Reforming Morocco's Constitution to guarantee the autonomy project for the Sahara Region.

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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 presentation aims at analyzing the consequences or impact of the said project on the current Moroccan Constitution. In other words, we shall look at the amendments that will have to be made to the Moroccan Constitution in order to guarantee the proposed autonomy. In this regard, this presentation is based on two premises that call for an explanation.

a) The first premise is that granting autonomy to the Sahara would fulfil the right to self-determination.

b) The second premise is that the actual scope of the autonomy offered in the proposal is actually very wide.

Against this background, the fundamental issue is the need to safeguard the very principle of the political autonomy of the Sahara. The aim is to integrate this principle in the Moroccan Constitution with the appropriate safeguards. This is the main focus of this presentation for the simple reason that without constitutional guarantees no matter how broad autonomy is it will not solve the dispute at hand. Without such constitutional guarantees, the autonomy given today could clearly be taken away tomorrow. The solution could be in a reform of the Moroccan Constitution. This paper looks into the meaning, the scope and the content of this reform.

To do that my presentation will be divided into four sections. In the first two we shall delve into the abovementioned premises. In the first section we shall briefly analyze whether autonomy for the Sahara would fulfil the right to self-determination that the international community recognized through the United Nations as belonging to the Sahara (I). In the second section, we shall look at the concrete content of the project presented by the Kingdom of Morocco, which will be analyzed in the light of existing models of comparative federalism, particularly the Spanish model (II). In the third section we shall detail the main focus of this paper, i.e. the legal and political guarantees of autonomy as well as the amendments that will have to be made in the Moroccan Constitution in order to integrate such safeguards. Such safeguards can only stem from a rational and normative Constitution based on the principles of democracy and constitutional supremacy (III). Finally, we shall offer a few conclusions to fuel the discussion.

Statute of autonomy and right to self-determination

The content of the draft autonomy statute for the Sahara makes us first and foremost wonder whether autonomy for the Sahara would fulfil the right to self-determination that the international community recognized through the United Nations as belonging to the Sahara. Should the answer to that question be negative, it would be useless to study the project. From the viewpoint of legality and international legitimacy, any legal approach to the conflict at hand can only be based on the right to self-determination of the Saharawi population.

I believe we should start by briefly establishing the content of this right in the framework of public law (international and constitutional). In virtually all studies on the right to self-determination a distinction is made between the meaning and the scope of that right in domestic public law and in international public law. Therefore, in domestic public law, the issue falls under constitutional law, and the exercise of the right to self-determination is equated with the principle of democracy, the ultimate foundation of the constitutional State. Besides, in international public law, self-determination offers four possible solutions that are worth recalling since in politics the first three tend to be ignored:

a) First of all, the right to self-determination can mean free association with an independent state. For instance, Dominica, Grenada, Saint Lucia, Saint-Vincent-and-the-Grenadines, Antigua and Barbuda were once associated with the United Kingdom and are now all independent states. In practice, Porto Rico retains the status of Free State associated with the United States. In any case, it is worth underlining that the peoples that make this decision do choose full-fledged independence or full integration into the state they were at one point associated with.

b) Second, the right to self-determination can result in the integration of a hitherto independent state into another sovereign state. This is what happened with Vermont and Texas in 1791 and 1845, respectively, which were integrated into the United States or, more recently with the German Democratic Republic that was integrated into the Federal Republic of Germany in 1990.

c) Third, the right to self-determination can lead a people on a given territory to decide to remain in the state it belongs to.

d) Fourth, and last, self-determination can also mean independence or secession as in the case of the Baltic States vis-à-vis the Soviet Union.

It is in this framework that our problem has to be situated.

In this respect, article I.8 of the Moroccan proposal indicates that "As the outcome of negotiations, the autonomy statute shall be submitted to the populations concerned for a referendum, in keeping with the principle of self-determination and with the provisions of the UN Charter."

To be more specific, article III.27 of the proposal combines referendum and right to self-determination: "The Region's autonomy statute shall be the subject of negotiations and shall be submitted to the populations concerned in a free referendum. This referendum will constitute a free exercise, by these populations, of their right to self- determination, as per the provisions of international legality, the Charter of the United Nations and the resolutions of the General Assembly and the Security Council."

