

*Manuel Calvo-García*  
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*Coordinadores*

# Federalismo

## *Federalism*



INSTITUTO INTERNACIONAL DE SOCIOLOGÍA JURÍDICA DE OÑATI

**DYKINSON**





**FEDERALISMO**  
*FEDERALISM*



**Manuel Calvo-García**  
**William L. F. Felstiner**  
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INSTITUTO INTERNACIONAL DE SOCIOLOGÍA JURÍDICA DE OÑATI

DYKINSON  
2004

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## *Presentación*

Durante los días 21 y 22 de junio de 2002 se celebraron en el Instituto Internacional de Sociología Jurídica de Oñati unas *Jornadas Internacionales sobre Federalismo* en las que participaron un grupo de reconocidos expertos procedentes de ámbitos culturales y políticos diversos.

Tanto aquellas Jornadas como el libro que ahora se presenta tuvieron como objetivo propiciar un foro de debate sobre la cuestión en el que se confrontasen tanto perspectivas intelectuales como experiencias prácticas sobre los sistemas federales con el fin de introducir elementos para una mejor comprensión de sus posibilidades y limitaciones en un debate difícil, lleno de obstáculos prácticos y recelos políticos.

Desde algunas posiciones, el federalismo es visto como la última estación antes de la independencia y, en ese sentido, se rechaza radicalmente como una opción secesionista. Desde otras, sin embargo, el federalismo no sería sino una trampa burocrática, una opción descentralizadora que hurtaría la verdadera realización de los derechos nacionales de los pueblos. En medio, obviamente, existe una gran gama de claroscuros y matices positivos o negativos en torno a la cuestión federal.

Este libro ha obviado tomar posición sobre las bondades o insuficiencias del federalismo. Sus objetivos son más modestos: suministrar información y perspectivas que ayuden a poner claridad —introduciendo la complejidad necesaria— en un debate que muchas veces se simplifica o elude en función de opciones políticas o ideológicas predeterminadas. Además, una de las primeras conclusiones y aportes de esta publicación tendría que ver con la necesidad de explorar nuevas vías y alternativas al federalismo tradicional.

Partiendo de esas premisas, este volumen aborda la problemática del federalismo desde diferentes ópticas y a partir de propuestas o experiencias federales diversas. Así, en el mismo se pueden encontrar tanto aportaciones y reflexiones de carácter teórico, como otras más centradas en la praxis de sistemas federales «realmente existentes». Se ha tratado, en definitiva, de conjugar aproximaciones referidas al análisis de los desarrollos sobre los fundamentos de legitimación y opciones de los

sistemas federales y conocer como se articulan algunas experiencias federales concretas con el fin de valorar si las realidades satisfacen las expectativas teóricas.

**Peter Schuck**, profesor *Simeon E. Baldwin* de la Universidad de Yale, plantea en su contribución, *Citizenship in a Federal System*, el problema de las tensiones entre las concepciones formales y sustantivas de ciudadanía desde la perspectiva de las presiones que ejerce el fenómeno de la globalización sobre las naciones y los grupos minoritarios y aborda cuestiones relacionadas con las soluciones que al respecto puede aportar el federalismo. En este sentido se analizan diversas facetas de los instrumentos legales y políticos vinculados a la noción del federalismo para concluir explorando cómo afecta un sistema federal a la cuestión de la ciudadanía y a su futuro en ese contexto. A este respecto, no sólo se tiene en cuenta las múltiples dimensiones de la ciudadanía, sino que a ese elemento de complejidad se suman los problemas de diversidad cultural propios de sociedades multiculturales no homogéneas.

**Ferran Requejo**, catedrático de Ciencia política en la Universidad Pompeu Fabra (Barcelona), aborda en su trabajo la cuestión del federalismo desde la perspectiva del «pluralismo de valores» y las realidades multinacionales. Tras plantearse cuál es la teoría política que mejor se adecua a las exigencias de las sociedades multinacionales (Bélgica, Canadá y España, por ejemplo) y decantarse hacia opciones orientadas al pluralismo de valores, centra su aportación en torno a la cuestión de si el federalismo sirve para articular sociedades plurinacionales. En su opinión, sólo una apuesta clara por un federalismo asimétrico —confederal— serviría para dar respuesta a las necesidades de las sociedades multinacionales. Más concretamente, si se quiere dar respuesta a estas sociedades sólo cabría pensar en una federación multinacional (confederación) basada en el reconocimiento constitucional y político del carácter plurinacional de la democracia; un alto nivel de autogobierno en cuestiones sensibles y mecanismos para articular un sistema de gobierno compartido en otros ámbitos, incluidos los aspectos fundacionales y de reforma del sistema federal. En cualquier caso, dado que este tipo de soluciones implica principios que muchas veces no se pueden jerarquizar, el pluralismo de valores debiera estar en la base de tales opciones, y ello obliga necesariamente al acuerdo. La conocida decisión de la Corte Suprema Canadiense de 1998 le sirve, por último, para concluir sus reflexiones desde un punto de vista más práctico.

El texto de **Jean-François Gaudreault-DesBiens** de la Universidad McGill (Canadá), *The Canadian Federal Experiment, or Legalism*

*without Federalism? Toward a Legal Theory of Federalism*, sirve como contrapunto entre la reflexión teórica y práctica. Partiendo de la experiencia canadiense, se aborda en este trabajo una ambiciosa reflexión sobre el propio principio federal en sí mismo con una perspectiva axiológico-normativa. La propia interrogación desde la que se presenta pone sobre la mesa los recelos sobre la experiencia federal canadiense, que es calificada en algún momento como un fracaso. En el fondo, late el recelo sobre si en ocasiones determinadas estrategias no se estarían apropiando de los ideales del federalismo para proyectos antifederalistas. Desde este prisma, se analiza el caso canadiense para concluir en las insuficiencias de los preceptos constitucionales y de la propia jurisprudencia para dar respuesta a las exigencias de los principios federales. En buena medida, estas limitaciones traerían causa de las propias carencias de la teoría jurídica y un legalismo mal entendido. Su opinión, con todo, es moderadamente positiva respecto a las posibilidades de recuperación de los genuinos principios federales (lealtad, igualdad, autonomía, subsidiariedad, justicia federal y solidaridad) y de realización plena de sus potencialidades constitucionales. Esto es, articulando dos niveles de gobierno iguales en estatus y operando autónoma y coordinadamente —cooperativamente, incluso— para la defensa de intereses que en ocasiones pueden entrar en competencia, pero que serían igualmente legítimos.

Los dos siguientes trabajos ya recalcan más directamente en la práctica de los sistemas federales de Alemania y Suiza, respectivamente. En el primero, bajo el título *The Constitutional Regulation and Practical Functioning of Federalism*, **Dian Schefold** (Universidad de Bremen) deja un tanto de lado el punto de vista teórico, para centrarse en un análisis de la regulación jurídica del Estado federal alemán y en su funcionamiento práctico. Tras desgranar las peculiaridades administrativas de este sistema, se detiene a destacar algunos aspectos concretos relacionados con la distribución y coordinación de competencias: la representación y participación de los *Länder* en las cuestiones relacionadas con el funcionamiento de la Unión Europea, el sistema parlamentario alemán y en particular la descripción del funcionamiento de la segunda cámara de acuerdo con las claves de un sistema federal. Por último, aborda las características de «coordinación voluntaria» propias del sistema federal alemán —basadas por lo demás en la tradición unitaria de este país. Por su parte, **Luzius Mader** (Universidad de Lausanne, Suiza), en *Sub-national Units in Federal States and Foreign Policy: the Swiss Case*, parte de la experiencia federal suiza y se centra en particular en los

aspectos de 1 y representación relacionados con la política exterior de este país. Tras describir las principales características del modelo federal suizo en la actualidad, pasa a analizar las relaciones exteriores de los cantones desde un prisma tanto interno como externo. Para ello revisa en primer lugar la intervención de los cantones en las relaciones exteriores menores y, a continuación, tras hacer balance de la regulación constitucional y los últimos desarrollos normativos al respecto, se detiene a revisar los espacios de participación de los cantones en la política exterior de la Confederación suiza a la luz de las nuevas instituciones de cooperación.

El último bloque de aportaciones se centra directamente en un análisis de la problemática del federalismo desde el contexto y los problemas específicos de Euskadi. En la primera de ellas, **José Manuel Castells Arteche** (Universidad del País Vasco), sobre *El Difícil Federalismo*, parte de la historia como premisa para abordar el análisis de una realidad bifronte: la prohibición formal del federalismo de la Constitución, por un lado, y el reverso federalista de la realidad, por otro. A partir de esos antecedentes se revisan los principales escollos del discurso federalista en el Estado español y se pasa al análisis del Senado como órgano fundamental en una concepción federalista del Estado. Todo ello le lleva a avanzar unas matizadas conclusiones sobre las posibilidades de instaurar un federalismo apropiado para el siglo XXI en el Estado español, esto es, un federalismo que racionalice su estructura político-constitucional y reconozca los entes identitarios existentes en su interior. En clave muy distinta se aborda la cuestión del federalismo en el trabajo de **Javier Villanueva**, *Federalismo, Nacionalismo y Autodeterminación en el País Vasco*. En el mismo se confrontan las tensiones del ideal federal con las propuestas históricas y presentes del nacionalismo vasco. Este análisis lleva al autor a subrayar que no existiría una incompatibilidad de fondo con las fórmulas confederales, aunque sí la habría con las demás formulas federativas. Para empezar, las tesis nacionalistas vascas serían incompatibles con el concepto primario de «nación española», aún en sus acepciones más plurales o abiertas; en segundo lugar, por el alto grado de diversidad de los cimientos nacionales de Euskal Herria; y, tercero, por el alto valor simbólico del derecho de autodeterminación en el contexto nacional vasco, lo cual acentuaría sus dificultades de realización tanto *interna* como *externamente*. En cualquier caso, más allá de las dificultades para su aceptación o realización, concluye apuntando que cualquier solución de futuro pasa por desdramatizar tanto la «secesión» como el «soberanismo».

