

## NEW CHALLENGES TO PLURINATIONAL STATES TO INFORM THE MOROCCAN AUTONOMY INITIATIVE FOR THE SAHARA REGION

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Morocco has embarked on a large scale economic, social and political development project for the Sahara region. It is an ambitious programme which seeks to enhance the sovereign powers of the Kingdom of Morocco over this territory, while developing port and inland infrastructure, exploiting natural resources and repopulating the territory.

In light of the different types of papers I previously published, I have been trying to identify the various institutional mechanisms Morocco may wish to look into in order to provide the region with the keys to social cohesion and better integration based on the institutions established by the Moroccan government throughout the territory. I therefore do not here wish to assess the government's leeway when it comes to acting on the territory, but rather to look into the various options available to encourage the widest possible participation of the populations and thus to get them involved in the region's future development.

The text below is divided into three main sections<sup>3</sup>. **First of all**, we shall look into the two main traditions competing in studies on federalism. We have chosen this angle because, to us, the best way to limit the power of leading groups remains the federal formula. **Second**, for minority nations we shall advocate for political projects and the adoption of policies conducive to active citizenship. Quebec's experience will provide the backdrop for the development of a project based on mutual, though conditional, trust for the nations involved. **Third**, we shall delve into the idea that it is essential for contemporaries to rethink political relations and, by extension, social relations by looking further into a plurinational approach without which the members of minority nations simply cannot enjoy the same living conditions and the same emancipatory opportunities for cultural, social, economic and legal empowerment. The political stability of current political regimes depends to a great extent on the ability of multinational forces to be sensitive to the needs and expectations of minority nations (Requejo and Gagnon, 2010).

### Two main traditions

The concept of federalism can vary depending on where and when it is used. The two main known traditions originated in the United States and in Switzerland. The American tradition, based on balance between the executive, the legislative and the judicial powers is the one which has been dominating the field of federal studies. Though it defeats the absolutist vision of power, this tradition ignores national diversity which is the very foundation for the federal pact and purports to create a homogenous and even nation in order to ensure political stability. This tradition recognizes only one *constituent power* and, at least in the United States, it came to be through armed conflicts by denying indigenous nations, more than others, the most basic rights to representation and self-representation. Experts usually consider the American tradition to be the most advanced expression of territorial federalism. It seems obvious that this tradition strongly influences the way the majority nation in Spain wishes power relations to develop even after the disappearance of Franco's regime and the advent of autonomous regions.

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The Swiss tradition of federalism differs from the American tradition in two respects: it hinges on the political autonomy of the member states of the (con)federation and on the separation of powers between all levels of government. This tradition has been very successful with complex democratic societies by recognizing founding nations as *constituent powers*. For this school of thought, the main challenge has been to re-imagine power relations on an ongoing basis, without prejudice to the political communities and historical nations behind the founding pact. This tradition has taken different shapes and sizes over time and is generally recognized as the most advanced expression of pluralistic federalism (Smith, 1995; Camilla, 2002) - some scholars like Ramon Maiz (2008) consider that it is the very basis of advanced multinational federalism by an emerging school of thought (Gagnon and Tully, 2001; Seymour and Gagnon, 2012) which is growing in several democratic countries characterized by national diversity.

In the Spanish State of autonomies - mirroring the Canadian experience - these two traditions exist, with the Government in Madrid trying to establish itself as the only constituent power while historical nations, especially Catalonia and the Basque Country, consider themselves constituent powers with which the political centre must contend with. On several occasions this situation resulted in political turmoil and even led several other autonomous communities to covet the status of historical nation (Valencia, Andalusia, Canary Islands, etc.) and use their new status to achieve political gains. Over the last decade, two of the main historical nations also tried to establish their status as constituent powers by seeking to consult their population directly through popular consultation, which they have so far been denied by the country's highest court.

Forty years after a major, but still incomplete, constitutional reform (Fossas, 2007; Joan Romero, 2012), Spain is now once again at a crossroads. Four possibilities arise, whose chances of success vary: political and constitutional status quo; recentralization of powers in Madrid together with new symmetry in the powers of autonomous communities; updated and enhanced autonomy statutes; secession of some historical autonomous communities.

The political and constitutional status quo can no longer even be considered by some autonomous communities which feel bogged down in a political system which has become ossified and has given up on the basic (federal) principles that underpinned its reform following Franco's death and the return to democracy in Spain. Let us recall that *the State of autonomies* was first and foremost born of the Swiss federal tradition that allowed for the recognition of various *demos* while defending the idea of an indivisible Spanish nation.

