CANADA'S JUDICIAL SYSTEM AND MOROCCO'S INITIATIVE FOR THE AUTONOMY OF THE SAHARA: UNIQUE STORIES, CONVERGING PRINCIPLES

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Almost a century and a half stand between the time when the two documents studied in this paper where drafted. Canada's Constitution Act and Morocco's Initiative for the autonomy of the Sahara however share the same goal: providing human communities with sufficiently clear constitutional references so as to establish the rule of law, a viable constitutional order and, ultimately, to ensure effective legal protection to citizens and incorporated entities which come under the purview of the courts.

The advantage of the Canadian experience is that it stretches over a long period of time and has consistently been enriched since it began in 1867. The annex to Canada's 1982 Constitution Act[2] provides a sober account of the numerous amendments to the Constitution which have updated and enriched the British North America Act,[3] the Constitution of Canada, as voted by the Parliament in London in 1867.

These more than thirty amendments paint the picture of a country initially centred on the Saint Lawrence Valley, between the Atlantic Ocean and the Great Lakes in the heart of America's mainland. Throughout the 19th century and ever since, the new country has gradually been extending further towards the Pacific and Arctic Oceans. These constitutional amendments paint the picture of a country, one of many remote colonies, that has since become a Member of the G7 and the drafter of major global policies and programmes. One can recall here the famous Blue Helmets who, despite many challenges, have been effectively contributing to the maintenance of peace and security in the world for nearly three quarters of a century.

One can imagine that Morocco's Initiative for the Autonomy of the Sahara,[4] embedded into a revised Constitution, will also over time be adjusted from an administrative, political or constitutional point of view as its provisions are implemented and tested, and as global changes lead the Kingdom as well as all other States to adjust their references and policies to universal public goods.

A sovereign judicial system

Other important developments of a non-constitutional nature, unrelated to the above-mentioned amendments, transformed Canada's system and political practice, namely with regards to the autonomy of Canada's judicial system. In this respect, in 1933 the Canadian Parliament removed appeals to the Judicial Committee of the British Privy Council in criminal matters and in 1949, in civil matters. Back in 1844, the Judicial Committee of the British Privy Council had been granted no less than the full powers of all of Great Britain's colonial courts.[5] In short, the Canadian Parliament's decisions of 1933 and 1949 confirmed the sovereignty of Canada's judicial system. If the British Crown

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[2] Constitution Act of 1982, amended by Constitution Amendment Proclamation, 1983 (TR/84-102) and Constitution Amendment, 1993 (New Brunswick) (TR/93-54). Ministry of Supply and Services, Canada, 19.

[3] British North America Act 1867 also called Constitution Act, 1867, 30 & 31 Victoria, chap. 3.

[4] Moroccan Initiative for Negotiating an Autonomy Statute for the Sahara Region: https://morocco-emba.jp/wp-content/uploads/2021/02/Moroccan-initiative-of-autonomy.pdf.

[5] Judicial Committee Act 1833 and 1844.

still holds a significant place in Canada's political landscape, this is not the case of the judicial system which is fully independent.

This act which had been called for, in vain, since 1875, had been the subject of formal procedures that were only partially successful in 1888, 1926, 1931 and 1947. These progressive breakthroughs culminated in 1949. From then on, the Supreme Court of Canada became the final court of appeal for all the country's courts, whether federal, provincial, territorial, or municipal.

For obvious reasons, Morocco's judicial system will be spared this long road to full sovereignty. It is indeed a complete structure which doesn't depend on any external court when it comes to jurisprudence, its functioning and possible updates. It emerged from a unique national history enriched over the long term and by the 2007 Initiative. This Initiative reminds us of Newfoundland which had been a British colony until 1949, when it became the tenth province of the Canadian Federation. A province quite unlike any other.

A federal judicial system

The terms "federal judicial system" are probably ambiguous when it comes to defining the Canadian judicial system except if the term "federal" that we chose to use here is understood as a fundamental political requirement that includes shared responsibilities (jurisdiction) as agreed between the various levels of government, be it the executive, the legislative or the judiciary. In this case, the terms "federal judicial system" meet the requirements of the complex but balanced political architecture established in the Constitution Act of 1867.

This Act grants the Federal Parliament the authority to "*provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better Administration of the Laws of Canada*." All the judges of these courts are appointed by the federal government.

In keeping with this power, the following courts were constituted over time: the Supreme Court, the Federal Court, the Federal Court of Appeal, Tax Court of Canada as well as federal administrative tribunals and commissions.

Moreover, the 1867 Constitution Act grants Provinces and Territories the authority, or even the duty, to constitute superior courts covering civil and penal courts. All judges serving these courts, which exercise jurisdiction over all the laws adopted by the Federal Parliament, those adopted by provincial parliaments, territorial parliaments as well as municipalities, are appointed by the federal government. The situation is quite different in provincial and territorial courts where judges are appointed by the provinces or the territories under which they fall.

The following courts were constituted in keeping with this power vested into provinces and territories: provincial or territorial courts of appeal, the highest tribunal in a province, provincial and territorial superior courts, provincial or territorial courts, municipal courts, family courts, youth courts, small claims courts, and probate courts.