Por último, se recoge también por su interés la comunicación presentada por **Luis Sanzo González**, sobre *Federalismo Territorial, Soberanía Cultural e Integración Europea*. Este trabajo se plantea la problemática del federalismo —vasco— en clave europea. El federalismo español estaría abocado a afrontar la problemática de la territorialidad, por un lado, y el mestizaje cultural, por otro. La resolución de los derechos nacionales en territorios pluriculturales exige un esfuerzo de concreción de las alternativas que haga factible y útil el modelo federal para las «partes». En su opinión, sólo un modelo federal que descansase en pactos bilaterales entre el Estado y los territorios nacionalmente diferenciados —en algún caso, con una estructura organizativa interna a su vez federal, por ejemplo en el caso de Euskadi y Navarra. Este modelo choca con innumerables obstáculos, empezando por la propia resolución —«paradójica»— dada a esta cuestión por la Constitución Española, que conjugaría un exacerbado nacionalismo español con un generoso criterio de «autonomización» cultural y organizativa. En cualquier caso, lo que resultaría obvio en su opinión es que cualquier alternativa federal articulada a partir del territorio estaría abocada al fracaso. Como también estaría fuera de lugar cualquier modelo federal planteado al margen del contexto de la «constitucionalización» europea, aspecto en el que profundiza en las últimas páginas de su trabajo.

\* \* \*

Quizá pudiera pensarse, tras la presentación de los diferentes trabajos que componen este volumen, que ha llegado el momento de esbozar qué es el federalismo y, dado el contexto más próximo en el que se desarrollan las actividades del Instituto Internacional de Sociología Jurídica de Oñati, esclarecer si el federalismo puede aportar algo a los conflictos nacionales. Dicho de otra manera, si el federalismo puede contribuir a la realización de los derechos de los grupos nacionales sin Estado. Al respecto, lo que resultó evidente a lo largo de las Jornadas y de los debates realizados es que no parece existir una respuesta tajante y definitiva a las cuestiones planteadas. Antes bien, lo que emerge con facilidad son las dificultades —tanto desde un punto de vista interno, como desde un punto de vista externo— y la necesidad de los matices siempre que se habla de federalismo y sus formas o alternativas.

Una de las primeras cuestiones a resolver tiene que ver con la pregunta: «¿qué federalismo?». Como se ha podido comprobar, los mode-

los federales pueden responder a claves organizativas diversas, pueden tener como horizonte sociedades homogéneas o culturalmente diversas, pueden ser más o menos sensibles a las demandas «identitarias» y a los derechos de los grupos, etc. En consecuencia, resulta extraordinariamente difícil definir cuáles son sus elementos centrales. Lo que sí emergió claramente en los debates fue la necesidad de huir de las definiciones que se quedan en meros aspectos institucionales, para atender a otros elementos: sociales, políticos y culturales. En realidad, los sistemas federales existentes suelen tener mucho que ver con las condiciones históricas, sociales y culturales de los pueblos.

En definitiva, no todas las experiencias federales, como no todas las propuestas teóricas en torno al federalismo, serían sensibles al reto de dar respuesta a los problemas de sociedades plurinacionales, lo cual no obsta para que esas experiencias puedan ser revisadas y desarrolladas teóricamente con la finalidad antedicha. El modelo federal también puede articularse teórica y prácticamente para intentar resolver las demandas de los grupos nacionales sin Estado. Al respecto, hablar del «difícil federalismo», sobre todo cuando el federalismo afronta la cuestión nacional, parece ser algo más que un mero recurso retórico.

En cualquier caso, si se piensa en el federalismo como uno de las opciones para dar salida a los derechos de grupos nacionales, es claro que el federalismo no puede quedarse en una mera coartada o, incluso, en un nuevo obstáculo para impedir su realización. En este sentido, el federalismo sólo serviría para dar respuesta a las necesidades de sociedades plurinacionales complejas si parte de la plena aceptación de esa diversidad y tiene como base el acuerdo de todos los grupos implicados. Además, como se apunta en alguno de los trabajos, no parece que sea prudente obviar cuestiones como la del derecho de autodeterminación o encastillarse en propuestas territoriales «soberanistas» que eludan la diversidad existente en su seno o la exclusión de parte del grupo más allá de los márgenes territoriales a los que se pudieran circunscribir esas propuestas.

Sentado lo anterior, no parece fácil llegar a proponer «recetas» en un sentido u otro desde experiencias ajenas. Antes bien, la perspectiva comparada y el análisis de esas experiencias muestran la necesidad de atender a la cuestión federal desde los contextos singulares en los que existe o para los que se piensa. Como se ha dicho, no todos los «federalismos» son iguales, ni tienen por qué serlo. En esa línea de reconocimiento de la necesidad de dotar de una cierta complejidad a los modelos federales hay que comenzar por desmarcar federalismo de

«territorialización» y acentuar los aspectos que permitan el reconocimiento de realidades plurinacionales mestizas y complejas. En este sentido, la vinculación del modelo federal a la realización de «derechos» puede ayudar a explorar nuevas vías y alternativas. En particular, si se vincula el federalismo a las demandas «identitarias» y a los derechos nacionales de los grupos sin Estado.

Hoy por hoy, sin embargo, como se puso de manifiesto en el debate, el federalismo parece haber sido secuestrado por las federaciones, esto es, por los propios Estados. Al estar tan férreamente atadas a los Estados, muchas de las experiencias federales habrían perdido las ventajas de su potencial flexibilidad. Indirectamente, algunos procesos concomitantes como el desarrollo de la UE podrían ayudar a recuperar parte de esas potencialidades. La desmitificación del rol de los Estados centrales que determinan los procesos de confluencia supranacionales puede ayudar, indirectamente, a dar más relevancia a las unidades sub-estatales. Con lo cual, si se conjuga este proceso con mayores dosis de flexibilidad en las propuestas federales, quizá no sea del todo aventurado vaticinar nuevos espacios para el desarrollo del federalismo a lo largo del siglo XXI.

Por último, no queremos finalizar sin dejar constancia de que este libro no habría sido posible sin la colaboración y el esfuerzo de todas las personas que trabajan en el Instituto Internacional de Sociología Jurídica. En particular, queremos agradecer la ayuda prestada para la organización de las *Jornadas* a Malen Gordo, responsable del Departamento de Reuniones. También José Antonio Azpiazu, como responsable del Departamento de Publicaciones, ha prestado una colaboración inestimable en la edición de los originales para dotarlos de homogeneidad e igualmente se ha ocupado de los demás aspectos relacionados con su publicación.

Manuel CALVO-GARCÍA  
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# Citizenship in Federal Systems

Por  
Peter H. Schuck\*

## *Introduction*

An odd and somewhat disquieting feature of citizenship talk<sup>1</sup> in the academy is its oscillation between two discursive poles, one formalistic and the other substantive. We commonly speak of the legal principles that regulate the statuses of citizen<sup>2</sup> and non-citizen<sup>3</sup>. But we also speak of what citizenship actually means in a society in which citizens and

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\* PETER H. SCHUCK is the Simeon E. Baldwin Professor, Yale Law School. This paper was originally published in 48 *American Journal of Comparative Law* 195 (2000). The only updating that I have done is infra note 124.

<sup>1</sup> I discuss different dimensions of what I call citizenship talk in Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* 176-78 (1998).

<sup>2</sup> For sound normative and perhaps constitutional reasons, citizenship in the U.S. (and presumably elsewhere) is an essentially undifferentiated status. American law treats all citizens, whether native-born or naturalized, the same for virtually all purposes, save two: eligibility to be elected President of the United States, and the renunciation oath required of naturalizing citizens, leading to somewhat different dual citizenship rules. See id. at 227-29. Not germane here is the conventional distinction between citizens and «nationals» (i.e., near-citizens but with lesser status and rights, usually as to voting) under domestic and international law. See id. at 412, n. 2.

<sup>3</sup> The term «alien» carries a more unpleasant—and for some, offensive—connotation than the term «non-citizen.» Johnson, «Aliens' and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons», 28 *Miami Inter-American L. Rev.* 263 (1996-97). Nevertheless, using «alien» can reduce confusion when one wishes to discuss both federal and state citizenship, as I do here. We do not speak of U.S. citizens who are citizens of New York and who enter New Jersey as «aliens» there. Unlike the citizen category, immigration law divides aliens into many subcategories, each bearing different rights, duties, and administrative statuses. See Schuck, «Current Debates About U.S. Citizenship», in *In Defense of the Alien*, (Lydio Tomasi, ed., 1999), at 83-84.

aliens tend to be unequal in resources as well as in status<sup>4</sup>. We generally use the formalistic conception to describe what the law says citizenship *is*, and the substantive conception to compare what it is with what we think it *could* and *should* be<sup>5</sup>. This tension between formal and substantive conceptions of citizenship reflects, among other things, the stark differences among legal rules, political realities, and civic aspirations.

Recent developments have heightened this tension by infusing new uncertainties and complexities into the current debate over citizenship. Many of these developments are gathered under the thematic portmanteau—I am tempted to say *idée fixe*—of globalization. Whether commentators view globalization as a harbinger of universal human rights, political reform, and multicultural ethics<sup>6</sup>, as an insidious agent of a corrosive world capitalism, or as something else, all seem to agree that globalization is already having profound effects on the nation-state, present and future.

Most of globalization's cheerleaders, skeptics, and agnostics converge on the view that an integrated world economy and new communications and information technologies are inexorably shrinking the plan-

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<sup>4</sup> Inequalities, of course, also persist and may even be growing, *within* each of these groups, perhaps especially among non-citizens who are distributed bimodally (in the U.S., at least) with respect to their socioeconomic status at the time of entry.

<sup>5</sup> This comparison can prompt disparate reactions. I rejoice, for example, that Germany has decided to permit long-resident descendants of former guestworkers to acquire and transmit German citizenship, but I also wonder whether their new status as Germans will succeed in integrating them into civil society. See generally, *Paths to Inclusion: The Integration of Migrants in the United States and Germany* (Peter H. Schuck & Rainer Münz, eds., 1998).

