

# **The autonomy statute proposed by Morocco in the context of decentralized democracy**

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## **1. Introduction**

Following years of tension in the region, Morocco took it upon itself to negotiate an autonomy statute for the region of the Sahara. This initiative should now be assessed in the context of decentralized democracy. Since this phrase covers a very broad range of situations, we shall assess the initiative from the viewpoint of Switzerland, i.e. from the perspective of federalism, not to try and explain that the Swiss system is what the Sahara needs (it would be totally absurd), but to keep federalism into sight as the expression of fully fledged decentralization. Indeed, the concepts of decentralization and federalism remain hard to comprehend, and we shall try to take up that challenge. By so doing, we shall discover that federalism (in the broadest sense of the term) is in a way an aspirational goal as this alone can strike a balance between legitimacy and efficiency to justify decentralization processes. In this context, it will be therefore up to us to show the difference between a federation and a decentralized unitary state, especially to highlight the need for further decentralization.

Regarding the assessment of the proposed statute, we will essentially have to look at shared sovereignty in order to understand the need to go beyond mere administrative devolution. Indeed, though apparently generous in several areas, the proposed statute seems somehow lacking when it comes to sovereignty sharing.

One conclusion will confirm the fact that it will be difficult for the Moroccan initiative to satisfy the right to self-determination, given that it doesn't go far enough in the recognition of the sovereignty of the Sahara region and that it furthermore falls within the dangerous framework of "federalism" with two constituent units.

## **2. Western Sahara and the autonomy statute proposed by Morocco**

No need to recall here the history of this politically very sensitive situation, so as not to ruffle anyone's feathers. Nonetheless, this former Spanish colony, a non-autonomous territory according to the UN, hasn't yet acquired a final legal status, more than thirty years after the departure of the Spanish colonizers in 1976. However, spread over 266 000 square kilometres (more than six times the size of Switzerland) and with its 405 000 inhabitants (slightly less than Luxemburg, but as many as Malta, two members of the European Union), it is not just any atoll lost in the middle of the Pacific.

However, in this instance, we cannot ignore one disturbing element. Decentralization is only relevant provided there is prior centralization, i.e. creation of a unitary state or of a centralized state. This is not the case here, since this rapprochement with the Sahara region is only recent and the region was never really integrated into Morocco. This is therefore decentralization without centralization.

On the other hand, the process here is more akin to the creation of a federation.

Historically speaking, we have here an entity (Western Sahara) added to another entity (Morocco). This happens in a number of federations created by adding newly independent or

In the last analysis, even if it is not always the case, federations are usually more decentralized than unitary regimes.

#### **4. Federalism as a scale of measurement**

Assessing the Moroccan initiative from the perspective of decentralized democracy involves finding a scale of measurement. For a Swiss citizen representing the Institute of Federalism, no wonder my scale will be that of federalism. But that doesn't mean the idea is to turn Morocco into a federal state (which would be a mammoth task that would go beyond the situation in South Morocco), but it means that federalism is a type of decentralization, if not ideal, at least very extensive, that represents some sort of model to be replicated.

Federalism is obviously a concept a bit foreign to Africa. It clearly came out of the first "Forum of decentralized Francophonie" held in Lyon from 26 to 28 October 2010. On that occasion, one of the participants to the forum noted that the phrase "decentralized Francophonie" is a pleonasm. We could rather consider it a symptom of schizophrenia worth being treated. This calls for explanations, starting with a very enlightening quote, not from African authors like Léopold Sédar Senghor or Aimé Césaire, but from philosopher Denis de Rougemont who explained coming out of the Second World War that "Federalism is marked by its love of complexity, in opposition to rough and simplistic totalitarian regimes"<sup>89</sup>. In order to guarantee peace and democracy, he called for a "Europe of the regions" and why not here widen his dream to a "Francophonie of the regions".

We are far from that yet, even for a very modest apology of federalism, since this type of government seems quite alien to French-speaking or African countries' tradition, possibly dampened by the short-lived federation of Mali. Quebec, Wallonia and the French-speaking part of Switzerland are part of federal states, and there are four federations in Africa, i.e. Nigeria, South Africa and Ethiopia, all English-speaking countries, and there is the small archipelago of the Comoros Arabic and French are official languages<sup>90</sup>.

This lack of interest has to do with the fact that federal states are often created by adding together once independent states (states in the United-States, Cantons in Switzerland, Länder in Germany), as clearly shown in the case of the European Union, an interesting example of a federation in the making. The opposite, i.e. starting with a unitary state, is not so frequent and more complicated (see Belgium), but it is much more akin to decentralization.

However, because federalism represents one of the ultimate forms of decentralization, it is interesting to take a look at some of its characteristics, just like car manufacturers adopt solutions first tested in Formula 1 in order to improve the car of the average man on the street.

There are now 25 federal states (amongst which the United-States, Canada, Brazil, India, Australia, Germany) that are home to some 40 percent of the world's population. They are often characterized by their effectiveness. Why is that? The fact is that the distribution of competences between the centre and the periphery is highly developed in these countries, so that the greatest possible account can be taken of the interests of all parties and thus to strengthen effectiveness and democracy. The distribution of financial competences is also considerable. Bear in mind that Switzerland's national budget is roughly shared one third for the Confederation, one third for its 26

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<sup>89</sup> Quote from the inaugural conference of the first Congress of the European Union of Federalists held on August 27<sup>th</sup> 1947 in Montreux; c.f. Denis de Rougemont, *L'Europe et la crise du XX<sup>ème</sup> siècle*, in *L'Europe en formation*, 3/2006, p.33.

<sup>90</sup> Forum of Federations (ed.), *Guide des pays fédérés*, Montreal/London/Ithaca 2002. Eleven representatives of the Comoros were registered in Lyon, but none took the floor.