Indeed, the fact that the Saharawi people holds the right to self-determination is beyond any doubt and undisputed. International law immediately and directly grants it this right. The problem is how to exercise this internationally recognized right to self-determination.

According to Morocco, submitting the negotiated autonomy statute to a referendum would allow to exercise that right.

From a purely legal point of view, is assertion is correct. The holding of such a referendum would be a valid and legitimate approach (though not the only one) that would allow the Saharawis to exercise their right to self-determination. It would be like integrating a sovereign people into another one to create a wider political community. The approval of the autonomy statute by the

Saharawis would be a constituting act of the Saharawi people under which it would be integrated into the Kingdom of Morocco under certain conditions clearly established in the approved Statute. This constituting act would implicitly entail dissolving the initial social pact and concluding another social pact with all Moroccan citizens. It is important to stress that this constituting act would have major repercussion on the Moroccan Constitution.

Under Morocco's proposal for the Sahara, the statute would be part and parcel of the Moroccan Constitution, which confirms the constituting nature of the referendum, not only from a material viewpoint, but from a formal one as well. This is what comes out of article III.29 of the proposal: "... 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".

On this subject, the Moroccan proposal – taking into account the clarifications made in Section three of this paper – is in keeping with the democratic political and legal theory of self-determination and thus respects the right to self-determination internationally enshrined as a human right.

Now that an answer has been provided to the first question raised, the content of the statute is worth looking into to see whether it contains the bases and principles that underpin integration.

Statute of Autonomy and Federalism

Article I.5 of the proposal gives a crystal-clear explanation of the meaning and scope of the proposed autonomy: "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."

Before delving into the basic elements of the proposal, it is worth highlighting that what was stated above gives us three major keys for this analysis.

a) The autonomy proposed isn't merely administrative. The words "will themselves run" are used in a broad sense and don't refer to a mere administrative function but rather to a function of governance since self-administration is ensured via executive, legislative and judiciary bodies.

b) On the other hand, and this is important, autonomy is not seen as an instrument of disintegration but a means of integration and participation. It doesn't only cover self-governance of internal affairs, but also participation in the overall affairs of the State. As we will see further down, the proposal very much insists on the first dimension of autonomy while remaining silent on participation and cooperation mechanisms and procedures. This is one of the shortcomings that will have to be remedied in the framework of negotiations. It will have to be specified in the Statute (Constitution) that these are the standard features of those means of participation.

c) Finally, and this is a fundamental issue, together with political autonomy, the proposal provides for the required financial autonomy without which autonomy would not be effective or possible.

Besides, it is worth underlining that the very proposal is not cast in stone but a mere starting point, a basic text open to negotiation. As indicated in article 8, it is the outcome of the negotiations that will be put to referendum.

Finally, the proposal expressly recognises that the project will build on "the constitutional provisions in force in countries that are geographically and culturally close to Morocco." The terminology used ("Autonomy Statute") is obviously reminiscent of the Spanish system.

The proposal has to be analyzed on the basis of these premises so as to gauge its pros and cons and, if necessary, put forward proposals of amendment that will technically improve it.

From an institutional point of view, decentralization affects the three standard powers of the state in so far as the future region will have its own legislative, executive and judiciary bodies.

On that basis and in order to compare the proposal to the Statutes of Autonomy of the Kingdom of Spain, it is worth mentioning that the Moroccan proposal provides for greater decentralization. Indeed, in Spain the judiciary is a unique power that cannot be decentralized in order to safeguard the unity of the legal order and consequently that of the state. The draft autonomy statute provides for the establishment of an autonomous judiciary in the form of a regional Parliament mandated to uphold the region's legal order.

Decentralization of the judiciary makes the system more complex since the relationship between the regional judiciary and the central judiciary, legal remedies as well as the body mandated to safeguard the legal order, will require careful management.

In any case, the proposal first lists the powers vested in the region. The issue of competences is always at the heart of decentralization processes, whatever their nature. As we shall see in Section three of this presentation, it has been acknowledged that as soon as the Constitution recognizes the principle of political autonomy of one or several infra-state bodies it is a decentralized state, whether composite or federal, knowing that some states give regions more competences than others.

