THE URGENCY TO DEVELOP A SENSE OF TOGETHERNESS IN DIVIDED SOCIETIES: THINKING OUTSIDE OF THE BOX

La necesidad de desarrollar un sentido de unidad en las sociedades divididas: pensar con creatividad

Gizarte banatuetan batasun-zentzua garatzeko premia: sormenez pentsatzea

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In the context of divided polities, this article discusses the urgency to challenge the dominant centralist stand in favor of a vision founded on the principles of co-ordination, non-subordination, and consent. Such an endeavor would contribute to appease political tensions as states – formed of distinctive demoi – would give a fairer and more equal hearing to its constitutive parts. The argument is made that it is crucial not to satisfy oneself with an approach based solely on the «right to choose» since, in such a scenario, political communities would be trapped in a legal straitjacket limiting their ability to act. It is important to assess conflicts of claims based first and foremost on the very notion of legitimacy rather than legality.

Key-words: Divided societies. Living Constitution. Majority nation. Minority nation. Self-determination. Self-rule. Shared rule. Sovereignty-association.

Con los actuales sistemas gubernamentales divididos, este artículo trata la necesidad de enfrentarse a la postura centralista dominante en aras de favorecer una visión basada en principios de coordinación, no-subordinación y consenso. Tal esfuerzo contribuiría a calmar tensiones políticas, puesto que los estados –formados por ciudadanos/as ilustres– escucharían de manera más justa y equitativa a sus partes constitutivas. Se argumenta que es crucial no satisfacerse a uno mismo desde un punto de vista basado solamente en el derecho de decidir dado que, en esa situación, las comunidades políticas quedarían atrapadas en una camisa de fuerza legal que limitaría su capacidad de acción. Para valorar los conflictos de demandas es importante basarse en primer lugar en la noción de legitimidad en vez de en la de legalidad.

Palabras clave: Sociedades divididas. Constitución viviente. Nación de mayoría. Nación de minoría. Autodeterminación. Gobierno autónomo. Gobierno compartido. Libre asociación.

Egun gobernu-sistemak bananduta daudela ikusirik, artikulu honek jarrera zentralista nagusiari aurre egiteko beharra jorratzen du, koordinazioko, subordinazio ezeko eta adostasuneko printzipioetan oinarritutako ikuspegia emateko helburuz. Ahalegin horrek tentsio politikoak arintzen lagunduko luke; izan ere, estatuek –herritar nabarmenek osatuta daude– modu zuzen eta parekideagoan entzungo lituzkete haien alde osagarriak. Hautatzeko eskubidean soilik oinarrituta nork bere burua ez asebetetzea ezinbestekoa dela argudiatzen du; izan ere, egoera horretan, komunitate politikoak alkandora hertsagarri legal batean harra-

patuta geratuko lirateke, eta haien jarduteko gaitasuna mugatuta. Demanden gatazkak ebaluatzeko garrantzitsua da lehenik legitimotasun-nozioan oinarritzea, legaltasun-nozioan baino gehiago.

Giltza hitzak: Gizarte bananduak. Konstituzio biziduna. Gehiengoaren nazioa. Gutxiengoaren nazioa. Autodeterminazioa. Gobernu autonomoa. Gobernu partekatua. Batasun librea.

SUMMARY

I. INTRODUCTION

We live a world that is inclined to turn its back on identity politics and political claims at the subnational level. And, often times, at the state level, political leaders want to impose the same rules to everyone whatever their living conditions and their legitimate aspirations as members of a political community. This can take different forms.

In Canada, the most frequently used expression is: *A province, is a province, is a province* – so a special status for Quebec is viewed with suspicion and discomfort. In Spain, the expression goes *Café para todos* which also reveals a discomfort with regions and communities that insist on advancing a specific model of governance with respect to culture, language, territory and citizen engagement.

In Spain, after having put in place a series of measures to accommodate deeper diversity (that is a diversity based on national pluralism) in the second half of the 1970s, we have witnessed central institutions reintroducing programs that contribute to tilt the balance in favor of symmetrical treatments[1]. As a consequence, the sensitivity toward minority nations' desire to implement more advanced self-government usages and practices have been reduced significantly to a point where members of the majority nation feel legitimated to deny political autonomy in the name of the political stability of the nationalizing state. This contributes to justify policy makers in their opposition to political and social reforms and in transforming the constitution into a congealed set of arrangements.