<sup>6</sup> Two premature celebrants are David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (1996), and Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (1994), to whose views I have reacted in Schuck, *supra* n. 1, at 202-05. For other relatively upbeat treatments of this question, see Thomas L. Friedman, *The Lexus and the Olive Tree* (1998); Rubenstein, «Citizenship in a Borderless World», in *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Antony Anghie & Garry Sturgess, eds., 1998), at 183; Tina Rosenberg, «A Bad Year for the World's Border Guards», *N. Y. Times*, July 2, 1999, at A16 (NATO bombing of Serbia, Pinochet arrest in London, and war crimes indictments show hopeful erosion of sovereignty). This debate and its associated literature are summarized and extended in Bosniak, «Citizenship Denationalized», *7 Ind. J. of Global Legal Stud.* 447 (2000).

et, transforming a system of territorial nation-states into a global village bound only by cyberspace. This, they say, renders anachronistic the notion of political identity tied to a nation's institutions, laws, borders, culture<sup>7</sup>, and citizenship<sup>8</sup>. Instead, globalization subjects even the most insular communities to the remorseless, tradition-withering, homogenizing discipline of world markets. In turn, the argument continues, these forces threaten the safety net and indeed any other social practice that cannot meet the acid test of economic efficiency. In this view, the competition for pools of capital that can be moved around the world instantaneously with the click of a mouse is unleashing a headlong race to the bottom in hot pursuit of the almighty dollar (or Euro)<sup>9</sup>.

I have serious misgivings about many of these claims, especially in their more extreme, Marxist-Hegelian forms, which imagine an economically determined, universalized unfolding of history<sup>10</sup>. This paper, however, is concerned not with the external, centrifugal forces that threaten to transcend the nation-state, but with their opposites. Part III describes the internal, centripetal forces that may impel nation-states to federalize power, devolving it downward to subnational units and in the process altering the nature and significance of citizenship. Part III also explores citizenship's political, constitutional, sociological, and psychological meanings and the legal and policy instruments (federalism, most notably) through which different polities may instantiate these meanings.

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<sup>7</sup> Canada, France, and other countries have imposed strict legal roles to inoculate their national cultures against the American virus, but to little avail. See, e.g., Susan Catto, «Keeping Canada's Public TV Network Purely Canadian», *N. Y. Times*, Jan. 25, 2000, at B2; Anthony DePalma, «It Isn't So Simple To Be Canadian», *N.Y. Times*, July 14, 1999, at E1.

<sup>8</sup> Observing the carnage in Kosovo, leading political figures and thinkers have embraced this view. See, e.g., Havel, «Beyond the Nation-State», 9 *The Responsive Community* (Summer 1999). For a deeply skeptical account of these currents, see Leon Wieseltier, «Winning Ugly», *The New Republic*, June 28, 1999, at 33 (mocking statements of Havel; of Bronislaw Geremek, Poland's foreign minister; and of Jurgen Habermas).

<sup>9</sup> For a representative example of the pessimistic side of this debate, see John Gray, *The False Dawn* (1998).

<sup>10</sup> Such prophecies ignore some inconvenient facts. Nation-states have been proliferating, not dying, as failed empires and states collapse, as demands for ethnic self-determination and even independence multiply, and as jerry-built compromises to suppress nationality fail. For an example of the latter, see Jane Perlez, «U.S. Asking Taiwan to Explain Its Policy After Uproar», *N. Y. Times*, July 14, 1999, at A3 (Taiwan asserting its sovereignty). Many of these new nation-states, of course, are poorly equipped to exercise much independent power on the world stage.

How does federalism<sup>11</sup> affect citizenship? Part IV focuses on four aspects of a federation that shape citizenship's meaning in that polity: (1) its historical and political origins; (2) its social diversity; (3) its distribution of powers between the national (or federal) level and the sub-national levels and among the latter; and (4) the rights and duties that the federation accords to each level's citizens. This discussion draws on legal and political analyses of the federal systems in Australia, Canada, Germany, Switzerland, the U.S., and to a lesser extent Belgium. Part V discusses the recent, unanticipated renaissance in the U.S. of a dual sovereignty form of federalism that many commentators hoped (or feared) had passed irretrievably from the scene. I conclude with some brief observations about the future of citizenship in federal systems.

I wish that this comparative analysis could yield analytically crisp models of federal citizenship, models that could both crystallize our understanding and guide future research. Alas, it cannot. All genuine federal systems are highly complex, contingent products of unique historical, social, and political forces. Comparisons can limn certain interesting relationships, as this paper does. For example, the sub-national entity's pre-federation status and the nature of the political crisis that impelled it to federate seem largely to determine the nature and extent of its independence from the center and hence the significance of sub-national citizenship. But extracting this kind of insight is not the same as developing coherent, non-trivial, generalizable hypotheses, much less testable ones<sup>12</sup>. Such a worthy ambition far exceeds the scope of this paper—and perhaps the scientific capacities of comparative methodology as well<sup>13</sup>.

### *The Changing Context of Citizenship*

The social developments that drive globalization have been much discussed. They include the integration of world markets through more mobile capital, technology, and labor; related revolutions in telecommunications and transportation; the migration-driven proliferation of

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<sup>11</sup> See my definition *infra* nn. 16-22.

<sup>12</sup> Recall that my sample size is only six and cannot be much enlarged because few other federal systems satisfy the paper's definition, which I present *infra* nn. 16-22.

<sup>13</sup> For a recent and trenchant exploration of these capacities, see Chodosh, «Comparing Comparisons: In Search of Methodology», *84 Iowa L. Rev.* 1025 (1999).

«transnational communities»; the end of the Cold War; rising education levels; and the spread of liberal democratic hegemony, human rights norms, market rationalism, dollarization (and Euro-ization) of national currencies, and English as the world's *lingua franca*.

At the same time, however, other social forces are blunting this global thrust, pressing both supranational formations and nation-states to devolve political authority both inward and downward<sup>14</sup>. To further complicate the picture, some of these developments are simultaneously pushing in both transnational and sub-national directions.

Buffeted by these powerful cross-winds, the nation-state can choose among several stabilization and survival strategies. One strategy, political mitosis, is exemplified by the former Yugoslavia and the former Soviet Union. States that are no longer viable as integrated, sovereign units may fracture, forming new states that are more or less independent of their reluctant parent state. A second strategy, exemplified by the Nazi abolition of German federalism in 1934 and by Yugoslavia, Pakistan, and Singapore today, is hyper-nationalism. Here, nation-states try to reinforce ideologies and institutions that support or symbolize its unity in hopes of consolidating power or staving off more wrenching change. A third strategy is supra-nationalism, in which states surrender some of their sovereignty to a larger entity such as the EU<sup>15</sup>, merging themselves in it to some extent. Federalism, the focus of this article, is a fourth strategy.

By federalism, I mean a system that divides political authority<sup>16</sup> between a nation-state and sub-national polities within its territory so

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<sup>14</sup> At the supranational level, this pressure is reflected in the growing importance of the EU's subsidiarity principle, which requires that policy functions be lodged at the lowest feasible level. Treaty Establishing the European Community, Feb. 7, 1992, Art. 3b, [1992 IC.M.L.R. 573, 590. In some tension with this principle, however, is the expansive universalist jurisprudence of the European Court of Human Rights. See, e.g., Roger Cohen, «A European Identity: Nation-State Losing Ground», *N.Y. Times*, Jan. 14, 2000, at A3 (Court ruling requiring Britain to end ban on openly gay members of armed forces an example of surrender of national sovereignty over law to European institutions.

<sup>15</sup> Or to the U.S., as with various forms of dollarization adopted by Argentina, Ecuador, and other nation-states. See, e.g., Larry Rohter, «U.S. Currency Becomes Ecuador», *N.Y. Times*, Jan. 18, 2000, at C1.

<sup>16</sup> I say political authority in order to minimize the well-known uncertainties surrounding the more traditional term, sovereignty. For a recent analysis of different kinds of sovereignty, see Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* 3-4 (1999). As noted in the text immediately below, I also mean to distinguish federalism from its more common cognate, the decentralization of national policy administration and implementation.

that both the national and sub-national polities directly govern individuals within their jurisdiction, *and* that confers both national and sub-national citizenships<sup>17</sup>. Some preliminary distinctions are in order here. Federalism entails decentralized administration, but they are by no means the same thing. Although long-unitary states like France, Spain, and the United Kingdom often devolve authority to regional or local units of administration, this devolution does not thereby create a sub-national polity, much less sub-national citizenship. Nor is a federation's dual citizenship (national and sub-national<sup>18</sup>) the same as dual citizenship in international law (citizenship in more than one nation-state)<sup>19</sup>. I also exclude nation-states like India that are federal in form but largely unitary in substance<sup>20</sup>, as well as supra-national formations like the European Union, a fully developed common market that has developed only embryonic political institutions and bears a weak, though gradually

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<sup>17</sup> The nature of sub-national citizenship in a federation varies. In some federations, citizenship in a sub-national unit follows more or less automatically from legal residence there, coupled with national citizenship. In the U.S., for example, the Citizenship Clause of the 14th Amendment mandated this relationship, which reversed an earlier constitutional logic in which, according to Joseph Story, «Every citizen of a State is ipso facto a citizen of the United States». Cited in Beaud, «The Question of Nationality Within a Federation: A Neglected Issue in Legislation Regarding Nationality», in *Reinventing Citizenship: Dual Citizenship, Social Rights, and Federal Citizenship in Europe and the United States* (Patrick Weil & Randall Hansen, eds., 2000). I discuss the Supreme Court's current understanding of this relationship in Part V infra.

Switzerland reverses the American pattern, deriving federation citizenship from cantonal citizenship, which in turn is based on residency. See, e.g., Hughes, «Cantonalism: The Golden Epoch of Switzerland», in *Comparative Federalism and Federation* (Michael Burgess & Alain Gagnon, eds., 1993)(herein after «*Comparative Federalism*»), at 160. There are no references to provincial citizenship in the Canadian Charter, and none to state citizenship in India's Constitution. See Vicki C. Jackson, «Citizenship and Federalism» (paper presented for Carnegie Comparative Citizenship Project: International Migration Policy Program, Carnegie Endowment for International Peace, forthcoming 2000) (on Switzerland, Canada, India, and U.S. citizenship roles).