In terms of competences, it is worth underlining that the statute proposed by Morocco 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 jurisdiction, 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 competences listed, fiscal autonomy has to be highlighted since, for instance, only two out of seventeen Spanish Autonomous Communities enjoy it.

Article 13 covers this financial and fiscal autonomy: "The Sahara autonomous Region will have the financial resources required for its development in all areas". Further down the proposal lists the various sources of financial resources. The first of these will be the "taxes, duties and regional levies enacted by the Region's competent authorities". In other words, the Region will be allowed to impose taxes, levy them and collect them through its own Treasury.

Financial autonomy is fundamental and indispensable. As for fiscal autonomy, though not indispensable, it will undoubtedly strengthen financial autonomy. In any case, there is one thing we cannot overlook: financial autonomy will bring the population of the Sahara far greater economic and social development than it currently enjoys through its formal economic sovereignty that means that the Sahara lives off international aid.

Considering how important this issue is, the relationship between the regional Treasury and the national Treasury will have to be properly regulated.

The central government retains all currency-related competences, competences related to state symbols, foreign policy and defence, as well as the exploration and exploitation of natural resources. The proceeds from the exploitation of these resources will however be allocated to the region. Due to the importance of the above, we believe that this provision should be defined as precisely as possible within the framework of upcoming negotiations.

Still on competences, one key competence of the central government is missing: the guarantee of market unity, the regulation and administration of the overall economic policy. This competence should be dealt with together with the one related to the currency in so far as economic and monetary policies should be a matter for the central government.

Regarding the competences vested neither in the region nor in the state, the draft Statute states that the "powers which are not specifically entrusted to a given party shall be exercised by common agreement, on the basis of the principle of subsidiarity." The formula is so vague and ambiguous that it cannot but be the source of permanent conflict. Indeed, many federal provisions (particularly so in the European Union) use it, but it doesn't provide a final solution to the issue of division of power. It should be amended and provide for more specific provisions for the State or the region.

In any case, and after having examined the matter of division of powers in the draft statute, we can conclude that the text gives considerable autonomy and far-reaching competences to the Sahara region. Within the framework of upcoming negotiations it will be hard to obtain more competences for the region (though the scope of some will have to be specified) in so far as the central government retains all competences that have a direct or indirect bearing on state sovereignty and are key to the very survival of the state, to unity of action and political decision-making.

It is important to insist on the fact that this aspect of the proposal will have to be specified since some of its provisions are ambiguous. Besides, it will be indispensable to explain, or at least outline, the elements of integration of the region into the state. Let us emphasize here that the specificity of the new Moroccan "federal" state will be that it will have one single politically autonomous region. In this context, the principle of federal equality won't be an issue since there will only be one region and no other subject to preach equality. However, the principle of federal loyalty is important here. The behaviour and action of public authorities and the region will have to be governed by the principle of federal loyalty, actions contrary to the general interest of the state being prohibited. The same applies to the central government that will have to take into account the Region's interests in its activity.

A joint body will be mandated to oversee respect for this principle. Setting aside the principle of state superiority, this body will handle possible conflicts (that will eventually have to be settled by an impartial body) but first and foremost all issues that call for a common answer because they are of common interest.

A critical comment should be made on this aspect of the proposal. It indeed implies dual federalism in so far as assignment of "exclusive" competences presupposes the coexistence of independent and unrelated powers (state and region). Such dualism can turn out to be dysfunctional. Comparative federalism and the Spanish model confirm the value of replacing dual federalism by a cooperative model within the framework of which, on the basis of "shared competences", joint action mechanisms and procedures are managed between the state and the region for the good of citizens.

On that basis, it is worth recalling that once agreed that by approving the autonomy regime the Saharawi population has exercised its right to political self-determination, the aim is first and foremost to raise the living standards of the population, to foster the region's economic and social development and that of its inhabitants. This will be easier with a cooperative model.

In any case, this far-reaching delegation of competences is due to the fact that the Kingdom of Morocco wants the proposal to appeal to the Saharawis, that they accept it and in the process relinquish any other possible means of self-determination. Other options would indeed be legally possible but would be a trauma for Morocco and in all likelihood untenable for the very Saharawi population.