Cantons and one third for its 2700 municipalities. You will easily imagine how scattered financial competences are! Compared to some French-speaking African states in which decentralized local authorities are only allocated a mere one percent of the national budget, the difference is striking.

But well managed decentralization doesn't only mean increased efficiency. It also preserves the identity of regions, provinces and municipalities, avoiding them drowning in a national unity that is often artificial and the source of tensions. Without federalism, multilingual and multicultural Switzerland or India wouldn't survive.

One often notices that decentralization processes lack political will and that the financial resources allocated are very limited. Therefore, as noted during the Lyon Forum that focused on precisely that, decentralized cooperation can be a way to overcome constitutional and institutional barriers to give municipalities the impression that they exist and have an identity<sup>91</sup>. Though this is some sort of recognition, it is not enough.

The fact is that many French-speaking states marched backwards into decentralization. Among other negative consequences, this lack of a systematic approach entails semantic inaccuracies: what type of decentralization are we talking about? The AIRF (International association of French-speaking regions) refers to regions, but when you follow the work of the Forum, you realize that it is often municipalities that are at work. In any event, municipalities and regions have understood the possible advantages of decentralization. On the other hand, it does seem that states haven't. This is what makes the situation schizophrenic: for want of a tradition, decentralized Francophonie consists of regions that aspire to decentralization and states that are reluctant to allow it.

We therefore need to convince unitary states, whether or not they are members of the Francophonie or of the African continent, that decentralization, or even federalism, are not a first step towards secession and a break-up the country, but on the contrary that they guarantee maximum democratic efficiency that benefits the whole country.

This is precisely what happened with the federations of Latin America (Mexico, Brazil, Argentina) created in the 20th century. For almost a century, federalism there remained a dead letter, but with the end of more or less totalitarian regimes and transition towards democracy, those countries came to rediscover the importance of federalism and decentralization. And when you think of Brazil, what a success it is!

Well designed decentralization should not only be based on regions, but also on local municipalities. You have to understand that the latter, that enjoy considerable powers and substantial financial resources, can notably improve state management. For instance, in Switzerland, municipalities are a school of democracy for future political elites. They also ensure daily management of all public services taking into account the needs of the population. Their competences also allow them to easily organize the many local elections and referenda that take place in Switzerland, thus strengthening citizen's involvement and direct democracy.

Obviously, the tragic events that took place in Rwanda and Burundi in 1994 were due to the countries' hyper-centralization that had laid the foundations for the most tragic events. It is therefore indispensable to go for decentralization, provided it is of a certain magnitude. Doing so in overseas French-speaking countries not very open to these issues is pretty challenging. Decentralization too often enters the Francophonie through the back door, which is a pity.

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<sup>91</sup> Nicolas Schmitt, *L'émergence du régionalisme coopératif en Europe*, Thesis, AISUF, Fribourg 2002.

## **5. Why federalism?**

Why did some states (amongst which Switzerland, the United-States, Canada, India, Australia, Germany, Austria, Malaysia or Brazil) choose to opt for this complex system of governance called federalism? Because when it reaches a certain critical mass, federalism possesses a remarkable quality: it makes the system of governance more efficient. This property/characteristic can easily be demonstrated provided one takes the trouble to study the history of the first two federations of modern times, i.e. the United States and Switzerland.

On the other side of the Atlantic, after 13 colonies proclaimed their independence in 1776, they gathered into a very loose confederation around a rough sketch of a constitution called The Articles of Confederation. This arrangement however didn't turn out to be very fruitful, notably because of the rivalries between the colonies. Three inspired authors, Alexander Hamilton, James Madison and John Jay, realized that the new country was wrecking all hopes raised by the Declaration of Independence of 1776. It was thus necessary to strengthen the links with the states, without destroying them, but at the same time creating above them an umbrella democracy capable of protecting the thirteen small democracies. These observations were first greeted with scepticism before being published in the Federalist Papers and then contributing to the success of the Philadelphia Convention during which the 1787 American Constitution was adopted. This Convention remains in force, which a posteriori confirms the wisdom of its drafters.

On this side of the Atlantic, the process was quite similar. After Napoleon's forced Helvetic Republic and his Act of Mediation, the cantons rushed in to become a noncommittal confederation within which each kept its sovereignty. It turned out to be at odds with its time, since the industrial revolution, just like the commencement of reunification between Germany and Italy, laid the groundwork for a more open continent. In that context, those very different cantons, each with its own currency, its customs authorities, its tolls, etc., stood out like a sore thumb in the heart of Europe. These technical issues were aggravated by tensions created by the coexistence of Catholic and Protestant cantons, the former more conservative than the latter. These tensions led to the signing of a separate treaty (Sonderbund) by the Catholics, in order to protect their specificities vis-à-vis the Protestants. Superimposing two oppositions (Catholics/conservatives versus Protestants/renovators) came to a head with the so-called Sonderbund War, most reformed cantons having decided to resort to force to dissolve the conservative alliance. General Dufour's troops having succeeded in doing so without too much difficulty, the former confederation was turned into a modern federal state reminiscent of the United States of America.

In both cases, the goal was to put an end to an unstable regime and to guarantee the existence of small democracies by spreading over them the protective wing of a wider democracy. The Swiss and the Americans know that this system led both their countries on the way to prosperity.

Establishing a federal state thus requires two fundamental steps. First of all, the state has to be given legitimacy, in other words to be given stability, and then be managed in the most efficient manner. A bit like in a game of chess. The various components of the federal state are the chessboard and its pieces. The search for efficiency is the rules of the game. The two go back centuries, but new combinations of moves are still discovered today.