<sup>18</sup> Beaud calls this citizenship in a sub-national unit «federated nationality». Id.

<sup>19</sup> On the latter, see Schuck, *supra* n. 1, chap. 10; Spiro, «Dual Nationality and the Meaning of Citizenship», 46 *Emory L. J.* 1435 (1997).

<sup>20</sup> India's states traditionally were little more than administrative agents of the national government. Among other things, the national government can (and sometimes does) dismiss states' chief ministers and their governments simply by declaring an emergency. See Rodden & Rose-Ackerman, «Does Federalism Preserve Markets?», 83 *Va. L. Rev.* 1521, n. 129 (1997). Recently, however, Indian states have been able to exploit a more fluid political system to extract concessions from New Delhi.

more robust, conception of citizenship<sup>21</sup>. Finally, I exclude non-democratic federations like Yugoslavia, the Russian-led Commonwealth of Independent States, and many sub-Saharan African polities.

Having provided a working definition of federalism, our question becomes: What is the problem to which federalism might be a plausible solution? The answer to this question, I believe, can largely be found in the conjunction of three related but analytically separable forces: minority group demands, devolution's functional advantages, and public discontent with centralized governance.

1. *Minority group demands*<sup>22</sup>. Some historians date the 20th century from the assassination in 1914 of the Archduke Francis Ferdinand by a Serbian nationalist, which led directly to the outbreak of World War I. Similar demands within and between nation-states, often backed by violence, constitute this century's bloody hallmark. They will certainly continue well into the next, as evidenced by the endless Balkan conflicts and the insurgencies by Kurdish, Palestinian, Chechenyan, religious fundamentalist, and other minorities. Such disaggregative pressures, moreover, are by no means confined to the Third World. Serious disaffection persists in Spain, Belgium, Indonesia, and French Canada, for example, and the claims of indigenes in Canada and the U. S. are being pressed—non-violently, for the most part, and with considerable success<sup>23</sup>.

At a minimum, these minority claims seek «recognition» of, or respect for, their group identity by the state and its civil society<sup>24</sup>. Depending on various demographic, military, economic, and political factors, these claims for recognition may evolve into more strident

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<sup>21</sup> See, e.g., Ball, «The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community's Legal Order», 37 *Harv. Int'l L. J.* 307 (1996). Even today, EU citizenship is not insignificant; it confers the right to vote for the European Parliament, to reside and work in any EU member state and to vote in its local elections, and to invoke the protection of European institutions such as the European Court of Human Rights and the European Court of Justice. Otherwise, however, it is still largely concerned with economic, not political, rights.

<sup>22</sup> Sometimes, as in South Africa before 1994, the majority asserts this claim against a ruling minority.

<sup>23</sup> See, e.g., Anthony DePalma, «A New State for Inuit: Frigid but Optimistic», *N.Y. Times*, Jan. 29, 1999, at A1 («the Inuit of Nunavut will be the first indigenous people in the Americas to govern themselves so completely»); Michael Janofsky, «Agreement Is Signed on Return of 84,000 Acres to Ute Indians», *N.Y. Times*, Jan. 14, 2000, at A14.

<sup>24</sup> Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (1994); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

demands for some form of self-determination. The state and the claimant groups then engage in a complex bargaining process in which threats, violence, side payments, horsetrading, internal and international politics, and other modes of influence all play their parts. The recognition granted by states may take the form of patronage, affirmative action and other special benefit programs, constitutional protections, linguistic and other cultural rights, group representation, economic concessions, political party status, administrative autonomy, leverage within a federal structure, self-determination within a commonwealth, independent nation-state status, and many other variants.

Indeed, minority demands for autonomy may be so compelling, and the forces of devolution so strong, that even long-unitary nation-states may be unable to suppress or resist them. Robert Cottrell recently noted that «[t]he most headstrong of Europe's regions —such as Catalonia in Spain, Flanders in Belgium, Scotland (a country in its own right, technically) within the United Kingdom— tend to be distinguished linguistically, and by the sense of a distinct history of their own. In the new, borderless Europe, they must be kept happy by a grant of powers over matters such as culture, education, and local planning, for example — because otherwise such regions cannot be maintained at all»<sup>25</sup>. Federal states are even more vulnerable to such centrifugal claims, particularly when their minorities are concentrated in discrete geographical areas. This vulnerability is illustrated by Canada's recent creation of the Nunavut territory in response to Inuit demands for autonomy<sup>26</sup>.

Disputes over the territorial boundaries of national and sub-national units provide an especially clear focus for state-destabilizing claims by both minorities and majorities. Colonial powers traditionally drew the

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<sup>25</sup> Cottrell, «Europe: So Far, It Flies», *N.Y. Rev. of Books*, Apr. 8, 1999, at p. 73. Westminster's recent grant of broad legislative authority to Scotland, Wales, and Northern Ireland, and Madrid's concessions to Catalonia, confirm the truth of this observation. Even Turkey may be moving, albeit glacially, toward some accommodation with its Kurdish minority. See Stephen Kinzer, «Turkey Delays the Execution of Rebel Kurd», *N. Y. Times*, Jan. 13, 2000, at 1 (conciliatory signs among Turkish and Kurd leaders).

<sup>26</sup> See supra n. 23. This vulnerability also helps to explain the traditionally militant refusals of Turkey and Iraq to recognize the legitimacy of Kurdish claims. But see Kinzer, supra n. 25. In response to these pressures, the EU has established a Committee on the Regions in Brussels. See generally, Roht-Arriaza, «The Committee on the Regions and the Role of Regional Governments in the European Union», *20 Hastings Int'l & Comp. L. Rev.* 413 (1997).

borders of their colonies according to political, military, or physical criteria that served the short-term interests of the occupiers, whereas the post-colonial regimes often viewed these borders as arbitrary and politically incendiary. This legacy provokes cross-border conflicts, as when a cohesive, strongly identified ethnic group is divided between two or more states<sup>27</sup>, or when a region's valuable natural resources are concentrated in one state to the exclusion of its neighbors<sup>28</sup>.

When the Austro-Hungarian and Ottoman empires dissolved in the wake of World War I, the victorious allies established many new states whose fiercely contested borders often divided ethnic groups, forming even smaller minorities in each of the resulting states. These highly politicized and opportunistic creations sowed the seeds of insurgency, revanchism, and other sources of political instability. State-creation resumed after World War II when Europe's former colonies and protectorates won their independence and quickly contested their borders, and then recurred with the fragmentation of the Soviet empire and Yugoslavia at the end of the Cold War. The long-smouldering conflicts between India and Pakistan, between China and Taiwan, between Israel and the Palestinians, and among many African states show that territorial disputes remain potent pressure points for those challenging the structure and legitimacy of fragile states.

Ethnic self-assertion seems certain to cause even more political division in the future. Literally hundreds of ethnic groups yearn to gain some measure of cultural, economic, or political autonomy from, or within, the larger polities in which they find themselves<sup>29</sup>. Human rights rhetoric and practice, including (after the bombing of Yugoslavia during the recent Kosovo war) a more credible threat of military intervention on humanitarian grounds, will also encourage such claims.

Federalism offers a possible remedy for such majority-minority conflicts, a service it has often performed in the past. But in an international order that increasingly countenances, and in principle protects, ethnic self-expression (if not always self-determination or autonomy), the

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<sup>27</sup> Examples include the Kurds in Turkey, Iraq, and Russia, and the Palestinians in Israel, the occupied territories, Jordan, and many other nations in the region.

<sup>28</sup> Examples include the oil and natural gas reserves in some of the new states of Central Asia.

<sup>29</sup> An estimated 1700 languages and 150 religions exist. *Migration News*, July 1999 <http://migration.ucdavis.edu>. India alone has 17 official languages.

minorities-within-minorities phenomenon complicates any federalist solution to such conflicts. Indeed, a federating polity that organizes a sub-unit around a particular mode of ethnic representation and patronage may actually exacerbate existing intra-ethnic conflicts in that sub-unit, thus encouraging new and more ardent minority claims for political recognition, greater autonomy, or even full independence<sup>30</sup>.

2. *Functional advantages of devolution.* The nation-state's durability<sup>31</sup> reflects more than just the conservative forces of inertia, ideology, and path dependency, important as they surely are. Its survival and indeed its ability to flourish—the number of states, after all, continues to grow—also reflects its functionality.

The nation-state enjoys certain comparative advantages over smaller political units. Some of these advantages are readily explicable by recourse to standard economic analysis. Thus, in an increasingly interdependent world in which the actions of individuals and groups both benefit and burden others with whom they cannot easily contract, only a polity as large as some nation-states can effectively «internalize» many of these «externalities.» Nation-states, moreover, can exploit some economies of scale and network effects that smaller units cannot, such as monetary, taxation, military, regulatory, and transportation systems. Indeed, some problems like cross-border pollution, epidemic diseases, refugee movements, and labor migration may yield to scale economies only at the supranational level<sup>32</sup>. For such problems, regulation at the sub-unit level may be ineffective—or even perverse<sup>33</sup>.

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<sup>30</sup> For example, Peter Spiro notes that many of the indigenes in Quebec have demanded the right to secede from an independent Quebec or at least have their autonomy guaranteed within such a state. Conversation with the author, July 1999.

<sup>31</sup> Historians often date the recognition of sovereignty in the nation-state to the Treaty of Westphalia in 1648, but recognizable, more or less unitary nation-states like England, Spain, and Holland long antedated Westphalia.

<sup>32</sup> This helps to explain why regional groupings like the EU and NAFTA have proved attractive. Another important factor, of course, was the collective memory of two world wars fought on European soil, which inspired both NATO and the trading blocs that prefigured the EU.