In short, it may be concluded that the competences vested in the region are generous but should be specified in the framework of negotiations and be based on a cooperative model.

In terms of institutional structures, the draft Statute provides for the creation of a parliament, a government, a head of government, as well as a judiciary and a higher regional court.

This structure should be further detailed in the framework of upcoming negotiations.

Therefore, by way of example, regarding the composition of parliament as mentioned in article 19 of the proposal, the text only contains three guidelines that are insufficient for a truly democratic institution. It is indeed stated that it should be made up of members elected by direct universal suffrage, which is compulsory, as well as members elected by the different tribes. This provision sounds strange and though it is a reflexion of the social life of the Saharawis, it could create difficulties to ensure equal voting rights. Likewise, the provision that states that "There shall be adequate representation of women in the Parliament" is obviously insufficient for it is too vague. This problem is obviously only due to the level of internal democracy in the region. However, when it comes to respect for international human rights standards, it has to be clearly stated that the Statute (Constitution) cannot derogate from the principle of equality between men and women, a principle whose effectiveness has to be guaranteed. It is probably in this area (in connection with human rights) that binding provisions will have to be added in order to guarantee effective equality for women in a Constitution that will necessarily have to safeguard this principle.

Article 25 of the proposal turns out to be essential in this respect in that it guarantees the principle of equality and should figure prominently in the new constitution: "The Region's populations shall enjoy all the guarantees afforded by the Moroccan Constitution in the area of human rights as they are universally recognized."

It is however to be welcomed that the Statute does not contain a statement of rights that could be interpreted as giving a different legal status to the citizens of the region.

In short, in terms of comparative federalism, and contrasting the content of the proposal with equivalent standards of other states (Statutes of the Spanish autonomous communities, Constitutions of German Landers, Statutes of Italian regions, etc.) it can be concluded that the draft Statute for the Sahara fulfils the necessary conditions for a functional political autonomy of the region.

That being said, we can now take a closer look at the crucial question of the guarantees of autonomy contained in the statute. I for one believe that this is where the Moroccan proposal is a bit weak, contains a few loopholes that should be closed through a constitutional reform. This

review would imply the birth of a new constitution, which would lead to a complete overhaul of the Moroccan monarchy.

Legal and political guarantees of autonomy

Article III.29 of the proposal expressly states 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."

We believe that the constitutional reform (replacement of the existing Constitution by a new one, to be more precise) must not only involve incorporation of the principle of political autonomy of the Sahara, but first and foremost the establishment of legal guarantees of this autonomy.

1. Guarantees inherent in the theory of Federal States

Obviously, once self-determination of the Saharawi population is realized through the approval of a statute of autonomy, the issue will be that of territorial organization of power, in other words the distribution of competences. This is a classic constitutional problem which since the adoption of the American Constitution in 1787 mainly found answers in the federal theory.

In the case of Morocco, the proposal implies replacing a centralized state by a federal state containing a single infra-state entity (the Sahara region) that enjoys far-reaching competences.

A functionality issue has to be highlighted here. In our opinion the reform should be used to establish the principle of regionalization throughout the country, to create other regions with the same constitutional status as that of the Sahara. A composite state with only one infra-state entity could be problematic.

In any case, we cannot only point to the concept of federalism here. Though the public law doctrine deals with this issue in different ways in so far as some distinguish three types of States depending on their territorial organization (centralized, regional and federal) while others confuse federalism and confederation, the theory according to which all States can be classified in one of two groups, centralized or federal, is undoubtedly more useful, more functional and more convincing.

Distinguishing between States is extremely easy. The States whose Constitution recognizes the political autonomy of infra-state entities (whatever their name) are federal States (United-States, Germany, Austria, Italy and Spain, among others), while the States whose Constitution does not recognize this principle are centralized States (France).

The meaning and the scope of political autonomy are just as simple to define. Political autonomy is defined as the self-governance powers recognized to the infra-state entity, which imply that the latter has its own assembly or an autonomous parliament mandated to adopt its own laws. As we have said, some States have given these regional parliaments far-reaching competences (Germany or Spain), whereas others limit them considerably. The difference is always quantitative and not qualitative.

