

Analytical Presentation of the International Seminar of Dakhla,

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In April 2007, the Kingdom of Morocco presented the Secretary General of the United Nations with a draft autonomy statute for the Sahara as a basis for negotiating an end to a conflict which is obviously in an impasse.

This intervention aims at presenting the conclusions of the international seminar entitled “Democracy and human rights in the Moroccan Autonomy Initiative for the Sahara Region” held in Dakhla on February 21st and 22nd 2011. Under the very able leadership of Professor Cruz Melchor Echa who managed to put together a large team of experts in decentralisation and human rights, we professors of constitutional and international law from various countries (Argentina, Canada, Switzerland, France and Spain) met for 2 days to analyze Morocco’s autonomy initiative from a scientific, objective, technical and totally unbiased point of view. The Security Council of the United Nations deemed this initiative serious and credible.

The question to be analyzed during the seminar was that of the conformity of the initiative with international human rights standards. As my colleague Professor Martos Quesada will recall later, the participants that took part in the seminar unanimously concluded that it is in conformity with international human rights and democracy standards.

From that point of view, I believe it is essential to underline that the initiative is not only serious and credible, but also fair and legitimate based on a) the context in which it is presented, b) the way it is presented, c) as well as its content.

I shall briefly cover these three items from the perspective of respect for international human rights standards.

a) Historical, political and social context of the initiative

Over the past forty years, the world has been hit by far-reaching and intense shocks that will have to be taken into account to give a realistic assessment of the issue at hand.

The holding of a referendum on self-determination is now neither feasible nor realistic since the Sahara population is spread out over at least four states of the region. This mismatch between human and territorial borders makes it virtually impossible to hold a referendum. As the Latin saying goes “ad impossibilia nemo tenetur”, i.e. nobody is obliged to do the impossible.

Besides, we believe that creating a new state would not solve the issues affected populations are faced with. The risk of failed state would be very high. It would also clearly be economically non-viable. The risk of terrorist organizations taking control over the territory would be very high too.

As established during the International Seminar held in Geneva in October 2009, in this context the right to self-determination of affected populations would be satisfied through the negotiation and approval of an Autonomy Statute.

For affected populations this would mean renouncing formal sovereignty in exchange for practical sovereignty. In other words, the approach would be the same as the one adopted by the member states of the European Union. Through autonomy the affected population would exercise its right to self-determination internally, its fundamental rights would be guaranteed and its quality of life would improve.

It clearly appeared during the seminar that autonomy is not only a realistic option but that it is in keeping with international human rights standards. I would even venture to say that in our day and age it is the only possible solution. I will conclude by adding that its legitimacy stems from the fact that it is necessary. The legitimacy of autonomy is even reinforced by the way it is shaped and by its content.

b) Openness of the initiative

The Moroccan proposal doesn't grant autonomy as such but contains a proposal open to negotiation with the other party to the dispute. The proposal is not a closed project but a starting point, a basic text open to negotiation. As stated in article 8 it is the draft "autonomy statute [which] shall be submitted to the populations concerned for a referendum".

It thus became clear during the seminar that refusal to debate and discuss the proposal would today be unjustified, quite simply because it would not mean rejecting the content of the proposal but the very possibility of finding an agreement. This conduct would grossly go against the good faith principle that should govern legal relationships, from the point of view of national and international law.

This feature of the Moroccan initiative needs to be emphasized. Its purpose is to end the impasse the conflict is in through negotiations and to find an agreement on the basis of a proposal deemed serious and credible by the Security Council. The proposal is subject to the scrutiny of the other party. It is not a closed proposal even if the participants in the seminar highlighted the fact that it is very generous since it provides for extensive autonomy comparable to that enjoyed by public entities in the most decentralized states of the world.

c) Scope of the autonomy proposed in the initiative

The scope of the autonomy proposed is made abundantly clear in article I.5 of the initiative: "the Sahara populations will themselves run their affairs democratically, through legislative, executive and judicial bodies enjoying exclusive powers. They will have the financial resources needed for the region's development in all fields, and will take an active part in the nation's economic, social and cultural life".

Autonomy thus becomes an instrument to guarantee internal self-determination and respect for the fundamental rights of the population. The Autonomy Statute contained in Morocco's proposal is configured as a basic rule covering the Region's competencies and institutions.

From an institutional point of view, decentralization affects the state's three basic powers in so far as the Region to be will have its own legislative, executive and judicial bodies. In this respect, a comparative study of the Statutes of Autonomy of the Kingdom of Spain does show that the Moroccan proposal offers enhanced decentralization since in Spain the Judiciary cannot in any way be decentralized. The draft Statute for the Sahara provides for the creation by the regional parliament of an autonomous judiciary, to ensure respect for the regional legal order.

The proposal contains a clear and detailed list of the competencies granted to the Region. The issue of competencies is always at the heart of decentralization processes, whatever their nature. In this respect, it is worth underlining that Morocco's proposal is extremely generous for the Region. Article 12 of the proposal grants the Region exclusive competencies in the areas of local administration, local police, local jurisdictions, economic policy, taxation policy, infrastructures, transport, health, education, culture and the environment, among others. It follows that management of public services and basic state functions will also be entrusted to the Region.