Now, as the *State of autonomies* emerged, it was observed that the central government tried to impose the American tradition of a territorial and mono-national federalism and paid less and less attention to the protection and promotion of national diversity. In so doing, Spain became unified and thus defederalized by putting forward practices of Jacobinical inspiration.

At the time of the transition towards democracy, two solutions had been imagined in order to accommodate historical nations as well as other autonomous communities. The historical nations of Catalonia, Galicia and the Basque Country would soon be able to exercise significant powers while the other communities would secure partial powers over a longer timeframe. Now, in order to lessen the political impact of the *hecho diferencial*, the government in Madrid repeatedly tried to impose the same rules on all communities based on the principle of *café para todos* well-known in Spain. By so doing, Spanish nationalism gained the upper hand over federal practices and historical nations' nationalism was lashed. This encouraged regions such

as the Basque Country and Catalonia to reflect on ways out of standardizing Spain (Requejo and Nagel, 2011; Requejo and Gagnon, 2011) which was progressively becoming more insensitive to national diversity and was turning equality between autonomous communities into a non-negotiable tenet.

Following the advent of a political cultural that was becoming less and less federal in Spain, several communities demanded a thorough review of their autonomy statute in order to keep (or enhance) their leeway and thus give their citizens a chance to live their native culture to the full within a plurinational Spain. Several eminent scholars coming from all regions and political families, engaged in the conceptualization of multinational federalism to turn it into a compromise acceptable to all. The scholarly work of Joxerramon Bengoetxa, Miguel Caminal, Enric Fossas, Ferran Requejo, Ramon Maiz, José Maria Sauca and Eduardo Vieytez are cases in point.

This was followed by a show of strength between the government of Madrid (more often than not supported by several autonomous communities under the aegis of the Popular Party) and the two main historical nations which tried to stand out (Catalonia, Basque Country). The Centre's lack of openness vis-a-vis historical nations only further alienated the inhabitants of these regions from the *State of autonomies* as established by Madrid and led them to consider going as far as withdrawing from the Spanish state through a constitutional referendum (Tierney, 2013; Kraus and Vergés Gifra, 2017).

Since they were unable to preserve their distinct character, Catalonia and the Basque Country, at different times, came to consider withdrawing from the Spanish State. How can this be explained? Three types of reasons explain the weakening bonds between historical nations and the Spanish nation and have long historical underpinnings: the difficulty for historical regions to develop their own linguistic regime in a country where the Spanish language was imposed as a common language; the gradual loss of influence of autonomous regions within the government of Madrid and the declining influence of regional political parties in central state governance; the disproportionate tax contribution (Boix, 2003) of the most prosperous regions for the benefit of the central region and less prosperous regions.

These reasons do not explain all political tensions in Spain but they allow us to better understand why the trust that was built when the *State of autonomies* was created was progressively eroded with the political and social crisis that have shaken the country over the past years. In so far as one can imagine a way out of the current political crisis, it will be necessary to consider without delay major adjustments by social, political and economic actors, as explained in my book *L'âge des incertitudes*.

It is important to rethink the paths to community reconciliation, based on new grounds, while going back to the very source of "pactism" in order to identify the avenues most conducive to a genuine constitutional reform that respects founding nations. It will also be important to develop the current political system which tends to defend a nation that towers over others and is currently rooted in pretense federalism, to turn it into a truly multinational type of federalism. In this respect, the studies of James Tully (1999), Ramon Maiz (2008) or Juan Romero (2012) will be of considerable help for they take into account the principles of reciprocity and mutual recognition inherent in constitutionalism theories. Finally, the establishment of treaty-based federalism (inherited from the First Nations in America) will require careful consideration in order to restore the trust that is currently cruelly lacking in Spain.

In a nutshell, reconciliation between the main partners in pluralist and plurinational Spain will be possible only in so far as nations are not only recognized and respected but also empowered to promote their language, their culture, their traditions and their own institutions. Which brings me to the transition required from *polity*, as a nation that integrates and assimilates, to a nation-State that is much more accommodating and more respectful of national diversity within a State bound to be more complex but above all more democratic.