In terms of stability, it is important to avoid any type of tension between the federation and its components. In this respect, there is no worse tension than the one over territory. It is essential to be able to build a federal state based on member states whose borders are not challenged and which thus enjoy the widest possible legitimacy, so as to avoid the new federation wearing itself out in fruitless quarrels over a fundamental aspect of its existence: its borders.

As for the basic rule of efficiency, it requires the best possible balance between devolution and participation, in other words between decentralization and centralization. The Americans speak of a combination of self-rule and shared rule<sup>92</sup>. In other words, a federation is a mixture of norms from each of its member states and rules common to all. One only has to find the best possible distribution depending on the economic, sociological, political contexts, among others. For instance, just like the 20th century was marked by technical progress and the acceleration of communications, in all the federations of the world this period was characterized by an increase in the number of functions to be performed by the central state. It was indeed becoming obvious that many problems could no longer be solved efficiently by a lower level entity. This is an application of the principle of subsidiarity<sup>93</sup>.

We must keep in mind the idea that federalism is a balancing act between legitimacy and efficiency, the two notions being so closely related that they create what could be called a virtuous circle. A legitimate state can function efficiently because it is not hindered in its action by internal disturbances, and a state that works to the satisfaction of all will raise less problems of legitimacy, if only because it can meet its population's expectations.

### **5.1. The importance of territory**

A number of federations, particularly those close to Switzerland<sup>94</sup>, attest to the importance of territory. This reminds us that federal states draw their legitimacy and their efficiency from the accurate delimitation of their territory and that as a corollary the states in which the delimitation of various components is subject to discussions come up against operational challenges.

#### **5.1.1. The United States**

The first federal state of the modern age has not changed structure in two centuries. True enough, the first thirteen states became fifty, but the system allowed for the progressive addition of thirty-seven newcomers<sup>95</sup>, until in 1959 Alaska (that had been bought from Russia in 1867) and Hawaii (annexed in 1898) acquired the status of states. Despite this long history, great differences remain between the states: the biggest is Alaska (1 530 700 sq km) and Texas on the continent (691 030 sq km); the smallest, besides the District of Columbia (178 sq km), is Rhode Island (3 140 sq km). The most populated state is California (27 663 000 inhabitants) and the least populated Wyoming (490 000 inhabitants).

#### **5.1.2 Germany**

Unlike Swiss cantons and American states whose borders have broadly remained unchanged for centuries, German Länder have changed a great deal. The Holy Roman Empire was a mosaic of principalities so patchy that Grotius compared it to a legal monster. This patchy model was then replaced by much more centralized structures (the Empire of 1870, the Weimar Republic, the Third Reich). Finally, the Länder were artificially remodelled at the end of the Second World War under international pressure. Here again there are considerable inequalities between the states, for instance between Bavaria (70 554 sq km) or Lower Saxony (47 606 sq km) and the city-states of Hamburg (755 sq km) and Bremen (404 sq km). There are also considerable differences in the

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<sup>92</sup> Cf. D. Elazar, *Self Rule/Shared Rule – Federal Solutions to the Middle East Conflict*, Ramat Gan, Turlidove Pub, 1979.

<sup>93</sup> This principle raises many issues that we won't discuss here.

<sup>94</sup> Cf. D. Elazar's monumental book, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements*, Harlow, Longman Current Affairs, 1991.

<sup>95</sup> Further details on this slow integration can be found in the *Dictionnaire International du Fédéralisme*, Bruxelles, Bruylant, 1994, under the section "United States", p.362 (363).

populations of the Länder, the most populated being Bavaria (11 049 000 inhabitants) and the least populated Bremen (685 000 inhabitants).

Despite such differences, no rebalancing procedure has been carried out since 1948, which attests to the stability and the importance of the Länder. This is all the more remarkable since the constitution contains one detailed provision, article 29, which allows the Bund to restructure the Länder to ensure that each Land be of a size and capacity to perform its functions effectively. Due regard shall be given in this connection to regional, historical and cultural ties, economic efficiency, and the requirements of local and regional planning<sup>96</sup>. The procedure provided is however complex and its chances of success greatly depend on the consensus between all stakeholders: the Bund, the Land and the population directly concerned<sup>97</sup>.

The Federal Republic met the challenge of legitimacy since in the eyes of its citizens, federalism as laid out after the war has become untouchable. A typical example of refusal of change was given in 1973 when an expert commission (the Ernst Commission) suggested creating five enlarged Länder, called Flächenländer (large scale territorial entities)<sup>98</sup>: the loyalty to the Länder that had developed in the meantime relegated the proposal to the waste paper bin of history.

The creation of five new Länder in the former GDR re-opened the debate on the Neugliederung, the reorganization of the Länder. Indeed, since 1990, discussions on the redrawing of borders and the reduction in the number of Länder have been going on. The only plan around which there was initially very little controversy was the merger of Berlin and Brandenburg into one single Land, but it was rejected by referendum on May 5th 1996. The practical difficulties of such reunification discouraged further plans. On the other hand, the proposals to incorporate smaller and weaker Länder of the West (a relative concept considering, for instance, the size of Swiss cantons), such as Bremen or Saarland (whereas Hamburg would be willing to consider consolidation with one or other of its neighbours), into a larger Land, and to reduce the number of Länder located East, triggered heated debates.

Redistributing the Länder or reducing their number from sixteen to eight or ten would have its pros and cons, but it is obvious that for the time being nothing will happen. The first Länder targeted West (Bremen and Saarland) are the fiercest opponents to any type of consolidation, and it seems difficult to impose a merger upon the Länder located East whereas they were only just reborn<sup>99</sup>.