<sup>33</sup> For example, state-level regulation, together with obstacles to inter-state collective action, might trigger a «race-to-the-bottom» dynamic in which states would be worse off as competition among them for investment funds and jobs drives their standards down to that of the lowest level state. Empirical studies, however, demonstrate that this competitive dynamic is very complex, that it operates differently in different policy domains, and

The nation-state also enjoys comparative advantages in certain ways that may elude economic analysis. For reasons of history, ideology, and group psychology, for example, the nation-state may often be a better locus than either a smaller or a larger unit for eliciting feelings of social solidarity and liberal community<sup>34</sup>, as well as the collective actions needed to instantiate those values. For similar reasons, most people experience patriotism, self-sacrifice, and political identity largely, if not exclusively, at the level of the nation-state<sup>35</sup>. As Euro-skeptics observe, who is prepared to risk his life for the EU? (Or, one might add, for Yorkshire). Sentiments like these seem to find cathexis in the nation-state, not some larger or smaller unit<sup>36</sup>.

But this is hardly the entire story. The value of greater population or territorial size today may be declining in certain respects, as the economic successes of Hong Kong, Japan, and Singapore demonstrate. Moreover, some forces that favor integration at the national or even supra-national level may also —perhaps at the same time— be disaggregative. Examples of such fractionating forces are labor migration,

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that races to the bottom are by no means inevitable. Much of the recent literature on this question is cited in Peter H. Schuck, *The Limits of Law: Essays on Democratic Governance* 477, nn. 232-34 (2000).

<sup>34</sup> See generally, Schuck, «Immigration Law and the Problem of Community», in *Clamor at the Gates: The New American Immigration* (Nathan Glazer, ed., 1985), at 285. The notion of liberal community is not an oxymoron. An interesting example is the recent proposed change in the roles governing the distribution of donated organs to determine priority according to need in the nation as a whole rather than, as in the prior system, need in smaller regions. See, Sheryl Gay Stolberg, «Agreement on Plan to Revamp Organ Distribution», *N.Y. Times*, Nov. 12, 1999, at A1.

In the U.S. version of liberalism, at least, the primary value of individual freedom has been opposed not to community *per se* but to governmental intrusion into the sphere of civil society. See, e.g., Ladd, «Bowling with Tocqueville», 9 *The Responsive Community* 11, 20 (1999) («The drift and consequences of American individualism are collectivist, though certainly not of a state-centered variety»).

<sup>35</sup> See «Europe Goes to the Polls», *The Economist*, June 12, 1999, at p. 21 (March 1999 survey indicating that roughly 90% of Europeans identify themselves by their country alone or first by their country and only second as a «European», with some variations among countries). See Schuck, *supra* n. 34.

<sup>36</sup> For a fantasy, both amusing and chilling, about small-unit chauvinism, see G.K. Chesterton, *The Napoleon of Notting Hill* (1904). Peter Spiro argues, however, that the spirit of sacrifice is moving away from the state to non-state communities where loyalties are now more intensely felt. «The Citizenship Dilemma», 51 *Stan. L. Rev.* 597, 629-30 (1999). This broad claim, of course, is difficult to test empirically.

which may affect sub-national regions very differently, and comparative economic advantage, which often and increasingly favors decentralization to nations, regions, or even cities<sup>37</sup>.

Social complexity, then, can produce scale *diseconomies* as well as scale economies. The transaction, information, and political costs of attempting to resolve issues at the national level may be much higher than doing so at a lower level<sup>38</sup>. Other things being equal (a crucial qualification in analyses like this one), centralized decision processes that must engage and govern a large, heterogeneous national population tend to be slower, more cumbersome, more costly, and more error-prone than processes that address smaller, more homogeneous populations that are closer to the key decisionmakers and thus generate more learning through shorter feedback loops.

These general tendencies, of course, are sometimes tempered or even outweighed by countervailing factors. In a larger unit, for example, the political compromises needed to accommodate greater diversity may be harder to strike<sup>39</sup>. On the other hand, decisionmakers whose constituents have more diverse interests may find it easier to logroll and compromise because more Pareto-superior trades (i.e., those in which some stand to gain and none lose) are possible. Similarly, the greater the distance of a central decisionmaker from a policy's true cost bearers and beneficiaries may leave her less informed, but it may also enable her to be more independent, decisive, and bold in addressing controversial issues like ethnic conflict<sup>40</sup>.

In deciding the governmental level at which power should be exercised<sup>41</sup>, then, it can be hard to determine precisely where the balance of advantage lies. The locus that is best for some decisions

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<sup>37</sup> See, e.g., Deeg, «Economic Globalization and the Shifting Boundaries of German Federalism», 26 *Publius* 27, 28 (1996). See generally, Saskia Sassen, *Cities in a World Economy* (2000).

<sup>38</sup> See, e.g., Schuck & Williams, «Removing Criminal Aliens: The Pitfalls and Promises of Federalism», 22 *Harv. J. L. & Pub. Policy* 367 (1999) (favoring decentralization of some immigration enforcement functions). See also, *supra* n. 14 (subsidiarity principle).

<sup>39</sup> See discussion and citations in Schuck, *supra* n. 33.

<sup>40</sup> During the civil rights struggle in the U.S., for example, the federal government was far more proactive politically than the states.

<sup>41</sup> This assumes, of course, that a prior decision has been made to allocate this power to public officials rather than leave such decisions to private actors and market processes. Such a decision is one type of what some have called «second-order decisions». See, e.g.,

will be the worst for others, depending on the nature of the particular policy at issue and the values of those whom it will affect. Federalism is an admirably flexible tool for locating and striking this delicate balance.

3. *Public discontent with centralized governance.* Still, many citizens in the liberal democracies seem convinced that some important public policy decisions are too centralized<sup>42</sup>. This is most apparent in the U.S., where the public has pressed Congress to devolve federal authority over some major policy areas to the states, and the U.S. Supreme Court has forced Congress to devolve even more autonomy than Congress wishes<sup>43</sup>. Congress has gone still further in some other areas, adopting market-based regulation and even full privatization, the ultimate form of devolution. I return to the American case in part V.

National governments in Europe have been far more reluctant than the U.S. to shift economic and social policymaking authority to lower levels. This is obviously so for unitary states like France, Italy, Spain, and the U.K that have no sub-national polities (as distinct from administrative arms of the national government) to receive the authority<sup>44</sup>. Some federal states like Germany, however, also resist devolution. Although EU states have privatized many state-owned companies, national policies imposing intrusive regulation and high taxes on labor and capital continue to stifle job growth and entrepreneurial activity.

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Guido Calabresi & Philip Bobbitt, *Tragic Choices* (1978); Sunstein & Ullmann-Margalit, «Second-Order Decisions», 110 *Ethics* 5 (1999).

<sup>42</sup> During the 1980s, the same was said about decisionmaking in large U.S. corporations. However, competitive capital and product markets, and new management theories stressing flexibility, drove them to adopt the flatter hierarchical structures and decentralized decisionmaking that are the new conventional wisdom in corporate circles, as even a cursory reading of current business publications confirms.

<sup>43</sup> See, e.g., *Kimel v. Florida Bd. of Regents*, 2000WL14165 (U.S. Fla.) (Eleventh Amendment immunity protects states from application to them of federal age discrimination law); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219 (1999) (Eleventh Amendment immunity protects states from intellectual property infringement claims); *Alden v. Maine*, 119 S.Ct. 2240 (1999) (Eleventh Amendment immunity protects states from suits in state courts).

<sup>44</sup> «Undoing Britain», *The Economist*, November 6, 1999, at 6 (devolution to regions in France and Spain very slow and unstable; predicting that Britain will be the same).

«Eurosclerosis» (as this condition is often called) has persisted for two decades and stricken all EU states including Germany, long the engine of European prosperity<sup>45</sup>. The crisis that this condition has engendered, moreover, seems destined to worsen as Europe's extensive, rigid, politically entrenched welfare states, whose already high costs will be magnified by rapidly aging populations, collide with the economic effects of even higher tax rates. The future trajectory of this crisis can be glimpsed in the swift loss of public confidence in Germany's new SPD-Green government and in the June 1999 elections for the EU Parliament, which signal widespread voter apathy about EU politics and a conservative backlash in many countries against the EU's power and policies<sup>46</sup>.

As public dissatisfaction with national policies grows and as technological changes reduce many of the center's comparative advantages, regional and local interests stand to gain in their power struggles with central authorities. As I detail in part V, recent U.S. experience illustrates this devolutionary dynamic not only in domestic policy but even in foreign trade and diplomacy, policy domains in which national control is most widely (though even here, not universally) accepted. Such developments<sup>47</sup> suggest a more profound, even seismic shift in the terms of political trade between the state's center and its periphery, much to the periphery's advantage. This shift is bound to be reflected in the allocation of power between them and thus in the need for federalist institutions, processes, and structures.

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<sup>45</sup> In Germany, Chancellor Gerhard Schroder's de-regulation, pro-growth, and tax reform proposals have generally provoked stiff resistance despite persistently high unemployment levels.

<sup>46</sup> See Warren Hoge, «Voters in Britain Rebuff Blair in Europe Parliament Election», *N. Y. Times*, June 15, 1999, at A5 (low turnout coupled with Europe-wide rejection of socialist and center-left dominance of EU Parliament for first time).

<sup>47</sup> There are many examples, from Northern Ireland to Canada to Indonesia. An interesting one occurred recently in Brazil, where the state of Minas Gerais sought to gain domestic political leverage over the national government by withholding its federal taxes, which made international credit agencies more reluctant to renew loans to the national government. Larry Rohter. «Brazil's Economic Crisis Pits President Against Governors», *N.Y. Times*, Jan. 25, 1999, at A8. The gambit backfired, at least temporarily. See Diana Jean Schemo, «World Bank Cuts Off Loans to 2 Brazilian States», *N. Y. Times*, Jan. 29, 1999, at A3.

*The Multiple Dimensions of Citizenship*

Citizenship —as social fact, as legal status, as idea, and as ideal— is an ancient phenomenon with no agreed-upon definition, either then or now<sup>48</sup>. Even in a single society, citizenship has many dimensions and bears many meanings. Scholars of citizenship, of course, have analyzed the concept in a variety of ways<sup>49</sup>. Nevertheless, four dimensions capture the full range of citizenship's essential normative and positive meanings. For want of better terms, I call these four dimensions political, legal, psychological, and sociological. After briefly defining each of them, I shall discuss the most important policy variables or levers that states can and do employ when they enact their collective visions of citizenship into law.