Besides, the federal nature of the State does not depend on the number of autonomous infra-state entities. Even if there is only one, the State can be considered a centralized regime.

In any case, the existence of a single autonomous subject immersed in a State whose territory is otherwise directly governed by the central government, is a unique feature that has to be taken into account and should be avoided, but doesn't fundamentally alter our argumentation.

On that basis, identifying the federal state becomes as easy as ABC, i.e. it is any State with more than one parliament.

Looked at from this standpoint, the draft Statute for the Sahara implies replacing the centralized Moroccan State by a new State structure of a federal nature.

Let us make two observations here in order to better understand this matter:

a) First of all, to be operational and functional, the federal Constitution cannot merely recognize the principle of political autonomy. It must necessarily answer two questions. First, how many subjects hold the right to self-governance and who are they? Second, what is the exact content of this autonomy, in other words what are the competences of infra-state entities?

All constitutions of federal States answer those questions (except for the Spanish one, which is the cause of all the problems confronting the country). The new Moroccan Constitution, as a federal Constitution, would not only recognize the principle of political autonomy, but it would also identify the Sahara Region as the single subject of political autonomy and would determine its exact level of competences.

b) Second, for a federal state to exist, recognizing political autonomy is not enough if it is not constitutionally guaranteed. It is worth mentioning that constitutional recognition implies automatic guarantee, but in order to avoid any ambiguity and because this is a fundamental issue, 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, i.e. the recognition of political autonomy should be enshrined in a constitutional text that contains a specific constitutional review process that prevents constituted powers 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 mandated to defend 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.

2. Transposing the Statute into a Title of the new Constitution

Before investigating the amendments that we believe should be made to the Constitution of Morocco to fully guarantee the autonomy of the Sahara, we should wonder how to incorporate recognition of the said autonomy.

The easiest and most desirable solution would involve adding a new Title to the Constitution, between existing Titles XI and XII, to be entitled "Political Autonomy of the Sahara Region".

This Title would specify the competences of the Region, its institutional structure, as well as its relationship with the central government. In this respect, let me refer you to heading 2 of this paper.

3. The Constitutional Council

In the light of the foregoing, 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 body 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 to 81) of the current Constitution.

"Article 78: A Constitutional Council shall be established.

Article 79: The Constitutional Council shall be made up of six members appointed by the King for a nine-year period. Upon consultation with parliamentary groups, six other members shall be appointed for the same period, half of them by the President of the House of Representatives and the other half by the President of the House of Counsellors. A third of each category of members shall be renewed every three years. The chairman of the Constitutional Council shall be selected by the king among the members appointed by him. The Chairman and the members of the Constitutional Council shall serve for a non-renewable term of office.

Article 80: An organic law shall govern the organisation and work of the Constitutional Council as well as the procedure it shall adopt, particularly with respect to deadlines set for referred disputes. Likewise, this organic law shall determine the functions which may not be compatible with that of Council member, the conditions of the first two renewals for a three-year term, as well as the procedure for replacing inactive members, either as a result of resignation or death during their term of office.

Article 81: The Constitutional Council shall perform the functions assigned by the articles of the Constitution or the provisions of the organic laws. It shall furthermore decide on the validity of the election of the Members of Parliament and that of referendum operations. Organic laws - before promulgation - and the Rules of Procedure of each House - before implementation - shall be submitted to the Constitutional Council to look into their consistence with the Constitution. Before promulgation, laws may, for the same reason, be referred to the Constitutional Council by the King, the Prime Minister, the President of the House of Representatives, the President of the House of Counsellors or one-fourth of the members making up one House or the other. The Constitutional Council shall have one month to decide upon the special instances stated in the preceding two paragraphs. However, in case of emergency, the deadline may be reduced to eight days if so requested by the Government. Regarding the above-mentioned instances, referring law to the Constitutional Council shall entail the suspension of the deadline of the promulgation thereof. No unconstitutional provision shall be promulgated or implemented. Decisions of the Constitutional Council shall, in no way, be put into question. They shall, furthermore, be binding upon all public authorities, administrative and judicial sectors."

