo e la democrazia europea, Rome: NIS, 78 ff.
2. See Jurri Duursma, 'Fragmentation and the International Relations of Micro-states: Self-determination and Statehood', (1996), Cambridge: Cambridge University Press, 976.
3. See Morganti (ed.), Europa: il ritorno dei piccoli stati: autonomie, piccole patrie, processi di sussidiarietà, (Rimini: Il cerchio 2012).
4. See Marcin Łukaszewski, 'Research on European Microstates in Social Science. Selected Methodological and Definitional Problems', (2011), (1) Ad Alta Journal of Interdisciplinary Research, 74–77.
5. See De Vendeuil, 'L'industrialisation des micro-états européens: Liechtenstein, Monaco, Andorre', (1983), Problemes economiques, 29–32.

by the concept of nation. It seems that, at the present stage in the history of European constitutionalism, the concept of microstate could be restored and reactivated, at least partially.

The focus of future studies on this topic could help to examine, by means of constant and comparative monitoring, the solidarity of microstates in order to better understand both their historical identity and their current situation. Additionally, targeted studies could also offer unexpected insights or solutions to serious limitations of EU approach to this new constitutional framework of which not only Europe itself, but also the whole world is in need[1].

1. See Marcin Łukaszewski, 'Research on European Microstates in Social Science. Selected Methodological and Definitional Problems', (2011), (1) Ad Alta Journal of Interdisciplinary Research 74–77.

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