In a nutshell, as can be seen, the very notion of "devolution" understood as delegation or permanent or ad hoc sharing of responsibilities is alien to the Canadian judicial system. This system is made of two autonomous institutional channels, independent from each other though connected as we shall see. The entities that make up these channels both get their mandate from the Constitution and are established by the different levels of government as provided for by the Constitution. Federal, provincial and territorial governments are free to create them according to a specific constitutional design which hasn't to this day been substantially challenged.

Upon careful reading of Morocco's 2007 Autonomy Initiative for the Sahara, one can state that, as is the case in Canada, this initiative is based on agreed power sharing (jurisdiction) between the Kingdom's levels of government, executive, legislative, or judiciary. The text is crystal clear: "*the Sahara populations will themselves run their affairs democratically, through legislative, executive and judicial bodies, enjoying exclusive powers*."

As is the case with the Canadian Constitution for provinces and territories, "*the legislative, executive and judicial bodies of the Sahara autonomous Region shall exercise powers, within the Region's territorial boundaries, over the Region's jurisdictions including to set up new courts in order to give rulings on disputes arising from enforcement of norms enacted by the competent bodies of the Sahara autonomous Region*." Finally, the text of the Initiative provides that the High Regional Court, "*the highest jurisdiction of the Sahara autonomous Region … shall give final decisions*."

A consistent scheme

The consistency of the Canadian system divided into two autonomous judicial branches, independent from one another, rests on strong foundations that guarantee doctrinal unity and consistency, as well as legal, political, and social readability.

First, Common Law is applied throughout the country except in Quebec where the civil code is the source of civil law.

Second, the Supreme Court of Canada was created in 1875 as a general court of appeal. Since 1949, it has been the final court of appeal in all Canada, the final court of appeal for all of the country's tribunals, whether federal, provincial, territorial or municipal. The Supreme Court comes into play once the provincial courts of appeal have ruled as final courts of appeal in the territory under their jurisdiction. The jurisprudence of the Supreme Court is a unifying factor at the level of the doctrine as well as with regards to the cohesion of the legal, political, and social requirements stemming from its analysis and decisions.

The Supreme Court consists of nine judges appointed by the federal government. These judges are initially shortlisted by an Advisory Board to be chosen and appointed by the Prime Minister of Canada. Three of these judges must come from Quebec (members of the bar or judges of Quebec). Supreme Court judgments are final, including in constitutional cases.

Since 1975, appeals to the Supreme Court in civil cases are subject to the authorization of the court; appeals in criminal cases are subject to the dissenting view of a judge sitting in the court whose decision is appealed against. In the first instance, there are cases relating to the constitutional validity of federal or provincial laws, those relating to the implementation of the Canadian Charter of Rights and Freedoms and, finally, those that can be referred by the federal government. By way of example, in 1998 and 2014 cases relating to issues of great importance, the secession of Quebec and the reform of Canada's Federal Senate, were referred.

When it comes to court decisions, consistency is fundamental. In the case of Morocco's Initiative for the autonomy of the Sahara, it appears that the content of three specific references in the text of the Initiative do provide for consistency.

First, the decisions are made "in the name of the King". In other words, this strict requirement implies that the jurisprudence is acknowledged and recognized. Second, consistency is required between "*court rulings* (but also laws and regulations) *issued by the bodies of the Sahara autonomous Region [and] the Region's autonomy Statute and […] the Kingdom's Constitution*". Finally, the powers vested in the Kingdom's Supreme Court and Constitutional Council are confirmed, as the country's highest

jurisdictions just like the Supreme Court in Canada. Clearly, in Morocco just like in Canada, the jurisprudence of the Supreme Court helps unify the doctrine and ensure the consistency of legal, political and social requirements stemming from its analysis and decisions.

Canada's judicial system, which is sovereign, federal, and consistent, brings together highly respected institutions. This does not prevent criticism and proposals to update the system in light of the changes in Canadian society and in the world. The goal is to have a diverse system that mirrors the diversity of this great continental state where a quarter of its citizens came from all over the world. The recent appointment[6] of Muslim Judge Mahmud Jamal to the Supreme Court is a first step in that direction. The idea is also to integrate the philosophy, the jurisprudence, the nature of the appeals as well as indigenous law into the country's legal heritage in order to invigorate it and enrich it. Having had to rule among others on the important question of traditional territories, the Supreme Court took on this complex task that needs to take into account different aboriginal, métis and Inuit bylaws, historic treaties, various types of ownership and oral traditions.

The implementation of Morocco's Initiative for the autonomy of the Sahara, in its judicial dimension, will undoubtedly have in time significant the Kingdom's judicial system, just like the evolution of the Moroccan society and that of the rest of the world call for in-depth adjustments to these fundamental documents in every corner of the world. That has been and remains Canada's experience. These adjustments are made all the easier when the original texts are comprehensive and specific. Such is the case with the Kingdom of Morocco's great project presented to the world for the Sahara, whose affiliation to the Kingdom and autonomy have been well established in a constitutional text that is abundantly clear and comprehensive.

[6] June 2021.