The members of the said Council will have the final say on issues related to the meaning and scope of autonomy. In other words, the Council may give a restrictive interpretation of this autonomy. Since it would only be limited by the Constitution, its margin of interpretation will always be considerable.

This is the reason why the political independence of the members of the Council is so important. Not only do they have to be truly independent, but they must also project an image of independence. Without independence this alternative will hardly be attractive to the Saharawis.

Though there is no such thing as a perfect system to guarantee the independence of the body that is the cornerstone of the constitutional state, since it hinges on political actors, special emphasis must be placed on the fact that the independence of the members of the Council can be consolidated including in two ways:

a) By demanding that the members be appointed by super-majorities of the chambers of Parliament, which requires wide consensus around the personality of the candidates.

b) Besides demanding a long legal career (twenty years or more), choosing very broad mandates stating that appointment to the Council is considered the crowning achievement of a cursus honorum.

It doesn't seem advisable to put forward a new wording for article 79. I shall limit myself to recall the abovementioned principles that should inspire the reform.

Regarding its functions, a specific function of the Council should be incorporated into article 81 of the Constitution, i.e. the defence of the very principle of political autonomy of the Sahara, while at the same time ensuring respect for constitutionally established competencies.

4. Constitutional Review process

The abovementioned safeguard, i.e. the independence of the Constitutional Council, would be vain if the legislature could take back the autonomy given to the Sahara.

Therefore, as suggested above, to be effective, the principle of political autonomy demands its recognition in a strong Constitution, in other words in a constitutional text that provides for a specific constitutional review process that prevents constituted powers from freely disposing of it. The said process would mean establishing 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 Moroccan Constitution complies with this principle in its Title XII on Revising the Constitution:

"Article 103: The king, the House of Representatives and the House of Counsellors: shall have the right to initiate a revision of the Constitution. The King shall have the right to submit, directly for referendum, the revision project he may initiate.

Article 104: A proposal for revision submitted by one or more members of one of the two Houses shall be adopted only if voted on by a two-thirds majority of the members of the House concerned. The proposal shall be submitted to the other House which may adopt it by a two-thirds majority of its members.

Article 105: Revision projects and proposals shall be submitted to the nation for referendum by Royal Decree. A revision of the Constitution shall be definitive after approval by referendum."

These provisions are perfectly acceptable. They establish a mechanism which, on the one hand, 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, from a political or historical point of view.

Conclusions

On the basis of the foregoing, the following overall conclusions can be drawn:

a) The approval of an autonomy regime by the Saharawi population would be a way to exercise its right to self-determination. From a legal and political point of view, the referendum would be tantamount to a constituting act.

The population of the Sahara would thus surrender (sovereignty) a legal independence which though legitimate would be barely practicable. The Moroccan offer is generous provided it contains the required safeguards. By adding constitutional guarantees, from the viewpoint of respect for democracy and human rights, it would be very difficult to find fault with the proposed statute of autonomy. However, in order to avoid any ambiguity or misinterpretation of the letter and spirit of this paper, in the absence of such safeguards the proposal would not be acceptable. This is where the crux of the matter lies and nowhere else. Autonomy is not synonymous with sovereignty, but it is constitutionally guaranteed.

What it means is that the population of the Sahara will surrender formal sovereignty of a failed state in exchange for real and effective sovereignty, provided it is guaranteed.

b) Morocco's new Constitution would enshrine the principle of autonomy as a fundamental principle of the State, 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) From the viewpoint of comparative federalism, comparing the content of the proposal with equivalent standards of other States (Statutes of the Spanish Autonomous Communities, Constitutions of the German Landers, 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. Federalism demands determined political commitment (based on a pact and loyalty) and a proper legal and technical base. On that basis, the proposal could be improved in the framework of negotiations and by establishing a framework for cooperation between the State and the Region. The new Constitution of Morocco would thus create a federal State with one single autonomous region enjoying extensive competences and endowed with cooperation mechanisms with the State. This autonomy aims at improving the living standards of its citizens and at fostering the Region's economic and social development.

d) In our opinion, in the light of the importance of the matter, and in so far as the exercise of the right to self-determination by the Saharawis would imply an irreversible decision since under the new social pact it would forego any possibility of secession, autonomy should go hand in hand with the required constitutional guarantees: its recognition and integration into a rigid Constitution.

e) The second indispensable guarantee is the existence of a body mandated to defend the Constitution, which would settle, in accordance with the law, as a juridical, independent body, as a constituted power subject only to the Constitution, the potential disputes between the Region and the State.