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[1] REQUEJO, F. and NAGEL, J. (eds.). *Federalism beyond Federations: Asymmetry and Processes of Resymmetrisation in Europe*, London: Routledge, 2010.

On 12 November 2018, Nicolas Sartorius stated in an interview (with Lucia Mendez) in *El Mundo* that «El derecho de decidir es reaccionario». Sartorius made a weary argument with respect to the right of an historic nation or an autonomous community to consult legally its constituents. He mused rhetorically : «[…] *Es que el referendum legal y pactado, ni es legal ni es pactado. Es imposible. No es legal porque la Constitución no lo permite, puesto que se modifica el sujeto de la soberanía nacional. Y no es pactado porque no se pacta nada, ya que la pregunta viene dada*»[2].

I argue, in this presentation, that this type of statement in no way contributes to bringing the parties to the dispute closer together. As a result, and we have witnessed this in various political settings, this type of political thinking means that the law, imposed by the majority nation, loses all its legitimacy with a large proportion of members of minority nations.

Historically, and against a frequently held view, the Spanish state has been very reticent to adopt federal practices and opposed confederal initiatives. For example, in article 145.1, the 1978 Constitution states that «Under no circumstances shall a federation of Autonomous Communities be allowed». In addition, from an outsider point of view, it is difficult to understand why, in a free society, bilateral relations between autonomous communities would not be encouraged.

In this article, I intend to cast some light on four dimensions.

- First, and in opposition with the view expressed by people of influence such as Nicolas Sartorius, I wish to urge political actors to think outside the box and take advantage of analytical tools offer by specialists of conflict management.
- Second, we need to identify the necessary conditions to hold democratic debates that can bring political communities out of the current impasse.
- Third, any healing process requires on the part of political leaders to have the decency to appraise fairly conflict of claims and not to hide blindly behind the law since the legitimacy of the institutions in place is based both on the rule of law and constitutionalism as key principles in their own right. Neither of these principles can take precedence over the other.

[2] In MÉNDEZ, L., Nicolas Sartorius: «El Derecho a Decidir es Reaccionario». In *El Mundo*, 12 November 2018.

- Fourth, the legitimacy that ought to reside behind political actions cannot be taken for granted, to use the famous sentence formulated by Ernest Renan, it has to be earned and deserved. In that sense «the nation is a daily plebiscite».

II. THINKING OUTSIDE OF THE BOX

A key question with respect to the situation prevailing in Spain is to ask ourselves if there is enough political will to transform the State of Autonomies into an authentic federal state with an appropriate balance between shared-rule and self-rule?

If one thing has become clear, over the last decade in the Spanish context, it is that the State of Autonomies, with its non-sharing of state sovereignty and its deficit of flexibility, is no longer delivering on its promises of bringing together all Spanish citizens, nations and nationalities.

At the moment, Spain is paralyzed in its capacity to change and evolve due to an excessive focus on the unity of the State. All potential reforms are appraised through this singular lens and, as a consequence, proposals that take some distance from the status quo are considered to be destabilizing for the State itself when not simply depicted as being unpatriotic or, of late, as acts of sedition or even acts of rebellion.

Potential reforms have been depicted as direct and immediate challenges against the state's livelihood. Even the simple idea that an Autonomous region can initiate and lead a potential constitutional reform is viewed with suspicion and plainly denounced.

With some hindsight, the Ibarretxe Plan, elaborated between 2001 and 2005, can be considered as a tentative to get out of a political impasse as it advocated a form of sovereignty-association scenario.

The question which arises is the following: can the situation evolve to the point where political leaders can be encouraged to invest time and energy into reshaping political institutions with a view to take into account both deep diversity and diverse state traditions ? I am thinking here especially of the Anglo-american, German, Swiss and post-colonial traditions[3].

Three principles ought to be at the play for the re-establishment of trust relations between the constituent power (the state central) and the constitutive

[3] CARDINAL, L. and SONNTAG, S. K. (eds.). *State Traditions and Language Rights*, Montreal and Kingston: McGill-Queen's University Press, 2015, pp. 4-5.

components of the state (Autonomous communities) : autonomy, non-subordination of power, and co-decision/interdependence/co-sovereignty (see discussion below).