### **National diversity and complex State models: the example of Quebec from an international point of view**

Several models have been put forward to manage diversity within liberal democracies in order to meet citizens' expectations and, more recently, to fulfill the need to recognize identities as expressed by the representatives of minority nations or during consultations and public hearings. Several options have been suggested to correct certain inequities between national communities, to revamp relations between citizens or rebuild trust between citizens and political institutions. Among these models of management of diversity within complex liberal societies, there is of course the State of autonomies in Spain, the consociation model specific to small European States, as well as territorial federal formulas (such as the United States) and multinational ones (such as Belgium). And then, there is the Canadian case, a hybrid model of *de jure* territorial federalism and *de facto* multinational federalism.

Let me say a few words about Quebec, founding member-State of the Canadian Federation which, for many experts in so-called Stateless nations (Guibernau 1999, Keating 2001), is an example that should be looked into to advance several other plurinational liberal democracies wishing to bring more democracy into their politics.

Quebec is trying to innovate within the Canadian Federation by developing the very principle of constitutionalism, whether by relying on historical continuity, by enhancing the consent of national communities or demanding reciprocity from political and social actors. These are, to some extent, the bedrock of living together and give Canadian polity an informal constitution which complements the formal one. Political institutions cannot ignore it or they will lose a good chunk of their political legitimacy. This informal constitution offers a policy framework that's much wider than the formal constitution and invites politicians to be responsive to the struggles fought at various decision-making levels by national communities. Quite a few struggles were fought for recognition and empowerment in Canada by the First Nations as well as by the Acadian and Quebec nations. These struggles are major challenges to be met to successfully establish a federation based on national diversity. In the case of Canada constitutional changes did not bring about the results minority nations anticipated, which the majority nation took for granted. All political parties must draft elements of constitutional policy in order to meet the demands that will undoubtedly surface one day or another.

With a view to countering (rather than to truly taking into account) national diversity and imposing its own model of territorial diversity management, the Canadian central government relied on a multicultural policy, one of the aims of which was to represent populations of various origins while giving the country a new sense of self. This policy has been heavily criticized in that it helped ethnicize social relations (Abu-Laban and Stasiulis, 1992) and delayed the participation of members of various cultural communities in one or other of the two main host communities in the country. This constitutes some kind of passive citizenship because multiculturalism is mainly the expression of a fact enshrined in the Canadian Constitution rather than the expression of practices that stem from interactions between groups or political

communities themselves. In the Canadian context, which very much resembles what is happening in Spain, trust is supposed to take root in the centre (Canadian Constitution) and to spread towards the periphery (community, ethnic or racial groups). Almost everything stems from the centre (Parliament, Supreme Court) and group mobilization seeks to ensure recognition by the central authorities precisely to give their claims higher priority while weakening the claims from national founding communities.

In response to the multicultural model, Quebec has been promoting its own model based on *interculturality* over the past thirty years and has relied on the creation of a constantly evolving (Bouchard, 2012) active citizenship (Gagnon, 2011). In keeping with this practice, the members of cultural communities are invited not to melt away into the masses but to publicly assert their differences and to try and further democratize decision making processes by revealing themselves to the majority group and forcing it to take its expectations into account (Gagnon and Iacovino, 2007). This is a very advanced form of community based self-representation and self-projection in the framework of ethnic pluralism and national diversity. The implementation of this communal way of life reflects a will to achieve in-depth transformation. It is first and foremost about dejudicializing the social relations inherited, amongst others, from the Canadian Charter of Rights and Freedoms and putting some sense back into the political sphere as a public space for cultural, political and social arbitration. The point here is to encourage the population to become politically active in the public arena with a view to allowing for the adoption of public policies that meet citizens' expectations. These interactions will bring about a relationship of trust thanks to cross-community exchanges and the creative tensions they produce. This *modus operandi* points to the consolidation of social bonds by relying on public debate and by creating occasions for intercultural encounters. This trust will never be unconditional. This trust will have to be earned but more than anything else, the quest for it will force the members of the majority group to leave no stone unturned to earn the esteem of all citizens.

Simply put, democracy must be built on mutual and conditional trust. It is in this spirit that the relationship between Quebec and Canada (or between autonomous communities and the central State in Spain) has to be frankly reworked and rest on a fairer and more equitable basis. The health of democracy in Quebec and in Canada, and obviously on a much wider scale too, hinges on the quality of this commitment to deliberate and respect the choices made at the various levels of polity. Let us now look into the challenges that majority nations will have to meet if they intend to preserve their legitimacy vis-a-vis the communities that make up the *polity*.