May these conclusions foster the much-needed debate wanted by the organizers of this international seminar.

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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

autonomous states that accept to sacrifice part of their independence to join the federation. This is the reason why we shall present the federal model in this context, as an example of fully fledged decentralization process.

The reverse is trickier. Few federations were born of a decentralization process. The most well known example is that of Belgium, but we could also mention Canada, initially intended to be a very centralized federation but which became largely decentralized over time.

3. In the context of decentralized democracy

This concept isn't easy to fathom. "Simple" decentralization has to be distinguished from more elaborate forms of regional autonomy, but also from confederations, that represent forms of unity with fewer constraints.

Generally speaking, it can be said that in confederations the central government is a legal creation of constituent units. On the contrary, in centralized regimes, regional authorities are created by central authorities. Finally, in federal systems the constitution guarantees each level of government its autonomous existence. In practice, some unitary countries are more decentralized than some federations.

3.1. Simple decentralization

A number of unitary regimes have become decentralized. Some unitary countries, such as Colombia, Italy and Japan, have established quite strong regional governments. Some previously unitary regimes, such as France and Peru, transferred substantial powers to now elected regional authorities. In certain cases, specific regions put considerable political pressure for further decentralization. This is how the United Kingdom delegated significant competences to the Scottish Parliament, especially in the field of education, health and local matters (lesser competences were transferred to Wales and Northern Ireland). Recently, Indonesia undertook to transfer many responsibilities to its provinces and to its local authorities, with specific arrangements for the Aceh Province. As to whether these developments could lead to the creation of a federation in the true sense of the term, it is still much too early to tell.

3.2. Federalism and decentralized government

The two oldest federations of modern times, the United-States and Switzerland, were initially confederations. These were generally indecisive and unstable. As to whether there remain genuine confederations in our contemporary world, the question is still open. The European Union presents itself as a unique political construct at the crossroads between a federation and a confederation. Benelux is a confederal association of limited scope, a bit like the CARICOM in the Caribbean. The United Arab Emirates call themselves a federation, but many of their features are reminiscent of a confederation.

Most countries are unitary countries often endowed with regional administrative structures without elected authorities. In other cases, there may be constituent units (often called provinces or regions) with independently elected authorities entrusted with substantial responsibilities, but the fact is that these authorities get all of their competences from the central government or parliament, and these competences can in principle be taken away from them just as easily as they were given them. True enough, in many cases going back on these powers would be difficult to imagine, so that some unitary countries have a lot in common with federations. In fact, some unitary states have transferred more competences to their constituent units than some federations.

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"[89]. 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[90].

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

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

[90] 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[91]. 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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[91] Nicolas Schmitt, *L'émergence du régionalisme coopératif en Europe*, Thesis, AISUF, Friburg 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 Ray, 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 Convention 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 that 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[92]. 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[93].

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[94], 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[95], 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 Landër 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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[92] Cf. D. Elazar, *Self Rule/Shared Rule – Federal Solutions to the Middle East Conflict*, Ramat Gan, Turledove Pub, 1979.

[93] This principle raises many issues that we won't discuss here.

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

[95] 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[96]. 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[97].

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)[98]: 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[99].

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[96] 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.

[97] 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 ?

[98] 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.

[99] 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 of 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[100]. 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[101]. 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 Mezzogiono". These attempts were short lived. Tax federalism[102] 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"[103].

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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[100] The Vorarlberg however launched secret negotiations in the hope of joining Switzerland!

[101] Cf E. Weibel, *La création des régions autonomes à statut spécial en Italie*, Librairie Droz, Genève, 1971.

[102] To learn it all about this very complex matter :
http://www.governo.it/GovernoInforma/Dossier/federalismo_fiscale/

[103] 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[104]. 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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[104] 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 pecific 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[105].

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[105] 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 is 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 by an "oddity" 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 is 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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