Political leaders in Spain might want to pursue various objectives with respect to the implementation of federalism – coming together versus holding together to use Alfred Stepan's terminology – by opposition to forcing together. These various trends reveal very distinct political legacy and purpose on the part of state actors.

The coming together tradition is generally associated with the American's territorial model which insists on the overall objective of constituting a single sovereign people.

At one end of the spectrum, one finds «relatively autonomous units that 'come-together' to pool their sovereignty while retaining their individual identities. The United States, Switzerland, and Australia are examples of such states. At the other end of the democratic continuum, we have India, Belgium, and Spain, as examples of 'holding together' federalism»[4].

Since Alfred Stepan published his seminal article almost twenty years ago, India, Belgium and Spain have continued their internal transformation with both India and Spain using state power, with different intensity, to contain their population with a view to maintain, by means of varying intensity, the territorial integrity of the country. It can be said that, in the case of Spain at least, the federal tradition has moved from a holding together stance to a forcing together mind-set on the part of both the majority nation and its ancillary institutions including the Constitutional Tribunal. I would argue that the consequences of such a transformation are significant and contribute to undermine the legitimacy of the Spanish state both internally with respect to historic nations and, externally, with respect to the European Union and the international political community.

It is imperative to think outside of the box and imagine political scenarios that do not limit themselves to reproduce mechanistically the status quo since the current state of affairs simply impose a straitjacket on members of the minority nations. This comes with some uncertainty but, at the same time, major political issues at stake cannot be resolved blindly through the use of coercive measures. Something has to give.

In the following section, I will make an attempt at identifying the necessary elements on which trust relations can be built or rebuilt.

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[4] STEPAN, A., Federalism and Democracy: Beyond the U.S. Model. In *Journal of Democracy*, vol. 10, no 4 (1999), p. 23.

What are the objectives that ought to be pursued?

The central question that needs to preoccupy political leaders: what are the means available to the various protagonists in position of authority and the ones that ought to be institutionalized to create the necessary conditions to hold democratic debates that can bring political communities out of the current impasse?

In other words, institutions matter!

Short of having political leaders capable of mobilizing the necessary energies to revitalize trust relations among political leaders as well as state actors, a good part of the solution might reside within civil society itself. I have been following for some time and with keen interest the social movement that is underway in the Basque territory. The movement, In our own hands/Gure Esku Dago, has produced very encouraging results by asserting five things:

1. that changes ought to occur with peaceful means;
2. that political transition ought to be preceded by a vast societal introspection as well as an all-encompassing political mobilization that seeks to leave no one outside of the political process;
3. that attaining consensus between political adversaries (nationalists, unionists, secessionist, etc.) is crucial before a major political move can be undertaken in order to avoid a *divide and conquer* strategy reminiscent of the British Imperial tradition;
4. the acceptance that the State of Autonomies is no longer in tune with political reality on the terrain in the Basque country and , by extension, in Catalonia;
5. that the four preceding elements contribute to transform the Basque country, and other national communities for this matter, into authentic political subjects that take the political community beyond its depiction, by the central state, simply as a singular culture or a sociological entity.

Initiatives, such as In our own hands (Gure Esko Dago), invite political leaders to think outside of the box by questioning the persistent «Spanish doctrine that all rights stem from the Spanish constitution of 1978, in which historic rights are – to use Michael Keating's take on this condition – consigned to an annex»[5].

[5] KEATING, M., The Basque Statute of Autonomy. In Centre for Constitutional Change. Researching the Issues. Informing the Debate, 22 October 2018.

The Supreme Court of Canada's Reference case with respect to Quebec's right of secession is particularly useful for us today as it invites political actors and state managers to reappraise «constitutional democracy, not as a system that solves […] problems once and for all with some definitive ordering of its members, but as a complex set of practices in which the irreducible conflicts over recognition of diversity and the requirements of unity are conciliated over time»[6].

Unity and diversity are not opposite terms. These terms ought to be seen as being compatible even congruent. Indeed, these terms ought to be at the basis of any plural and decent society. «The opposite of unity is not diversity; it is disunity while the opposite of diversity is a single uniform homogeneity[7].