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<sup>96</sup> Art. 29, al. 1 (translated). For more information, see H.D. Jarass, B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland – Kommentar*, München, Beck, 1989, ad. Art. 29, p. 376 to 379.

<sup>97</sup> According to H. Wagner, *Quelques aspects du fédéralisme allemand actuel*, in *L'Europe en Formation, July – October 1985*, [Nice, C.I.F.E.] p. 29 ; his assessment is based on the following question : can a federal structure be guaranteed by a constitution ?

<sup>98</sup> Quoted by Wolfgang Graf Vitzthum, *Le fédéralisme allemand. Histoire, doctrine, fonctionnement*, in the *Revue de la recherche juridique. Prospective Law*. Extracted from n° 1988-3, Presses universitaires d'Aix-Marseille, p.625 ; cfr. Council of Europe (Ed.), *Structures locales et régionales dans les pays membres du Conseil de l'Europe*, various offprints.

<sup>99</sup> The Joint constitutional commission however recommended amending art. 29 (to add an eighth sub-item (that has been accepted since) on the reorganization of the Länder. The main change has to do with the fact that the Länder are now competent to conclude agreements revising their borders. Whether the agreement affects only part of the Land's territory or whole of it, the agreement has to be accepted by referendum by at least 25% of voters. This amendment makes territorial revisions easier to carry out but the referendum remains a difficult barrier to overcome.

### 5.1.3. Austria

Austria's history has been eventful... Created at the end of the First World War on the ruins of the Habsburg Empire, it was asymmetric from the onset: a bloated centre (Vienna) and a puny body. In fact, at the end of the Versailles Congress that did away with the Austro-Hungarian Empire, when Clémenceau was asked "But what is Austria?", the Tiger replied "Austria is what's left!". What was left was however not a "country", but nine Länder which accepted to merge into an Austrian federation<sup>100</sup>. But because, quite amazingly, history eternally repeats itself, an identical process started at the end of the Second World War with the new Austria being built on the ruins of Nazism and the Anschluss. What is striking is that at that time only the Länder still enjoyed some sort of legitimacy, and that they once again agreed to merge into a federal state. This *modus vivendi* allowed the allies to consider "null and void" the tragic parenthesis of Nazism. Since then, Austria successfully joined the circle of European nations. Its structure and its nine Länder haven't changed, so that the stability of the regime allowed it to look into issues related to the "rehabilitation" of the Länder and to take account of part of the claims they regularly send to the federal government.

### 5.1.4 Italy

Though the issue of federalism crops up time and again, Italy is not a federal state but a country which can be considered a decentralized, or even regional country. Nowhere is federalism mentioned in its constitution. Italy is cruelly lacking in tradition in this area, i.e. it lacks legitimacy for its regional structure. This is notably due to the fact that dividing the country into regions has always been extremely problematic<sup>101</sup>. After the war, only those regions with clearly identified geographical boundaries could be easily defined, i.e. the islands of Sicily and Sardinia, French-speaking Valle d'Aosta, and German-speaking Trentino-Alto-Adige. But as for the rest of the Boot, it was always very difficult to know whether Italy was the country of twenty regions, or if it should be the country of a hundred provinces or even eight thousand municipalities.

The division of the country that was eventually chosen (15 very artificial regions on top of those created in the aftermath of the war) lacked regional legitimacy and thus did not attract the interest of citizens or politicians for whom regional mandates are not glamorous at all, thus causing the system to lack efficiency. It even came under threat of implosion due to the Lega Norte's secessionist aims, with its leader Umberto Bossi. Assisted by Gianfranco Miglio, the former tried to use federalism to justify a new division of the country which sole aim was actually to give the "Rich North" more financial autonomy compared to the "poor Mezzogiorno". These attempts were short lived. Tax federalism<sup>102</sup> is now on the agenda, but this reform shall enter into force only once implementing decrees are themselves approved. This leaves room for negotiation. As noted by Sabino Cassese, "There is much ambiguity in the debate on federalism in Italy"<sup>103</sup>.

### 5.1.5. France

The problem is the same in France, except that it is more understandable in a country that is the result of one thousand years of centralization. However, since Napoleon and throughout the 20th century, decentralization has been up for discussion. But drawing regional boundaries turned out to be pretty tricky, especially from a political point of view. The parties in power indeed always

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<sup>100</sup> The Vorarlberg however launched secret negotiations in the hope of joining Switzerland!

<sup>101</sup> Cf E. Weibel, *La création des régions autonomes à statut spécial en Italie*, Librairie Droz, Genève, 1971.

<sup>102</sup> To learn it all about this very complex matter :

[http://www.governo.it/GovernoInforma/Dossier/federalismo\\_fiscale/](http://www.governo.it/GovernoInforma/Dossier/federalismo_fiscale/)

<sup>103</sup> S. Cassese, *L'actualité juridique. Droit administratif*, dans *AJDA*, 2300-2301 ; the author briefly introduces the evolution of local powers in Italy.

considered that the regions should be small to avoid the risk of them turning into counter powers, while opposition parties wanted large regions to counterbalance the government.

Decentralization finally became a reality with President Mitterrand, but here again, political ulterior motives prevented regional institutions from making the most of the potential offered. It was eventually decided to go for a sprinkling of residual competences so that “regionalization” became “decentralization” and France, a unitary State par excellence, is now the one state in the world with so many decentralized local authorities. Here again, the lack of legitimacy entailed malfunction of regional institutions.

### **5.1.6 Preliminary conclusion**

History makes it plain that federalism (in the sense of fully fledged decentralization) is a source of legitimacy and efficiency. We should thus work towards this lofty and demanding form of decentralization to be able to reap its full benefits.