The *political* dimension of citizenship (at least in a democratic state) affirms the value of public participation in the project of self-government<sup>50</sup>, tempered by an exclusionary principle that certain types of political activity, notably voting<sup>51</sup>, is properly limited to those who meet the standards for full membership in the polity, however those standards may be defined.

The *legal* dimension, the most easily defined and measured, emphasizes the positive law that creates the distinctive status of citizen, usually in a constitution or other fundamental charter, and that prescribes the specific rights and obligations attaching to citizens but not to others on the state's territory —much less to humankind generally.

The *psychological* dimension is concerned with the political identity of citizens. Their political identity is determined by whether they conceive of themselves primarily as members of a particular state rather than as members of some other political community, by how salient this identity is for them, and by the identity that others ascribe

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<sup>48</sup> See Aristotle, *The Politics* (trans. T.A. Sinclair, rev. ed., 1981).

<sup>49</sup> See discussion in Bosniak, *supra* n. 6.

<sup>50</sup> After all, following the ancient practice conspicuously revived by the French Revolution, we call participants citizens, not subjects.

<sup>51</sup> As discussed *infra*, many polities permit aliens to vote in some elections (usually local) but not others. Recently, the idea of giving parents extra votes to cast for their children has aroused some academic interest. See Bennett, «Should Parents Be Given Extra Votes on Account of Their Children? Toward a Conversational Understanding of American Democracy», 94 *Nw. U. L. Rev.* 503 (2000).

to them. Political identity is not inconsistent with other facets of identity such as ethnicity, nor does it preclude the possibility that a citizen may identify politically with more than one polity, as many dual and single citizens do<sup>52</sup>.

The *sociological* dimension looks to how individual citizens are integrated into civil society<sup>53</sup>. This has a stronger normative resonance in public debates than the other dimensions of citizenship. A notion like «second-class citizenship» is used colloquially to criticize the effective exclusion of women, minorities, or other groups from full participation in the economic, cultural, political, or other aspects of community life despite their legal status as citizens. Conversely, critics may point to a polity's failure to accord citizenship status to long-resident groups, such as third-generation Turks in Germany, that may be socially integrated in some ways (e.g., language) more than in others (e.g., economic mobility).

Each state's laws governing citizenship, immigration, and the rights of aliens<sup>54</sup> instantiate its particular values about how inclusive it should be, along which dimensions, and on what terms. Although immigration is the only gateway to citizenship for most foreign-born individuals<sup>55</sup>, few states viewed themselves as countries of immigration until very recently, and even those that did, such as the U.S., Australia, Canada, and Israel, had imposed certain racial, religious, or nationality barriers<sup>56</sup>. Italy, Ireland, and some other European states still think of themselves as countries of emigration even after they have in fact begun to experience net migratory inflows. The extreme example is Germany<sup>57</sup>, despite almost 10% of its population now being foreign-born (a larger share than in the

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<sup>52</sup> See sources cited supra n. 19.

<sup>53</sup> T. H. Marshall, *Citizenship and Social Class* (1949), an early but very influential analysis of this dimension, emphasized the social rights needed to achieve equality.

<sup>54</sup> This last category is sometimes referred to as «immigrant» (as distinct from «immigration») law.

<sup>55</sup> I say «most» rather than «all» because some foreign-born children of American parents may, under the statutory roles of *jus sanguinis*, receive U.S. citizenship automatically at birth.

<sup>56</sup> On the U.S., see, e.g., Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997).

<sup>57</sup> On Germany, see, e.g., Bade, «From Emigration to Immigration: The German Experience in the Nineteenth and Twentieth Centuries», in *Migration Past, Migration Future* 1 (Klaus Bade & Myron Weiner, eds., 1997).

U.S.) and a demographic profile that ensures that this share will steadily grow. Millions of German residents were born, raised, and are permanently settled there without having gained German citizenship for themselves or even for their German-born children or grandchildren. (The German nationality law enacted in 1999, however, should gradually reverse this pattern through liberalization of the rules governing *jus sanguinis* citizenship, dual citizenship, and naturalization)<sup>58</sup>.

In general, citizenship can be acquired in some or all of the following ways: birth within the state's territory (*jus soli*), birth to parents who are citizens of the state (*jus sanguinis*), marriage to a citizen, naturalization after a prescribed period of legal residence, or as a result of ethno-cultural ties<sup>59</sup>. (Other, less common routes to citizenship include service in a state's military and incorporation through annexation). Although these roles are generally a matter of national law, some federations legislate them at the sub-unit level<sup>60</sup>.

The specific roles that govern each of these modes of acquiring citizenship varies from state to state. Two of the most important variables concern the scope of the *jus soli*<sup>61</sup> and *jus sanguinis*<sup>62</sup> rules. Both primarily reflect historical and political factors. England, for example, used *jus soli* to cement its subjects' perpetual allegiance to

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<sup>58</sup> See Roger Cohen, «Germany Makes Citizenship Easier for Foreigners to Get», *N.Y. Times*, May 22, 1999, at A3.

<sup>59</sup> Israel's Law of Return is perhaps the purest example of ethnically-based citizenship; a newly-arrived Jew may acquire it even if his parents were not Israeli citizens. Persons of German ancestry must show a strong cultural, especially linguistic, linkage to the German nation in order to acquire immediate German citizenship. In 1993, however, Germany limited the number of such «*Aussiedler*» who may naturalize each year. See Munz & Ohliger, «Long-Distance Citizens: Ethnic Germans and Their Immigration to Germany», in *Paths to Inclusion*, supra n. 5, at 160.

<sup>60</sup> See Jackson, supra n. 17 (discussing variants).

<sup>61</sup> For example, some states apply *jus soli* to the first generation born in the state, while others apply it only to the second or even third generation born there. For a summary of the roles in the 25 states studied by the International Migration Policy Project of the Carnegie Endowment for International Peace, see Patrick Weil, «Access to Citizenship» (unpublished manuscript, 1999).

<sup>62</sup> For example, states differ as to whether, in order to transmit citizenship, one or both parents must be citizens; required periods of residence for the parents, the child, or both; the number of generations after which *jus sanguinis* transmission of citizenship can continue; and the like. *Id.*

the Crown, the U.S. used it to attract immigrants<sup>63</sup>, and many European states used *jus sanguinis* to maintain emotional, political, military, and economic links to their emigrant diasporas<sup>64</sup>. Several other important variables also shape acquisition-of-citizenship rules—for example, the period and continuity of residence necessary to become eligible for naturalization, the availability of a shorter residence period for spouses<sup>65</sup>, and the permissibility of dual citizenship<sup>66</sup>. States' rules also differ as to whether and how a state may terminate (denationalize or denaturalize) one's citizenship and how citizens may renounce it and expatriate themselves<sup>67</sup>.

Citizenship's most consequential dimension, of course, is the *value* that accrues to the state granting it and to the individual receiving it, above and beyond the value that they may gain from an individual's mere legal residence without citizenship. Some commentators doubt that citizenship produces any real «value added» in a liberal democracy<sup>68</sup>. Others, noting that the marginal benefits of citizenship relative to legal residence have declined (at least until recently<sup>69</sup>) while the costs have changed little, are more ambivalent about this status devaluation<sup>70</sup>. Citizenship's value to both state and citizen, of course, mainly depends

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<sup>63</sup> The American states did likewise, at least until 1868 when the Citizenship Clause of the Fourteenth Amendment assigned state citizenship on the basis of mere residency. See Peter H. Schuck & Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (1985). The significance of state citizenship is discussed in some detail *infra* Part V.

<sup>64</sup> See generally, *Reinventing Citizenship*, *supra* n. 17. It may also account for the kinship-based citizenship in Ancient Greece. See H.D.F. Kitto, *The Greeks* 125 (1951).

<sup>65</sup> Weil, *supra* n. 61.

<sup>66</sup> Here, the main determinants are whether the state requires those who are naturalizing to renounce their other nationalities, whether and how the applicant must prove the legal effectiveness of that renunciation in the state of first citizenship, and whether a citizen of state A may acquire citizenship in state B without losing his citizenship in A as a result. *Id.* See also, Schuck, *supra* n. 1, chapter 10.

<sup>67</sup> For a discussion of the legal roles governing loss of U.S. citizenship, see Schuck, *supra* n. 3.

<sup>68</sup> See, e.g., Legomsky, «Why Citizenship?», 35 *Va. J. Int'l L.* 279 (1994).

<sup>69</sup> In the U.S., this calculation changed dramatically in 1996 when Congress authorized, and in some cases mandated, federal and state governments to discriminate against some non-citizens in eligibility for certain public benefits. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Title IV and Sec. 742, 8 U.S.C. Sec. 1611-15, Pub.L. 104-193.

<sup>70</sup> See, e.g., Schuck, *supra* n. 1, chapters 7 and 8.

on the value that they ascribe to the rights and duties that uniquely attach to that status. Domestic law defines the most important of these but some others are prescribed by international law<sup>71</sup> and even by other states<sup>72</sup>.

### *Citizenship in a Federal System*

How a federation affects citizenship depends on many factors, of which four seem most important: (1) the historical and political motives for federating; (2) the value that the federation and its people assign to social and political pluralism; (3) the allocation of powers between the federation's national and sub-national levels, and among its sub-national units; and (4) the legal rights<sup>73</sup> enjoyed by the federation's citizens and by citizens of sub-national units.

*Motives.* The reasons for creating federations help to determine their subsequent levels of political and social coherence and cohesion<sup>74</sup>. Most federations originate in one of four ways. First, pre-existing, independent polities may decide to become sub-national units in a new federated polity, retaining some portion of their former sovereignty<sup>75</sup>. The more consensual the independent polities' decision to federate

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<sup>71</sup> Examples include the right to be repatriated to one's state if one wishes, and the right, when arrested in a foreign state, to consult there with the consul of one's own state. In one more example of the gap between rights and remedies in international law, see *supra* n. 10, the U.S. Supreme Court recently denied an alien in the U.S. any legal remedy for a violation of this consultation right. *Breard v. Greene*, 523 U.S. 371 (1998).