In connection with this understanding, political philosopher James Tully judiciously identifies two contrasted paths that cohabit within constitutional democracies.

The first path is depicted as an «end-state' relation to democracy – «that is, a view of democracy as some definitive ordering of the members of a political association and of the relations among them. […] [with the aim of] arriving at the 'just' ordering of the members and their relations once and for all»[8]. This is, often times, what the majority nation seeks to impose, with different intensity, on the other members of an established political association. The situation prevailing in Catalonia under Article 155 is a case of unusual intensity during which direct rule over Catalonia was imposed, suspending, as a result, Catalonia's indirect political self-rule.

The second path, and a promising response to the end-state relation to democracy is the 'activity-oriented' expression of democracy which pursues, as its primary objective, the goal of freedom. Under this second rendering, democracy is being accomplished through a series of «processes of discussion and change both in accordance with constitutional rules as well as over these rules»[9].

In such a democratic endeavor, dissent and political resistance ought not to be considered as detrimental to the democratic expression but as a crucial and

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[6] TULLY, J., *The Unattained Yet Attainable Democracy : Canada and Quebec Face the New Century*, *Les Grandes conférences Desjardins*, Québec Studies Programme, McGill University, 23 March 2000, p. 4.

[7] GAGNON, A.-G. and BURGESS, M., Introduction : Revisiting Unity and Diversity in Federal Countries. In A. G. Gagnon and M. Burgess (ed.), *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities*, Boston/Leiden: Brill/Nijhoff, 2017, p. xviii.

[8] TULLY, J., *The Unattained, op. cit.,* p. 4.

[9] *Ibidem*, p. 4.

necessary component. In Canada, this is what has happened with the Quebec challenge to Canadian institutions with the referendums of May 1980 and October 1995.

This brings to the front of the debate, the right to decide as a valid and legitimate concept. For me, the right to decide can be equated with the purpose of creating majority communities at various scales while pursuing the central objective of enlarging the democratic project. In other words, democracy is not limited to, let's say, parliamentary institutions or to the single will of a majority nation. In addition, the right to decide, as a mobilizing concept, covers a lot of ground as it encompasses both internal and external processes of self-determination. And, for this reason, it renders the concept much less performing than what some colleagues would have – I am thinking here, for example, to the body of work produced over the years Jaume Lopez (2011)[10]. The main shortcoming of the right to decide concept, and that ought to be identified as a significant flaw, is that it ends up reducing political claims founded on the principle of legitimacy to issues in the realm of legality contributing to buffer constitutional court against potential criticisms or, to use Torbisco Casals' terminology, to support unwisely a politics founded on «constitutional fetishism that dominates Spanish legal culture»[11].

I believe, we need to embrace the influential work produced by James Tully when he addresses values that are supported and fed by the democratic project when he opposes the logic driven by an end-state approach and the logic resting on the activity-oriented approach to democracy. These two distinct paths highlight particular features : namely political stability and political freedom. Such dimensions cast important light on the two sides of the same coin and allow us to insist on their capacity to manage conflicts jointly. These two processes do not evolve in silos; they need to be combined and reconciled. In my view, these two paths need one another to succeed.

Either of these two paths taken alone do not possess the necessary qualities to take deeply divided polities out of their ongoing predicament. However, finding an adequate balance between these two paths appears to be the best option to select if political leaders and state managers are serious about finding a way out of a constitutional impasse.

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[10] LOPEZ, J., Del dret a l'autodeterminacio al dret a decidir. Un possible canvi de paradigma en la reivindicacio dels drets de les nacions sense estat, *Quaderns de recerca*, no 4, Unescocat, 2011.

[11] TORBISCO CASALS, N., National Minorities, Self-Determination and Human Rights: A Critique of the Dominant Paradigms in the Catalan Case. In Peter A. Kraus and Joan Vergés Gifra (eds.), *The Catalan Process: Sovereignty, Self-Determination and Democracy in the 21st Century*, Barcelona: Institut d'Estudis de l'Autogovern, 2017, p. 216.

James Tully made another particularly insightful point when stating that «a constitutional democracy will not be legitimate because it is completely just (which is never the case), but because it is free and 'flexible' – always open and responsive to dissent and amendment»[12].