## **6. Difference between federation and decentralized unitary state**

The fact that Morocco is not considering a “confederation” with the Sahara region (like the erstwhile Senegambian confederation) means we don’t have to look at the notion of confederation and at the difference with a federation.

We must however think about what happens when one goes beyond the federation and gets closer to a unitary state, in other words we must define the difference between unitary state and federation. It is neither easy nor unequivocal to answer that question, but this distinction can be understood on the basis of a number of criteria for which there exists as many exceptions. France may in this respect be used as an example. The distinction is nevertheless extremely important as it illustrates the inherent weaknesses of decentralization.

### **6.1. The nature of sovereignty**

In a federation, member states can be considered sovereign (cf. *infra*). Maybe it is not unrestricted sovereignty as defined in international law, but the legal transcription of the fact that they enjoy certain state qualities. In Switzerland for instance, article 3 of the Federal Constitution states that “The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation”. According to Kelsen, the member states of the state constituted by their federation represent a third layer of state. This is even more so in federations formed by the association of previously independent states. The “State” character of federated entities is forcefully underlined by the American, the German and the Swiss doctrine: federated entities don’t stem from federations, they exist before them. Contrariwise, in a centralized state regional authorities do not exist beforehand but are created by a decision by higher authorities; they are merely administrative units. Until recently for instance, French regions were not even mentioned in the constitution. Their creation was dictated from above, by a “mere” law that allowed to eliminate them or to create new ones at leisure. This however did not prevent a federation like Nigeria to create new states galore.

### **6.2. Guarantees over territory and sovereignty**

This criterion is closely linked to the previous one. In so far as the member state enjoys certain sovereignty, that sovereignty and its territory have to be guaranteed. The German fundamental law for instance provides that no constitutional provision should interfere with the principle of federalism. Nigeria’s counter-example can be mentioned here as well.

### **6.3. Existence of a constitution**

This is a major aspect of the federalist thinking, i.e. a dual constitutional layer, one subject to the other, while keeping its constitutional nature, in other words its basic and founding nature. At first sight, this can be difficult to fathom, just like the “state” nature of federated entities. In any event, in a federation, member states have their own constitution, a founding text that contributes to their state nature. On the other hand, the regional authorities of centralized states don’t have such a founding text and can only implement the texts adopted at the higher level. Their power is at best legislative. In Italy, the regions are granted a Status decided by the national parliament that doesn’t have the legitimacy of a Constitution.

### **6.4. Controls**

Member states of a federation enjoy much greater leeway than the local authorities of a centralized state. They are thus subject to lesser scrutiny. There is no state control. There is no technical supervision either in federations as in principle judiciary institutions ensure monitoring of legality. The President of the United States, the German Chancellor or the Swiss Federal Council cannot easily go against the decisions adopted by their member states. It is precisely the fact that there is limited scope for retribution against unwanted (though not illegal) behaviour that leads to the principle of “confederal loyalty”.

### **6.5. Federalism in the “hierarchy” of political regimes**

Federalism is an intermediate step halfway between absolute sovereignty and a centralized state. The features of centralization and decentralization should be seen in the context of the Hegelian dialectic that acknowledges the inseparability of contradictions before discovering a higher principle of union. It is therefore easy to understand that the federal mechanism works to the fullest when tensions are both strong and balanced, but it ceases to do so when tensions become lopsided and that the federation slides towards a centralized state or dislocation. This hypothesis was painfully confirmed on several occasions, in the Antilles, in Rhodesia-Nyassaland, in Yugoslavia or the USSR, in Pakistan and Czechoslovakia, but it has to be noted that the first hypothesis did not materialize, which attests to the strength of member states when a federation is created. The main risk for the latter is thus that of dislocation rather than excessive centralization.

## **7. The question of sovereignty sharing**

Relations being at times tense between two territorial entities, it stands to reason that sovereignty plays an essential role. The issue we are going to deal with here is thus closely connected to a possible sharing of sovereignty, the very notion at the heart of federalism.

### **7.1. The importance of participation**

What sets the federal state apart from the unitary state? The general theory of the state (very or possibly far too dominated by the doctrine of sovereignty) always found it difficult to distinguish the federative state from the unitary state. Indivisible sovereignty which is the condition which defines the state, doesn’t permit to distinguish between the unitary state and the federative state. Or sovereignty has to be granted to the people or the territory of the member state, which means that the federation loses its nature as a state, or the people and the territory of the member state enjoy no sovereignty which means they are (simply) part of the unitary state that is above them.

For Paul Laband (1838-1918), the only difference compared to the unitary state is the consultation of member states. Since federated states have a say in what the federal state does and

because the latter has to consult its member states in the exercise of its sovereignty, it sets itself apart from a unitary state. For Georges Burdeau too the decisive factor is the participation of member states in the decision making process of the federative state.

These considerations led some states of a federal nature to give more weight to the right of member states to be consulted, or in some cases to take an active part in the state's decision-making process. Jean-François Aubert even considers that the notion of participation is the key to the definition of federalism. This participation can come in different shapes and sizes.

Most of the time the idea of participation is institutionalized in the upper house of parliament which precisely serves for representation and participation of constituent units, whatever their size and population.

But participation can take other shapes, such as the weight given to member states in constitutional amendments or in direct democracy. These limit the central state's decision-making power but they also strengthen the identity and legitimacy of minorities.

Whatever the structure of their political system, federations differ in the way ethnic and regional minorities are involved in the central decision-making process. Their participation can reflect the power of minorities in the formation of coalitions, unless it is a matter of political culture, a long-standing practice, or even a constitutional obligation. Giving minorities a genuine chance to express themselves in the central institutions can be important to foster social harmony and political stability.