### **Advocacy for multinational democracy**

While there were only 51 nation-States when the United Nations was created in 1945, there are no less than 197 today in 2018. Minority nations often have expectations when it comes to their recognition and their willingness to exercise internal self-determination, barring which they will sometimes try to exercise external self-determination. This practice is usually not encouraged by the international community though it is often acknowledged as legitimate. By the way, the opinion of the International Court of Justice on Kosovo on the stability of federations states that:

*"During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations*

*of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases”* (International Court of Justice, 2010: article 79).

Obviously many nations want to achieve nation-State status. In this respect, Allen Buchanan recalls that it is important to distinguish between the legal right and the moral right to secession (Buchanan, 1992: 162). It is not possible to identify all the criteria for determining whether a nation can legitimately claim such status. In other words, majority nations must, on the basis of the highest international standards, demonstrate that the legitimate claims of minority nations are to a great extent fulfilled in a satisfactory and respectful manner within legally constituted States. Minority nations claims are to a great extent fulfilled in so far as their preferences<sup>4</sup> will no longer simply be subordinated to those of majority nations. The federal formula can help bring communities together and strengthen intercommunity trust. To do so, three basic conditions will need to be met:

- the representatives of the majority nation and of minority nations commit to a genuine process of deliberation and disclosure;
- the majority nation avoids using its coercive powers (threats, intimidation, sanctions, courts of justice, the army) to close in on itself. The right to consult the population is moreover a legitimate democratic tool the (central) government can resort to to clarify its position;
- minority nations must not threaten to break off negotiations at any time but instead accept to maintain a direct relationship with their interlocutors. Incidentally, the right to consult the political community (canton, province, autonomous community) is a legitimate democratic tool that can be used by the political representatives of national communities.

In so far as these conditions are met, which shouldn't be a problem in advanced liberal democracies, multinational federalism offers in our view the best opportunities for responsible and equitable management of intercommunity relations such as those that need to prevail between the nations that exist within complex multinational democratic States (Parent, 2011; Gagnon and Keating, 2012).

The federal formula (beyond respect for federal practices) is a more advanced form of democratic exercise in that it allows for the fragmentation of state sovereignty and can thus bring citizens closer to the centers of power where the communities they primarily belong to will be able to fulfill their obligations of representation and of promotion of their values, viewpoints and interests. It is for instance the case with Swiss cantons or historical autonomous communities in Spain. They are the first interface between citizens at various territorial levels and the central State. This is somewhat reminiscent of what John Emerich Acton said about the theories of unity and freedom of the political subject: “The presence of different nations under the same sovereignty (...) provides against the servility which flourishes under the shadow of a single authority, by balancing interests, multiplying associations, and giving to the subject the restraint and support of a combined opinion. (...) Liberty provokes diversity, and diversity preserves liberty by supplying the means of organization” (Lord Acton, quoted by Himmelfarb,

<sup>4</sup> Jack Minz and Richard Simeon (1982) offer an interesting distinction between conflicts in the claims chapter and those in the values chapter, see their article published at the time of the repatriation of the Canadian Constitution.

1949). Nowadays the Catalans, the Quebecers, and several other nations, aspiring to be fully recognized, lay claim to Lord Acton's words and demand political institutions that are more in tune with the most developed of democratic practices.

Plurinational federalism offers minority nations options to explore. On the one hand, it promotes the recognition of these nations and makes them self-governing within their own nation and, on the other hand, it is a shield against any attempt to interfere in the fields of competences which come under the jurisdiction of constituent entities in their own right (or which are theirs by devolution, such as with autonomy statutes), while enhancing community citizenship.

Canada, Great-Britain or Spain can no longer escape the challenge of national diversity (Gagnon, 2012). In each of these cases, the majority nation is invited to further develop its intercommunity exchanges while respecting everyone's national traditions with a view to establishing friendlier political regimes and complementary citizenship regimes. The decision of the Supreme Court of Canada, made public in August 1998, concerning the right of Quebec to secession is part of that process which involves opening-up and listening to the needs of diverse national communities. The decision of the Cameron Government in the United Kingdom to accept the holding of a referendum in Scotland also attests to that will to open-up to others, in so far as the central government is ready to hear the democratic arguments in favor of secession (Tierney, 2012) of a major partner of its *Union of States* (Forsyth, 1981). In this connection, Spain, ignoring Lord Acton's teachings, still refuses to grant that much freedom to its constituent nations and prefers to retain its authority over all autonomous communities whatever their status under the new constitutional order - which was negotiated in a particularly difficult context - agreed at the time of transition to democracy 40 years ago.