Ongoing debates in Spain, at least with respect to Basque as well as Catalan political claims, have tended to focus on an end-state view of democracy. Such a view is bound to make winners and losers. Such a position appears not to be very conducive for the political stability of a political regime and, I would go as far as arguing that it would be detrimental for the maintenance of trust relations between constitutional partners.

III. RETHINKING CONSTITUTIONAL ARRANGEMENTS

Let's begin this segment by identifying an important caveat with respect to tensions which, often times, characterize power relations in fragmented polities. In any democratic political setting, it stands to reason that political opposition and rival political projects cannot be reduced to silence or eliminated. It is crucial that competing voices be heard and that debates can take place to inform the public and put to test the democratic qualities of a given society even in situations during which such discussions may create political tensions. Such tensions are essential at different historical junctures in order to imagine ways to come up with a fairer partnership.

Arend Lijphart, a world-acclaimed scholar to whom we owe the concept of consociational democracy, reminds us that:

> «Although the replacement of segmental loyalties by a common national allegiance appears to be a logical answer to the problem posed by a plural society, it is extremely dangerous to attempt it. Because of the tenacity of primordial loyalties, any effort to eradicate them not only is quite unlikely to succeed […] but may well be counterproductive and may stimulate segmental cohesion and intersegmental violence rather than national cohesion»[13].

The work of Lijphart and, in his footsteps, Brendan O'Leary and John McGarry have contributed to make the scientific community more aware of the urgency to pay attention (not only lip service), in various contexts, to the constitutional design of many segmented polities. Cases in point include South Tyrol, Flanders and Wallonia, Northern Ireland, and New Caledonia. These authors have taken seriously and wisely, it seems to me, moral and political claims ex-

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[12] TULLY, J., *The Unattained, op. cit.,* pp. 4-5.

[13] LIJPHART, A., *Democracy in Plural Societies : A Comparative Exploration*, New Haven: Yale University Press, 1977, p. 24.

pressed by distinct national communities that had come together, at different moments, with a view to materialize and actualize historical arrangements.

Successes experienced in these national contexts are essentially due to four main reasons. First, a desire on the part of political leaders to accommodate national communities rather than to force their integration, at all cost, into a larger nation. Second, although this differs in quality from one region to the next, the possibility for member units of a given polity to have an authentic say in the making of public policies at the (supra)national level. Here, and in descending order, Flanders, Wallonia, Northern Ireland and New Caledonia have, over time, consistently seen their respective roles gain in prominence in international forums. Third, in all cases, initiatives based on a social harmony rather than coercive measures have led to a substantial increase of political trust among constitutional partners. Fourth, a perhaps even more decisive, is the role played by the judiciary which has to act as fair arbiter and honest broker and be viewed as operating in such a manner by all. In the cases just mentioned, constitutional courts have been in a position to maintain and even consolidate their legitimate moral authority.

I might not have all the required information to discuss the ongoing situation that appears to be prevailing in this country. Instead, I will turn to the prevailing in Canada and, briefly, evoke what the Supreme Court stood for when it has been confronted to some very tough cases. The Supreme Court is said to have the ambition to provide a fair hearing of issues at stake as well as to provide time for constitutional partners to convey their arguments in an appropriate manner.

In the 1998 reference case with respect to the right of Quebec to secede:

> «The Court's adopted role can be an integral part of a decision recognizing the legitimacy of multiple models and the federation as a process and outcome of negotiation. […] paired with a role for the Court as a broad facilitator of this negotiation, either explicitly or more implicitly». […]
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> […] It is in assuming this role that the Court ideally seeks to reinforce the legitimacy of the various parties' perspectives, to affirm the legitimacy of the political and the institutional processes that allow negotiation and cooperation, and to induce the parties to use the processes. […] Here the ideal is to avoid imposing a particular party's perspective on another party, to reaffirm the legitimacy of the losing party's perspective, and to mitigate the loss for a party to the extent possible, while also seeking to emphasize that continued disagreement is reasonable and that the federal system can account for this situation as a flexible and dynamic association»[14].

[14] SCHERTZER, R., The Judiciary Role in a Diverse Federation: Lessons from the Supreme Court of Canada, Toronto: University of Toronto Press, 2016, p. 255.