## 7.2. Beyond participation

The concept of sovereignty in a federal state can be analysed from another, more subtle, yet very empirical angle<sup>104</sup>. Thomas Fleiner-Gerster takes the example of the police in a Swiss canton. In Switzerland, each canton has its own police force, and it would be totally inconceivable, for instance, for a driver driving in his canton to be arrested by a police officer from another canton or a federal police officer. Drivers from the Vaud Canton consider that a "federal" or "national" police officer is not legitimated, and that only a police officer from the Vaud Canton has that legitimacy granted by the constitution and the cantons' legislation.

Cantonal constitutions are also legitimated by a vote by the population of the canton. But as rightly stressed by Fleiner, and this is the crux of the matter, no-one will manage to get it into the head of the citizen of Vaud, or Zurich or Ticino, that the popular decision of the Vaud population is legitimate because the Swiss Federal Constitution gives the cantons sovereign competence over the organization of police forces. In a federal state like Switzerland, the idea of delegation of sovereignty to the canton is foreign to people's mind. The prevailing view is that it is only through a democratic referendum that the police forces of a canton are legitimated.

Conversely, under article 3 of the Federal Constitution (c.f. supra 6.1), the Confederation can only exercise its sovereign power in so far as the Federal Constitution allows it. And the latter can only contain such a norm provided it has been amended by a double majority vote of the citizens (the majority of all citizens voting in the country) and of the cantons (a majority of citizens voting in a majority of cantons).

As an old well established federation (but the example would also be valid in many other federal states, even if in other areas), Switzerland clearly shows that the legitimacy of state power

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<sup>104</sup> Thomas Fleiner-Gerster, *Théorie générale de l'État*, p. 219s.

(failing sovereignty per se, since the discussion would then take us too far) can be shared. Indeed, the population of the member state of the federation grants itself the legitimacy of its sovereign power as a member state; this justification doesn't come from the central power. In Switzerland many cantonal institutions clearly exhibit this self-awareness. This is how several cantons officially call themselves "Republic and Canton". The Jura Canton, the 26th and last canton of the Helvetic Confederation, established in the preamble to its cantonal constitution: "The people of Jura, conscious of its responsibilities before God and men, wanting to restore its sovereign rights and to create a united community, adopts the following Constitution..." Such a preamble shows how the federal conscience prevails in Switzerland, but it above all shows how important it is to start from the grassroots to build a stable structure.

Hence, considering from now on that sovereignty is not the supreme power resulting from the power of the state, but considering rather that it is the people that confers legitimacy to the public authority over its territory that is legitimate, we can then accept to share sovereignty between federated states and the federal state.

This however implies that the member state's popular sovereignty has to be truly original and not come from the central state. These observations highlight the absolute necessity for "genuine" federalism to rest on popular sovereignty. Hierarchies and/or public authorities legitimized by the will of God only (just like in the days of Bodin) are inconceivable in any truly federal system, just like totalitarian regimes do not tolerate any opposition from constituent bodies which are their member states and which theoretically enjoy some sort of autonomy. The sad examples of the former USRR and the former Yugoslavia are here to remind us that these questions are not merely theoretical speculation, but that they have concrete implications.

As Jean-Marc Favret recalls in the conclusion to his study of the subject, the classic conception of sovereignty as formulated by Bodin or even by Carré de Malberg, has had its day. This is further confirmed by Mrs G. Burdeau who notices "the very thorough interpretation of the various components of the international society". She adds that what becomes essential for a sovereign state "is not so much to assert its competences through a lonely and conditional exercise of those, but to matter in the definition of the international order which, in any case, will govern its relations with other countries and to which it will be subject".

## **8. Assessment of the proposed statute**

In 2006 Morocco decided to give internal autonomy to what it considers its territory, and asked the Royal Advisory Council for Saharan Affairs (CORCAS) to study possible autonomy statutes for the region. However, the Polisario and Algeria will turn down any solution that doesn't offer the option of independence for the disputed territory.

Morocco advocates large autonomy within the framework of the sovereignty of the Alaouite Kingdom in order to end the conflict over Western Sahara, a former Spanish colony controlled by Rabat since 1975. According to Rabat, the proposal for an autonomy statute for Western Sahara is a "modernist, democratic and credible" approach that takes into account the political process under way in the Alaouite Kingdom for the past years. This project is said to be supported by several countries such as the United-States, France, Spain as well as most countries in the Arab League.

Without any value judgment as to the events that led to this situation, but only taking into account the scale of assessment of federalism, we can venture a few comments on the statute.

## **8.1. The question of territory and the dangers of federations with two constituent units**

Federalism is first and foremost a type of territorial organization. We have seen that in a federation the existence of constituent units could turn out to be important to integrate populations concentrated on a given territory with a strong and distinct identity, while at the same time giving them appropriate competences. However, even if that population constitutes a regional majority within one of the constituent units, it won't identify with the federation as a whole if it has the impression that it is not being treated adequately and that it is not associated with the central political and administrative institutions of the federation.

### **8.1.1. Decentralization without centralization, or the problem of asymmetry**

In this particular case, it is a bit paradoxical to talk about decentralization in the context of an entity that was never centralized since it is made up of two distinct "entities".

On the one hand you have Morocco, with a relatively complex administrative structure based on 16 regions divided into 17 wilayas, themselves subdivided into 71 provinces and prefectures covering 1547 urban and rural municipalities.

On the other hand you have the Sahara region. The situation is obviously very asymmetrical. Now, federations generally endow their constituent units with absolutely identical competences, precisely in order to give absolutely equal rights to their member states, whatever their size. It sometimes happens that some units are granted powers that are not exactly the same as those of the others. This constitutional asymmetry is usually limited since major imbalances will make it difficult to manage the federation.