Among all the competencies listed, fiscal autonomy has to be highlighted since, for instance, only two of the seventeen abovementioned Spanish Autonomous Communities enjoy it.

The central government reserves the right to control only areas of competence close to the hard core of sovereignty, i.e. currency related matters, state symbols, foreign policy and defence, as well as exploration and exploitation of natural resources. The proceeds from the exploitation of these resources are however allocated to the Region.

d) Constitutional guarantees of autonomy

In light of the above, from the point of view of democracy and human rights what really matters is to protect the political autonomy of the Sahara. It is about incorporating the very principle of autonomy into the Moroccan Constitution, subject to the highest legal safeguards. Indeed, should autonomy (however extensive) not be constitutionally guaranteed it would not be of any use to end the present conflict, for the simple reason that in the absence of such guarantees autonomy could be taken away tomorrow. The only solution would be a reform of Morocco's Constitution.

It is explicitly stated in article III.29 of the initiative that "the Moroccan Constitution shall be amended and the autonomy Statute incorporated into it, in order to guarantee its sustainability and reflect its special place in the country's national juridical architecture". This express provision for constitutional revision dispels any last doubt one may have had regarding the initiative's conformity with international standards. The institutional recognition of the autonomy of the Sahara Region, its incorporation into the Kingdom's Constitution implicitly attest to it. In any event, to avoid any misunderstanding and given the importance of the topic, a few clarifications should be made.

Autonomy can be constitutionally guaranteed to a greater or lesser extent but it demands that two preconditions be met. First: constitutional rigidity. The Constitution should provide for a specific process of constitutional reform that prevents the authorities from freely disposing of it. This process implies the establishment of a constituent and constituted power of constitutional reform based on qualified majority voting of Parliament and, as the case may be, on the participation of the people itself.

The second guarantee is just as essential: the existence of an entity responsible for defending the Constitution, an independent court, a constituted power subject only to the Constitution, which can settle potential disputes between the Region and the state in accordance with the law.

In light of the above and of the discussion during the seminar, one may conclude that the easiest and most convenient solution to guarantee the autonomy of the Region would be to add a new Title to the Constitution, between current Titles XI and XII, entitled "Political autonomy of the Sahara Region". It would define the Region's competencies, its institutional system, as well as the type of relations with the central government.

That way, the principle and content of the Region's autonomy would enjoy two fundamental constitutional guarantees enshrined in the Kingdom's Constitution, i.e. their protection a) by the entity responsible for defending the Constitution and b) the specific process of constitutional reform.

The effectiveness of the Region's political autonomy will ultimately be subject to the existence of an entity responsible for settling the disputes that may arise between the Region's institutions or bodies and those of the State.

This entity can only be the one entrusted with defending the supremacy of the Constitution, in other words the Constitutional Council in the case of Morocco, as stated in Title VI (art. 78-81) of the current Constitution. Regarding its functions, a specific one should be incorporated into article 81 of the Constitution, i.e. the defence of the principle of political autonomy of the Sahara, while at the same time ensuring respect for constitutionally established competencies. The previous guarantee of an independent Constitutional Council would turn out to be useless should the legislative power be able to remove the autonomy. That would be possible in the absence of a specific constitutional reform process. Title XII of the Kingdom's Constitution already provides for such process considered a constituent and constituted power, under which decisions are taken by qualified majority voting of the Parliament or, as the case may be, by the people itself. The reform process as established in Title XII is perfectly acceptable. It prevents arbitrary or whimsical reforms by imposing qualified majority voting, whilst at the same time making it possible to carry out a reform when it is necessary.

On the basis of the above considerations, the following comments can be made:

- ❖ By approving autonomy the population of the Sahara will exercise its right to self-determination. It will thus surrender formal sovereignty (of a failed state) in exchange for real and effective sovereignty, constitutionally guaranteed and in keeping with international human rights standards.
- ❖ b) Morocco's new Constitution would enshrine the principle of autonomy as a State fundamental principle, it would recognize the Sahara Region and grant it extensive powers. Next to the Moroccan Parliament would be created another territorial Parliament for the Sahara Region with extensive legislative powers over a large number of subject matters.
- ❖ c) A comparative study of the content of the proposal and equivalent standards of other states (Statutes of the Spanish Autonomous Communities, Constitutions of the German Lander, Statutes of the Regions of Italy, etc.) brings us to the conclusion that the draft Statute for the Sahara fulfils the requirements laid down to ensure proper functioning of the political autonomy of the Region. The approach is plausible and overall deserves a positive assessment. The purpose of the autonomy would be to improve the population's standard of living and to foster the Region's economic and social development.
- ❖ d) Finally, it should be underlined that this proposal is part of an ambitious process of constitutional and democratic reforms that have to be encouraged. Incorporating regional autonomy into the Constitution of the Kingdom would mean deepening the democratic principle. The principle of autonomy, in keeping with international human rights standards, would allow the population concerned to internally exercise its right to political self-determination. A measure of self-government would thus be constitutionally guaranteed and the population would be able to fully enjoy its fundamental rights, to contribute to the Region's economic and social development and to ultimately determine its own future.