I grant you that this view might not portray exactly what the situation is in reality since the Supreme Court was careful not to give a free license to any member state to act as they wish without paying attention to the presence and claims of other partners in the federation. Building on four principles – namely democracy, federalism, the rule of law and constitutionalism, and the protection of the rights of minorities) –, the SC made the point in paragraph 88 that «[t]he Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution to effect whatever constitutional arrangements are desired within the Canadian territory, including, should it be so desired, the secession of Quebec from Canada».

In contrast with the situation prevailing in Spain, it is possible for the government of Quebec or the people of Quebec to seek actively to achieve independence but the conditions to be met remain very tough to assemble. For example, two conditions have been identified in paragraph 148: «a clear majority of Quebeckers votes on a clear question in favour of secession». If these two conditions are met, them a process of negotiation can be initiated. The SC specifies that the final decision resides not with voters but is left to political actors themselves[15]. So, from this standpoint, there is no guarantee of success on the part of Quebec in its capacity to act as a minority nation.

In addition, the four principles identified in the Supreme Court's reference with respect to Quebec secession constitutes guarantees and represent significant hurdles. In fact, these principles can be viewed as representing a series of powerful constitutional locks. In the end though, the SC ruling was well-received by the main parties to the constitutional conflict thus contributing to attenuate ongoing political tensions.

IV. DISPUTED LEGITIMACY OF THE POLITICAL REGIME

Both Canada and Spain portray themselves as constitutional democracy although their way of accommodating national diversity seems to be at opposite ends of the constitutional spectrum. At one end of the spectrum, and roughly stated, one finds Canada that gives an image of being «demos-enabling» (a politics of contentment) while, at the other end, one finds Spain that is equated with a strategy that corresponds more to a «demos-constraining» philosophy (a politics of containment).

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[15] CASANAS ADAM, E. and ROCHER, F. (Mis)recognition in Catalunya and Quebec : the Politics of Containment. In Jaime Lluch (ed.), *Constitutionalism and the Politics of Accommodation in Multinational Democracies*, New York: Palgrave Macmillan, 2014, p. 62.

The situation prevailing in Canada may not be as an open-ended as some analysts have stated but it remains that there exists much more room to maneuver than it is the case in Spain. This is in good part due to the fact that the exercise of sovereignty is not perceived in the same manner by political actors, state managers as well as by the judiciary.

Montesquieu was right in advocating a separation of powers between the main branches of political authority. « Pour qu'on ne puisse pas abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir. » / so that power cannot be abused, it is necessary that, by the disposition of things, power stops power[16].

Much closer to us, the work of Jürgen Habermas is particularly relevant as this author insists on the importance, for a political regime, to preserve its political legitimacy. According to Habermas, legitimacy corresponds to «a political order's worthiness to be recognized»[17].

When people, minorities, large segments of political communities no longer recognize the legitimacy of a given political regime to act on their behalf, political stability can only be maintained through coercive measures. From that point on, a regime can be maintained, but, a process of societal disintegration is clearly underway and the necessary cohesion for a state to succeed starts unravelling. Again, to quote Habermas, «inasmuch as the state assumes the guarantee to prevent social disintegration by way of binding decisions, the exercise of state power is then measured against this; it must be recognized as legitimate if it is to last[18].

The legitimacy of a political regime must go beyond the existence and the control of representative institutions although the latter are essential to secure its political stability. But, based on the principle of modern constitutionalism, a certain number of conditions must be met. I consider the following four conditions to be crucial in any sustainable relations between constitutional partners: historical continuity, political consent, hospitality and reciprocity. I have discussed at some length these four conditions in earlier publications.

Building on the work of philosophers such as Will Kymlicka, Philip Pettit, Nancy Fraser, among others, Neus Torbisco Casals, considers a substantial deficit of legitimacy to be a sufficient reason to consider the «exit option». She made the point that

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[16] Quoted in DUCHARME, M., *Le concept de liberté au Canada à l'époque des révolutions atlantiques, 1776-1838*, Montréal and Kingston: McGill-Queen's University Press, 2010, p. 57.

[17] HABERMAS, J., *Communication and the Evolution of Society*, Cambridge: Polity Press, 1991, p. 178.

[18] *Ibidem,* p. 180.