<sup>72</sup> The rights of a dual citizen in one of her states, for example, may be affected by the law of her other state of citizenship, which may include treaty law between the two states.

<sup>73</sup> I discuss rights and not duties because citizenship, at least in the U.S., entails few special legal (as distinguished from moral) duties other than jury duty and military service. Nations that require military service usually limit it to citizens, but the U.S. conscripted aliens into its military before it abolished the draft in the 1970s.

<sup>74</sup> Those reasons, of course, may cease to be persuasive or even relevant as conditions change. Because foundational political structures tend to exhibit path dependency, however, few if any federations have freely decided to transform themselves into unitary states. But it is common for federations, once established, to alter their internal allocations of power, as occurred when the U.S. Constitution supplanted the Articles of Confederation.

<sup>75</sup> That the American states were independent polities prior to ratification of the Constitution is evidenced in the Articles of Confederation, which treated and denominated them as such, and in the Continental Congresses and the Philadelphia convention, where their representatives voted as such. When North Carolina and Rhode Island declined for a time to ratify the Constitution, the U.S. treated them as independent states outside the

was (as in the U.S. case), the more significant their retained sovereignty, and thus their sub-national citizenship status, is likely to be (as in the Swiss case)<sup>76</sup>. This contrasts with coerced federations like the former Soviet Union and the former Yugoslavia. Second, federations may be created under imperial auspices from what were colonial administrative units, in which case the de-colonization settlement determines the nature of the sovereignty that the center retains, as with Canada<sup>77</sup> and Australia<sup>78</sup>. Third, a nation-state may create sub-national units corresponding to pre-existing cultural or political entities, as with Belgium<sup>79</sup> and as the U.S. did with respect to its western territories. Finally, the creation or recognition of sub-national polities may reflect political, military, or administrative<sup>80</sup> goals of the new state's architects<sup>81</sup>.

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Union. See, e.g., Akhil Reed Amar, «Abraham Lincoln and the American Union», 2001 *U. Ill. L. Rev.* (forthcoming 2001). Professor Larry Kramer expresses doubts on this point. Communication with the author, December 3, 1999.

<sup>76</sup> The 25 original cantons that came together in 1815 and later federated under a constitution had not previously been sovereign states but did have distinct, state-like political histories. Hughes, *supra* n. 17, at 156-57 (sovereignty «a fiction ... they scrambled from one pre-state subordinate status straight into federal subjection»). A 26th canton was carved out of the territory of another in 1980. *Id.*

<sup>77</sup> See Field, «The Differing Federalisms of Canada and the United States», 55 *Law & Contemp. Problems* 107 (1992).

<sup>78</sup> See Rydon, «The Australian Tradition of Federalism and Federation», in *Comparative Federalism* 227.

<sup>79</sup> See O'Neill, «Re-Imagining Belgium: New Federalism and the Political Management of Cultural Diversity», 51 *Parl. Affairs* 241 (1998).

<sup>80</sup> This is not the same as administrative decentralization within a unitary state. See discussion part II *supra*.

<sup>81</sup> In creating the Federal Republic of Germany, the occupying allies established and configured the *new Länder* for geopolitical reasons. Except for Bavaria and the free cities of Hamburg and Bremen, the *Länder* were not previously independent polities, but their borders contained some. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 61 (1997) («Schleswig-Holstein contains much of its former territory, as do... Brandenburg, Mecklenburg, Saxony, Saxony-Anhalt, and Thuringia. The remaining states were carved artificially out of postwar zones of occupation ... yet these boundaries have proved remarkably durable.») Political motives also fueled the creation of western states in the U.S. and in Canada. See, e.g., Gibbons, «Federal Societies, Institutions, and Politics», in *Federalism and the Role of the State* 15, 19 (Herman Bakvis & William M. Chandler, eds., 1987) (Canada's provincial lines drawn not only to accommodate religious and linguistic diversity but also to avoid creating a single prairie province that could rival Ontario and Quebec).

*Pluralism.* Some federations, like the U.S., Switzerland, and Canada, were more socially heterogeneous at their inception than others, like Germany and Australia<sup>82</sup>. Still, most federations are designed to contain the centrifugal forces of diverse cultural, linguistic, economic, and political interests by giving those interests recognition and representation, while also gaining the advantages of aggregation.

Federalism cannot easily resolve the political conflicts generated by diversity, however, for its effort to defuse them can instead deepen and harden them. And when a federation empowers a geographically concentrated minority group by making it the core of a sub-national polity, it may easily foster new and more intractable conflicts between that minority and others now subordinated to its control—for example, Anglophones in Quebec<sup>83</sup>, Francophones in Flanders<sup>84</sup>, Russians in the Baltic states<sup>85</sup>, and Croats or Muslims in the rump Yugoslavia<sup>86</sup>.

Whether a federation can ameliorate this minorities-within-minorities problem depends, among other factors, on how minorities are distributed geographically, the nature and depth of social cleavages and dis-

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<sup>82</sup> See Rydon, *supra* n. 78, at 229 (advocates of Australian federation «stressed the ‘crimson thread of kinship’ linking the people of the six colonies. There were no basic cultural, racial, religious or linguistic differences between them. Differences between the colonies which became the states were, and have remained, differences of geography, size, and economic activity and potential»); Riker, «Six Books in Search of a Subject, or Does Federalism Exist and Does It Matter?», 2 *Compar. Pol.* 135 (1969) (puzzled by federalism in homogeneous society). Recent immigration to Australia, of course, has increased its diversity. The same is true of Germany.

<sup>83</sup> In an interesting twist on this conflict, many Francophones in New Brunswick, Canada’s only officially bilingual province, oppose independence for Quebec, fearing that this would leave them and the rest of Canada’s French-speakers as a much smaller minority (only 5%) in the Quebec-less Canada. See, James Brooke, «Canada’s Other French-Speakers Cope», *N. Y. Times*, Sept. 6, 1999, at A6 (New England ed.)

<sup>84</sup> See O’Neill, *supra* n. 79. Devolution of power to these cultural communities in turn reinforced and magnified their demands for further autonomy. See discussion of minorities-within-minorities problem, *supra* FNN. 28-30.

<sup>85</sup> See, e.g., Kalvaites, «Citizenship and National Identity in Baltic States», 16 *B.U. J. Int’l L.* 231 (1998).

<sup>86</sup> 86. See, e.g., Cairns, «Constitutional Government and the Two Faces of Ethnicity: Federalism is Not Enough», in *Rethinking Federalism* (Karen Knop et al., eds., 1995), at 15, 26-27 («In democratic federalisms the extensive movement of citizens across internal ‘borders’ is difficult to control without violating norms of equal citizenship. As a result, an ethnically pure political unit will be a rarity [thus raising] the question of the status and treatment of those who do not belong to the empowered regional majority»).

parate political identities<sup>87</sup>, whether the system as a whole tends to reinforce those cleavages, as Canada does<sup>88</sup>, or to bridge or dampen them, as the U.S. does<sup>89</sup>, how gradually the power-sharing arrangements are introduced, and whether they are negotiated or imposed<sup>90</sup>.

*Allocations of Power.* The significance of the dual citizenships held by individuals in a federation is shaped by the formal structures of «vertical» power-sharing among the national and sub-national levels and the group and individual actors in civil society, by the formal structures of «horizontal» power-sharing among institutions at a given level, and by the informal processes of conflict and cooperation that adapt and invigorate those structures<sup>91</sup>. As a formal matter, of course, the fundamental law determines how power is distributed among these entities. Thus, it allocates the authority to make, implement, and enforce law in different policy domains<sup>92</sup>, establishes a system for representing the sub-units (and perhaps non-governmental institutions) in the national parliament and administration<sup>93</sup>, defines the relationship between national and sub-national judiciaries<sup>94</sup> and the rules for resolving conflicts between and

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<sup>87</sup> For a discussion of how federations can influence civic identities, see, e.g., Jackson, «Federalism and the Uses and Limits of Law: Printz and Principle?», 111 *Harv. L. Rev.* 2180, 2220-22 (1998).

<sup>88</sup> See Simeon, «Canada and the United States: Lessons from the North American Experience», in *Rethinking Federalism*, supra n. 86, at 257 (Canada «entrenches, perpetuates and institutionalizes» cleavages).

<sup>89</sup> *Id.*, at 253 (U.S. cross-cuts cleavages). The Civil War, of course, is tragic testimony to the American system's failure to bridge the social and political divisions of that era.

<sup>90</sup> The Belgian federation, for example, developed incrementally over thirty years in a multistage process beginning with the formal recognition of linguistic «frontiers» in 1962 and culminating in the current settlement adopted in 1993. See O'Neill, supra n. 79.

<sup>91</sup> For this reason, the constitutional divisions of power are an inadequate guide to how any particular federal system actually operates. See, e.g., Bogdanor, «Forms of Autonomy and the Protection of Minorities», 126 *Daedalus* 65 (Spring 1997).

<sup>92</sup> See discussion in text immediately following.

<sup>93</sup> This is often a key role of the parliament's upper chamber, as in the German Bundesrat and the Swiss Council of States. This is also true of the Australian and American senates, which are both powerful and directly elected by state voters, not legislatures. See Sharman, «Second Chambers», in *Federalism and the Role of the State*, supra n. 81, at 82, 84.

<sup>94</sup> In the U.S., for example, the national and state court systems are wholly independent, although the U.S. Constitution's Supremacy Clause and judicial decisions may dictate a degree of comity between them. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (federal courts must apply state's substantive law in diversity-of-citizenship cases).

among the levels<sup>95</sup>, regulates the structure of the party systems<sup>96</sup> and voting rules<sup>97</sup>, and addresses other institutional factors<sup>98</sup>.