In the case of plurinational societies, one has to understand that the judiciary plays a crucial role. Courts of last instance have major responsibilities in maintaining the bond of trust that has to prevail between the members of the various communities that experience pluralism. These courts' primary obligation is not to side with the central government or with member States but to act as "supreme jurisdiction called upon to rule on disputes over competences which may arise between [member States] and the central power or between themselves" (Ergec, 1994: 42). In other words, the Court of last instance enjoys several prerogatives but it cannot, under any circumstances, be partisan, otherwise it would put in question its own legitimacy. In this respect, several lawyers (Viver, 2010; Vieyetz, 2011) noted that Spain's Constitutional Court was more committed to defending the interests of the "Spanish" State than those of its parts.

#### **A few challenges need to be met**

In their approach to sovereignty as well as in the way they envisage its implementation, advanced liberal democracies are centers of political innovation and freedom. However, even in liberal democracies, minority nations are still faced with many difficulties (Guibernau, 2007; Requejo and Gagnon, 2010): historical continuity, quest for recognition, affirmation of identity, the need to ensure dignity and liberty, the ability to welcome immigrants, economic prosperity, social development, integration into networks and international outreach are goals to be achieved. With a view to finding answers to bring together majority and minority nations, it is therefore important to consider rebalancing power sharing, the way the political preferences of the national communities members of the polity are taken into account, in order to extend and deepen the democratic practices that are the key to democratic pluralistic societies.

In our view, the federal formula, in so far as it must be negotiated and not imposed, possesses all the qualities that are central to the stability of political regimes in that these regimes will make it a point to recognize the nations they have based their political actions on. This is how the ability of majority nations to recognize minority nations will help strengthen and enrich the intercommunity trust that is so often lacking in certain countries which are very likely to impose laws that favor the majority nation (Karmis and Rocher, 2012).

Within plurinational democracies, rebalancing remains a key goal that calls for constant improvements. Looking for balance is the hallmark of active and experienced democracies that must be on top of the legitimate claims of the nations at work.

The case of Spain attests to the will of minority nations to reconsider their relationship with the central government by reviewing the autonomy statutes agreed when Spain embarked on an era of democratic transition. It has to be recognized that when the State of autonomies was created and the process of democratization was launched, all autonomous communities were ready to grant considerable concessions in terms of the goals to achieve in the immediate future in the belief that, in the long term, it would be possible to revisit some of the elements that underpin each community's statute.

Transition was possible in Spain because established elites had reached some kind of consensus on key challenges. These consensus agreements put into question some specific constitutional provisions that nobody should be allowed to challenge. Such commitments by the elites seem to be what made it possible to come to an agreement surrounding the new Spanish constitution [of 1978]. They reflect J.A. Corry's focus on "constitutional morality" - self-repression and the awareness of majorities that they must not use their power to subject minorities if long term success is to be achieved (Banting and Simeon, 1985: 20)."

At the time of democratic transition, Spain had planned to grant autonomous communities specific powers and statutes, while underlying the specificity of Catalonia, Galicia and the Basque Country, by granting them historical nations status. Often at the instigation of the central government that wished to progressively impose equality for autonomous communities, several autonomous governments managed to convince their constituents that these were only privileges and not historical rights. This is the reason why the 1978 agreement began to fall apart and that historical nations saw other regions obtain the same status which was to progressively remove *el hecho diferencial*.

Those plurinational States operating within advanced plurinational democracies have to be fair and straightforward when answering minority nations' requests for recognition (Seymour and Laforest, 2011). The majority nation all too often reproduces power relations and fails to adequately take into account the legitimate claims of minority nations. It is now important to pave the way for intercommunity debates, to encourage political partners by launching national talks and to nurture a society driven by the *ethics of hospitality* to use Daniel Innerarity's beautiful formula. Such practice would allow each and all to feel totally free under the plurinational spaces that they share and to rethink the constitutional basis of their nation-State(s) while respecting the guiding principles of constitutionalism which are historical continuity, consent, reciprocity and, some might say, moderation.

In this respect, the Moroccan Initiative which is the focus of this seminar can rely on considerable literature which supports living together. On this basis, we can ponder the



conditions 1) inviting all regional actors to be heard and 2) prompting state actors to imagine models of shared governance that meet the expectations raised by this Initiative.

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