> «[…] Secession, even a unilateral one, should emerge as a legitimate action in a democratic context whenever the state insists on subjugating its national minorities, denying them equal recognition as collective subjects as well as the right to internal self-determination (including the attribution of the necessary powers to allow their cultural and linguistic development).
>
> Hence, the right of secession would work as a shield against the impulse of majorities to oppress minorities»[19].

Inspired by the interpretative framework developed by Geneviève Nootens, I wish here to endorse her account of state sovereignty when she argues that: «The idea that sovereignty (state or popular) is one and indivisible, that the state corresponds to a single and indivisible constituent power, and that people's ability to act is subordinated to the embodiment of autonomy of the political within the state, constitutes an hindrance to the democratization of relations between nations in multinational federations»[20].

It is here, I believe, that the right to decide can take on its full potential. To the extent that a political regime simply reproduces and even consolidates preferences and political claims of the majority (nation), it becomes clear that the democratic principle is not exercised in its full sense. Both federalism as a political contract and consociationalism as a political option offer some potent cues as to, on the one hand, rally oppositional political forces around a series of common objectives and, in the second hand, to negotiate a revamped constitutional order void as much as possible of a dominant mentality.

Democratic federations and consociations provide some fundamental pillars on which to build an all-encompassing society that is congruent with a plurality of cultures as well as a diversity of political and legal traditions. To be efficient and legitimate, a consociational democracy needs to stand up for four principles: a grand coalition between political parties, segmental autonomy and federalism, proportionality, and a mutual veto[21]. In other words, the majority rule is considered to be an unsatisfying way of governing.

If I may bring in the Canadian example at this point since I believe it might cast a useful light. Even though there has been, over the years, some

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[19] TORBISCO CASALS, N., National Minorities, *op. cit.,* p. 221.

[20] « L'idée que la souveraineté (étatique ou populaire) est une et indivisible, qu'à l'État correspond un pouvoir constituant unique et indivisible, et que la capacité d'agir des gens est subordonnée à l'incarnation de l'autonomie du politique dans l'État, constitue une entrave à la démocratisation des rapports entre les nations dans les fédérations multinationales ». NOOTENS, G., Démocratie et pouvoirs constituants dans les sociétés plurinationales : quelques problèmes de théorie politique. In Félix Mathieu and Dave Guénette (ed.), *Ré-imaginer le Canada : de l'État binational à l'État multinational*, Montréal : Presses de l'Université Laval, 2019, p. 18.

[21] LIJPHART, A., *Democracy in Plural Societies, op. cit*.

important political tensions between Quebec and Ottawa with respect to constitutional arrangements, it remains that concrete efforts have been made to bring together two major traditions of federalism (territorial and multinational) as well as three legal traditions (common law, civil code, and more recently Aboriginal's customary law).

I believe that such an endeavor has contributed to give legitimacy to political institutions. For example, the Supreme Court of Canada in the Reference Case on the Law of the Supreme Court in 2014[22], recognized the importance of having three out of nine of its members to be Quebec-based. It reads as follows: «The purpose of s. 6 is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights. Put differently, s. 6 protects both the *functioning* and the *legitimacy* of the Supreme Court as a general court of appeal for Canada».

The Canadian Supreme Court has taken upon itself to advance of constitutional philosophy that is prone to favor federal practices, democratic values, constitutionalism and the rule of law in addition to the protection of minority rights. Such a philosophy has contributed since the referendum of 1995 in Quebec to ease political tensions and bring back Quebecers and Aboriginal nations into the federal mold.

It also suggests that the judiciary can offer a positive role model in the management of deep diversity[23].

A constructive initiative at this point on the part of the Prime minister of Canada would be to invite member states of the federation and various community of interests to suggest names to be considered to serve on the Supreme Court. This would be the best way to guarantee that the Court is an impartial umpire.

V. ADHERING TO A LIVING CONSTITUTION

Constitutions are there to provide guidance to political actors in managing societal diversity and in elaborating schemes that will contribute to put in place

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[22] This point has been mentioned to me by jurist Dave GUÉNETTE, D'ambiguïtés et d'opportunités – Le constitutionnalisme et les tensions nationales au Canada. In Félix Mathieu and Dave Guénette (eds.), *Ré-imaginer le Canada : de l'État binational à l'État multinational*, Montréal, Presses de l'Université Laval, 2019.