There can also be more pragmatic forms of asymmetry. The term can apply to various aspects of the differences between the constituent units of a federation: asymmetry in terms of their political weight, asymmetry in the rights and status of minority or linguistic groups, asymmetry in their competences. Each present particular challenges. Obviously, the political weight of each constituent unit will vary on the basis of its population, its resources and strategic position; some federations try to limit this phenomenon by giving particular weight to the representation of the smallest entities within their central institutions. It is not uncommon for federations to adopt specific provisions regarding the rights of minority, religious or linguistic groups within constituent units.

Nevertheless, in a federation, asymmetrical distribution of competences between constituent units remains a rare occurrence. This is particularly true of asymmetries provided for in the constitution. The aim may be to take into account the claims of a given region, which demands for itself one or the other competence(s) that other units won't consider a priority. However, granting preferential treatment to one constituent unit can push others to demand the same treatment. In the same vein, if asymmetrical competences are considerable, or if they are granted to a very large constituent unit, it can lead to pressure to limit the weight of the representatives of the unit involved in the central government's decision-making process. In practice, most asymmetries mentioned in constitutions have to do with relatively secondary competences, or arrangements for really small constituent units and with very specific characteristics<sup>105</sup>.

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<sup>105</sup> This is different from the second zone status granted to certain territories or tribal areas, but also at times to national capitals (Canberra, Washington D.C.). Some federations are however endowed with non-constitutional processes that allow for an asymmetry in the political or administrative responsibilities of their constituent unit.

Here are some examples of asymmetrical distribution of competences within certain federations in order to better understand the difference with the importance of the statute proposed for the Sahara region.

Let us recall that as a rule and barring exceptions, all long-standing federations normally grant the same legislative competences to each of their constituent units. It is true that in Canada, Quebec (that nevertheless enjoys a really strong and different identity in North America) benefits from non-constitutional agreements with the federal government, which gives it a different type of authority - while preserving harmony between them - compared with the other provinces (especially in the areas of pensions, taxes, and social programmes). Amongst the new federations, Malaysia give its states on the island of Borneo special competences in the areas of indigenous peoples' rights, communications, fishing, forests and immigration. India provided for identical provisions for Jammu and Kashmir, as well as for other small-scale states. Russia made extensive use of a large range of non-constitutional bilateral arrangements with its constituent units, with a view to favouring certain powerful units, but since then those imbalances have mostly been corrected. As for Spain, it committed itself through constitutional bilateral arrangements, especially by granting special competences to its autonomous communities made up of so-called historical nationalities; here again, discrepancies have become blurred over time, except for the long-standing tax prerogatives of the Basque country and Navarra. The constitutions of Belgium, Bosnia-Herzegovina, the Comoros, as well as Saint Kitts and Nevis all provide for asymmetries. But the most striking of all these asymmetrical arrangements are probably those between Scotland and the United Kingdom (though not a federation). Their implications are still debated in the Kingdom. As for the European Union (not yet a federation), some of its members are not part of the Monetary Union.

#### **8.1.2. Federations with 2 constituent units**

In this context, a second problem crops up: that of federations that include a very small number of constituent units, the smallest possible number being two units only.

Saint Kitts and Nevis has two islands, 75 percent of its population lives on Saint Kitts. Bosnia-Herzegovina also has two entities, the Bosnian-Croat federation integrating 61 percent of the population. Regarding the three islands constituting the Comoros archipelago, Grand Comore is home to 51 percent of the population. Micronesia consists of four states, 50 percent of the population living in Chuuk. Belgium consists of three regions (but also three communities), and 58 percent of the population lives in Flanders. Pakistan currently brings together four provinces, with 56 percent of the population living in Punjab. The country initially only had two, separated by India, West Pakistan and East Pakistan, the latter having broken away in 1971 after a civil war to create Bangladesh. At the end of the communist regime, Czechoslovakia presented itself as a Czech and Slovak bipolar federation, but it only lasted for three years. Nigeria was initially composed of three provinces, with more than 50 percent of the population living in the Northern Province. The country's early history was marked by endless tensions between the regions, which precipitated the fall of the civilian rule and led to a tragic civil war. Nigeria is now home to no less than 36 states.

In all the abovementioned cases, the limited number of units and the fact that nearly half of the population lived in only one of them turned out to be a source of tension and instability. Bipolar federations (with only two member states) are even more exposed than others to claims from their smallest entities and related to the decision-making process, claims that are often rejected by bigger units.

Most federations avoid that pitfall and comprise from six (Australia), to 89 (Russia) constituent units. In between are those with 26 cantons (Switzerland), 31 states (Mexico) or 50 states (United States). It appears that a high number of constituent units facilitates the management of intergovernmental relations and makes the system more stable (though it is striking to see to what extent the European Community focused on strengthening its decision-making process as the Community was getting bigger (going from six to twenty seven members).

Besides, few federations comprise a densely populated entity (Ontario is home to 39 percent of Canada's population; the Province of Buenos Aires 38 percent of the population of Argentina; New South Wales, 34 percent of that of Australia) likely to play a key role in the country's policy and to cause litigation with the rest of the country. Other factors obviously also contribute to tensions within the federation, such as heterogeneity.

### **8.1.3 Conclusion on that item**

Without prejudging its chances of success, a northern Sahara region that would enjoy considerable autonomy on the edge of the Kingdom of Morocco whose structure is very different would be an "oddy" in the eyes of federalism. Whether in terms of their very territorial existence or the competences given to it, asymmetrical and bipolar federations have throughout history been a source of tensions. One need only think of late structures such as Czechoslovakia, Senegambia, or the United Arab Republic.