[23] SCHERTZER, R., The Judiciary Role, *op. cit.*, p. 255.

the necessary conditions and instruments to protect minorities from potential abuses on the part of the majority. Not paying attention to claims made by minority nations would be tantamount to saying that institutions in place would come to take the side of the majority culture. Stated differently, if a constitution is too much out of step with the milieu it intends to protect, then it ceases to be a source of political legitimacy[24].

Ghandi once made the statement that «*A nation's greatness is measured by how it treats its weakest members*». This idea has been reformulated in Canada in the context of Métis political claims and historical rights. Prime Minister Pierre Elliott Trudeau once stated with regard to such a matter that «Riel and his followers were protesting against the Government's indifference to their problems and its refusal to consult them on matters of their vital interest. […] Questions of minority rights have deep roots in our history […]. We must never forget that, in the long run, a democracy is judged by the way the majority treats the minority. Louis Riel's battle is not yet won»[25].

This is why I stated, at the very beginning of my presentation, that we need to think outside of the box since, in the Spanish case, there are no lever for action that is immediately available.

The Executive power is afraid of taking actions that would make an alliance with political adversaries impossible.

The Constitutional Tribunal has been incapable to show that it can act as impartial umpire.

At the level of the European Union, state actors are afraid to see their own minorities follow the Catalan example and advance a political project in favor of national independence.

So we are left with the absolute power in the hands of the majority. Michael Ignatieff, writing at the time when Quebeckers and Aboriginals in Canada felt ill at ease in the Canadian federation, had clearly identified the challenge that minority nations often face today. With respect the Canadian example, he noted that:

> «At the moment, might lies with the majority and right with the minority. Mutual recognition must rebalance the relationship, with both power and le-

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[24] GAGNON, A.-G. and SCHWARTZ, A., Canadian Federalism since Patriation: Advancing a Federalism of Empowerment» in Lois Harder and Steve Patten, ed., *Patriation and its Consequences: Constitution-Making in Canada*, Vancouver : University of British Columbia Press, 2015, p. 252.

[25] Quoted in MILLER, J. R. From Riel to the Métis. In R. Douglas Francis and Howard Palmer (eds.), *The Prairie West: Historical Readings*, Edmonton, The University of Alberta Press, 1992, p. 189.

> gitimacy finding a new equilibrium. Then, and only then, will we be able to live together in peace in two countries at once, a community of rights-bearing equals and a community of self-governing nations»[26].

In brief then, Thinking outside of the book would mean that…

1. Democracy is not reduceable to the «majority rule». In the modern era, democracy means that minorities deserve protection and ought to get equal protection, equal opportunities and equal conditions of existence to accomplish themselves as full members of the society.
2. Civil society has to be considered as a legitimate actor in developing political consensus and imagining constitutional arrangements – and its leaders cannot be thrown in jail without the due process of a fair hearing.
3. Political projects emanating from the Autonomous communities ought to be welcomed rather than condemned. This seems to be an evidence in a «free and democratic society».
4. The European Union ought to play a much more active role when national minorities and minority nations evolving within one of its member states are displaying distress due to an unfair hearing or an unfair treatment.

As a consequence, it is crucial to develop a meta-normative theory that would focus on three aspects: federalism rather than unilateralism, constitutional pluralism rather than monism and subsidiarity rather than centralization. In sum, only a shared vision of constitutional categories can pave the way for a reconciliation of the parties and a consolidation of the political system. Assuming these conditions are met, loyalty would become a natural path. Recasting the dominant centralist stand in favor of a vision founded on the principles of coordination, non-subordination, and consent appears to be the best political and societal investment a country could make in this new century. Such an endeavor would contribute to appease political tensions as states, formed of distinctive *demoi,* would give a fairer and more equal hearing to its constitutive parts. And, to wrap up, it is important not to satisfy oneself with an approach based solely on the «right to choose» since – in such a scenario – political communities would be trapped in a legal straitjacket limiting their ability to act. In other words, I am of the view that it would be crucial to assess conflicts of claims bases on the very notion of legitimacy rather than legality as a superseding concept.

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[26] IGNATIEFF, Michael, *The Rights Revolution*, Toronto: House of Anansi Limited, 2001, p. 84.

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