## **8.2. Sovereignty sharing**

The proposed statute, though apparently generous in many areas, is singularly miserly when it comes to sharing sovereignty. It is lacking in the field of participation of the populations concerned and in the field of symbolic sharing of sovereignty. As we have seen above, such restrictions are likely to arouse distrust.

To begin with, the text clearly states that (article 6) "The State will keep its powers in the Royal domains". In this context, article 14 states that the State shall keep exclusive jurisdiction in particular over the attributes of sovereignty, the attributes stemming from the constitutional and religious prerogatives of the King, national security, external defence and territorial integrity, external relations and the Kingdom's juridical order. Clearly, the sharing of sovereignty is here completely absent.

In the same vein, the Moroccan initiative doesn't provide for the Autonomous Region of the Sahara to partake in the shaping of the national will. The populations of the region are represented in the national parliament (which is a truism, as if they could be prohibited from being in parliament!).

Is this type of power sharing in keeping with modern standards of decentralized democracy? From the perspective of the theory of federalism, it is actually far from meeting the standards used to describe a state as federal. This is a mere decentralization process, but – as we have seen above – the political situation surrounding it makes it paradoxical.

## **8.3. The Head of Government**

The position of the Head of Government in the context of decentralized powers raises another question. As drafted, the text is very ambiguous, just like the current position of prefects in certain Swiss Cantons that have kept this remnant of French centralization. Both elected by the population of the region and as a state representative in the region, the poor official is riding between two

horses since those who voted for him want him to represent them and defend them against the central state, while the latter expects its representative to implement in the region the decisions adopted by the central authorities.

#### **8.4. Financial equalization**

This is an extremely complex chapter of the theory of federalism, too complicated to be dealt with here given that it touches upon legal, political and economic questions.

Let us recall in essence that whatever the country, some regions are always substantially richer than others. In federations, such distortions are a major challenge since all constituent units generally have the same responsibilities – or almost – while their financing capacity can be very different from one region to the next. As a consequence, if they have to manage with their own resources only, constituent units provide public services that greatly vary in quantity and in quality.

Federations have found very different ways of addressing this issue, but most of them (with the notable exception of the United States, at least from a formal point of view) turn to financial equalization. In other words they establish mechanisms meant to equalize the available income of constituent units. Conversely, there is the so-called derivation principle under which the community which is at the source of a given income is entitled to claim it in whole or in part: this principle is often used for royalties on natural resources (whatever the constitutional rule). There is a clear opposition between the financial equalization and derivation principles, and the weight given to each of them varies from one federation to the next.

Most federations have some sort of equalization or resource sharing programme that imply transfers from the central government to its constituent units (though in Germany and in Switzerland there are also direct horizontal transfers from the richer to the poorer units). These programmes however build on very different approaches.

Regarding the financial resources reserved for the Sahara region, there is no mention of equalization resources. Depending on the level of development and on the region's own resources, such a loophole could have very serious consequences and undermine the region's very existence.

#### **8.5. Unity after discord**

Recreating unity in a post-conflict environment is particularly challenging and probably requires more than a simple decentralization process. Federalism can play a part in a peace plan or a reconciliation strategy.

The oldest federations were born peacefully, except maybe for Switzerland, which turned into a federal state after a brief conflict between the cantons of the former confederation. A number of federations have gone through intense internal disturbances: the Civil War in the United States; the Biafran war in Nigeria; the Mexican revolution; various conflicts in Argentina and Brazil; the insurrection in the Spanish Basque country. Such upheavals usually leave behind them deeply bruised societies and getting back to political normality can then take a long time; nevertheless, in all of the abovementioned countries much of the heat has been taken out of the debate on secession, the issue has even been solved in some cases.

Over the past years, various attempts were made to introduce federal arrangements into peace plans: in Bosnia-Herzegovina, Sudan, The Democratic Republic of the Congo and Iraq all opted for federal institutions or federalism-oriented institutions, but establishing them proved difficult

and their situation remains precarious. Federalism is now being considered in Nepal after the end of the Maoist rebellion and as a possible solution for Sri Lanka. Though in such situations logic would have it to conclude arrangements along the lines of federalism, the challenge is finding the degree of mutual trust or confidence needed for political institutions to work and be relatively stable. Besides, such countries usually have limited regional political and administrative capacities.

In short, it is the elements of generosity, sharing, participation, acknowledgement of diversities at the core of federalism that could eventually put the finishing touches to this mission of reconciliation.

We have come full circle: federalism is definitely the scale of measurement to be used to restore peace and serenity following a period of disturbances.

## **9. Overall conclusion**

From the perspective of decentralized democracy, the proposed statute is indeed “better than nothing” but it falls short of the criteria that apply to federalism, in the area of decentralization or even administrative devolution, the region of the Sahara being granted a status that doesn’t presuppose prior sovereignty, like in a federal union.

The democratic dimension of the adoption by plebiscite is indeed encouraging, but it will only involve the “populations concerned” and not the whole Kingdom, which is bound to make the Sahara region look like “an afterthought” that falls short of the “new nation” expected from the creation of a federation.

As a conclusion, one cannot but remember “The Wolf and the Dog” by Jean de la Fontaine

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The wolf, by force of appetite,  
Accepts the terms outright,  
Tears glistening in his eyes.  
But faring on, he spies  
A galled spot on the mastiff's neck.  
"What's that?" he cries. "O, nothing but a speck."  
"A speck?" "Ay, ay; It's not enough to pain me;  
Perhaps the collar's mark by which they chain me."  
"Chain! chain you! What! run you not, then,  
Just where you please, and when?"  
"Not always, sir; but what of that?"  
"Enough for me, to spoil your fat!  
It ought to be a precious price  
Which could to servile chains entice;  
For me, I'll shun them while I have wit."  
So ran Sir Wolf, and runs yet.

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