Because effective power flows from the integration of both formal and informal elements whose distribution varies in different federations, simple comparisons of federal systems can be misleading. For example, Canada does not give its provinces any formal representation in Parliament's upper house<sup>99</sup>, as most federations do, yet Canada remains perhaps the most decentralized federation of all. Canadian provinces possess more extensive independent policymaking authority than German *Länder* or American states do, particularly in areas like commerce, economic regulation, labor relations, and immigration<sup>100</sup>. Provincial prerogatives are also protected by the Supreme Court, the umpire of Canadian federalism. In addition, provincial legislatures that oppose the Court's constitutional rulings can sometimes override them through legislation<sup>101</sup>. Informally, moreover, Canada's version of «cooperative executive federalism», a continuous process of negotiations and «treaties» between Ottawa and the provinces over policy design and implementation, assures a strong provincial role even where national policymaking authority is clear<sup>102</sup>.

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<sup>95</sup> On the importance of such arrangements in safeguarding federalism, see Derthick, «The Structural Protections of American Federalism», in *North American and Comparative Federalism* (Schreiber ed., 1992), at 8. The German Constitutional Court, with half of its members selected by the Bundesrat, also actively protects *Länder* prerogatives. Switzerland's Federal Tribunal can strike down cantonal, but not national, legislation. See Lenaerts, «Constitutionalism and the Many Faces of Federalism», 38 *Am. J. Comp. L.* 205, 254 (1990).

<sup>96</sup> In Australia, as in the U.S., parties are organized primarily at the state level. See Rydon, *supra* n. 78, at 230.

<sup>97</sup> See generally, Donald L. Horowitz, *Ethnic Groups in Conflict* (1985).

<sup>98</sup> An example of an informal institution is the practice in the U.S. of «senatorial courtesy» in connection with certain presidential appointments.

<sup>99</sup> See Hodge, «Patriation of the Canadian Constitution: Comparative Federalism in a New Context», 60 *Wash. L. Rev.* 585,605 (1984) (Canadian Senate «never a true repository of sectional, provincial interest»).

<sup>100</sup> On provincial power over immigration policy, see Tessier, «Immigration and the Crisis in Federalism: A Comparison of the United States and Canada», 3 *Ind. J. Global Legal Stud.* 211 (1995).

<sup>101</sup> Canadian Charter of Rights and Freedoms, Sec. 33. Quebec has often done so.

<sup>102</sup> See Chapman, «Structure, Process, and the Federal Factor», in *Comparative Federalism*, *supra* n. 17, at 69. Indeed, even Ottawa's treaty-making power does not necessarily bind the provinces within their broad spheres of legislative authority. See Friesen, «The

Germany's «*administrative federalism*» is different. The *Länder* possess the sole authority to administer laws unless the Basic Law provides for national administration. Through the Bundesrat, the *Länder* may also exercise an absolute veto over national laws affecting their vital interests<sup>103</sup>; moreover, they wield power over immigration and citizenship policies<sup>104</sup> denied to Australian and American states<sup>105</sup> and even to Canadian provinces. Swiss cantons control cultural policy (e.g., language, education, and religion) and exercise broad powers over taxation, banking and welfare<sup>106</sup>. Despite these important examples of decentralized federalism, there is much evidence of a more general centralizing trend during the 20th century<sup>107</sup>.

The nature of citizenship in a federation is influenced not only by these vertical relationships between national and sub-national governments, but also by horizontal ones, including the equality of resources

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Distribution of Treaty-Implementing Powers on Constitutional Federations: Thoughts on the American and Canadian Models», 94 *Colum. L. Rev.* 1415, 1428-33 (1994). This provincial autonomy, already great, appears to be growing. See, e.g., Anthony DePalma, «Ottawa and Provinces (But Not Quebec) Agree on Social Program», *N.Y. Times*, Feb. 5, 1999, at A5 (nation losing power to the provinces).

Germany has also been characterized as a system of «cooperative federalism» terms, see Deeg, *supra* n. 37, at 30-31, as has Australia's more formally centralized one. See Warhurst, «Managing Intergovernmental Relations», in *Federalism and the Role of the States*, *supra* n. 81, at 259, 261-63; Opeskin & Rothwell, «The Impact of Treaties on Australian Federalism», 27 *Case W. Res. J. Int'l L.* 1 (1995). The integration of national and sub-national administration in these three parliamentary systems is more extensive and fully institutionalized than in the American system.

<sup>103</sup> The vital interests specified in the Basic Law include all constitutional amendments, laws affecting *Länder* revenues, and laws affecting *Länder* administration of federal law.

<sup>104</sup> See, e.g., Franck, «Clan and Superclan: Loyalty, Identity, and Community in Law and Practice», 90 *Am. J. Int'l L.* 359, 380 (1996) (*Länder* must each decide whether to allow their citizens to obtain another nationality).

<sup>105</sup> Although this seems to have always been the case in Australia, see Mary Crock, *Immigration and Refugee Law in Australia* (1998) (no mention of state role), it was not always so in the U.S. See Neuman, «The Lost Century of Immigration Law (1776-1875)», 93 *Colum. L. Rev.* 1833 (1993).

<sup>106</sup> See, e.g., Thomas W. Merrill, 1 *Green Bag* 2d 153, 158 (1998); Hix, «Elections, Parties, and Institutional Design: A Comparative Perspective on Eastern European Democracy», *W. Eur. Politics*, July 1, 1998, at n. 30.

<sup>107</sup> See, e.g., Heugelin, «New Wine in Old Bottles? Federalism and Nation-States in the Twenty-First Century: A Conceptual Overview», in *Rethinking Federalism*, *supra* n. 86, at 203, 206; Merrill, *id.* See also, Schuck, *supra* n. 33, at 424-26 (on the U.S.).

and outcomes within and among the sub-national units. Indeed, the goal of equality among sub-national units is sometimes a major normative and political justification for further centralizing power within an existing federation. Accordingly, the fundamental law usually bars discrimination by one sub-national unit against the citizens of another sub-national unit<sup>108</sup>.

This egalitarian justification, however, often conflicts with other federalist goals like tolerating pluralism and limiting governmental power<sup>109</sup>. When former Chancellor Helmut Kohl employed policies of massive redistribution in an effort to reintegrate the eastern *Länder* into the Federal Republic, he invoked a Basic Law provision requiring the national government to ensure reasonable equality between financially strong and weak *Länder*<sup>110</sup>. The fiscal burdens borne by Germans who live in the west, however, contributed to Kohl's 1998 electoral defeat. They remain highly controversial today.

*Citizens' Rights.* In most federal systems, the fundamental laws of both national and sub-national governments define the rights that attach to their own citizenship statuses. These individual rights, together with any additional protections created by structural limits on public power, constitute citizens' legal endowment. Some of these rights, such as the right to travel from subunit to subunit or the right (discussed immediately above) to enjoy equal treatment in other subunits, pertain to or are implied by the distinctive relationships among citizens of federations<sup>111</sup>. Other rights have no necessary relationship to the federal form adopted by the polity that secures them.

Federations differ in the kind and amount of permissible variation between national and sub-national laws. In the U.S., for example, many state constitutions define their citizens' rights in the very same words that the federal constitution uses for U.S. citizens yet interpret those

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<sup>108</sup> See, e.g., U.S. Const., Art. IV, Sec. 2 and 14th Amend., Sec. 1, discussed in part V *infra*; Basic Law of Germany, Art. 33. The evolution of Swiss law on discrimination against people from other cantons is discussed in Beaud, *supra* n. 17 (summarizing analysis by Rossi).

<sup>109</sup> See, e.g., Simeon, *supra* n. 88, at 258 (Canada); Deeg, *supra* n. 37, at 49 (Germany).

<sup>110</sup> Kommers, *supra* n. 81, at 90. Australia also has a system of «fiscal federalism.» Rydon, *supra* n. 78, at 233-34. In the U.S., as discussed in part V *infra*, the Congress and the Supreme Court countenance significant inter-state inequalities.

<sup>111</sup> Beaud calls these «federative rights.» *Supra* n. 17.

words differently. One finds even more variation between the federal and state polities, and among the states, in the common law and statutory rights that they confer. Much the same seems to be true in Canada<sup>112</sup>, while Australia's state constitutions apparently do not serve as autonomous sources of individual rights in the same sense<sup>113</sup>.

Two final rights-oriented issues in the design of federative citizenship are (1) whether citizens of the nation enjoy greater rights than aliens, and (2) whether citizens of a sub-national unit enjoy greater rights than citizens of another sub-national unit who enter or take up residence in the first one («federative rights», in Olivier Beaud's taxonomy<sup>114</sup>). That is, to what extent do nations (1) discriminate against aliens, and (2) permit their sub-units to do so with respect to either aliens or citizens of other sub-units?

The answer to the first question is complicated by the bewildering details and heterogeneity—in each country and across countries—of national and sub-national laws, including the variety of alien statuses defined by law. All federations bar aliens from voting in national elections and limit their access to certain public benefits and public employment, but the commonalities end there<sup>115</sup>. Federations also differ on the second question. The U.S. and Australian constitutions, for example, bar their states from discriminating against citizens of other states<sup>116</sup>; Ger-

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<sup>112</sup> See, e.g., Kasserman, «Putting the Professor to Bed», 17 *Contemp. Lab. L. J.* 206, 217 (1995) (strong provincial statutes against employment discrimination); Harvetta Asamoah et al., «International Legal Developments in Review, 1997», 32 *Int'l Law.* 559, 573 (1997) (all but two provinces ban discrimination on basis of sexual orientation).

<sup>113</sup> See Thompson, «State Constitutional Law: American Lessons for Australian Adventures», 63 *Texas L. Rev.* 1225 (1985). State parliaments, however, protect some individual rights by statute. *Id.* at n. 234.

<sup>114</sup> *Supra* n. 17.

<sup>115</sup> The Canadian provinces and German *Länder* regulate access to many public benefits. Germany also requires residency permits that restrict non-citizens' ability to travel and work. On Switzerland, see, e.g., Matsis, «Guestworker Policies», 74 *Marq. L. Rev.* 525 (1991) (limits on public assistance); Patrick R. Ireland, *The Policy Challenge of Ethnic Diversity, Immigrant Politics in France and Switzerland* (1994) (Switzerland more restrictive); Heisler, «Contextualizing Global Migration: Sketching the Socio-Political Landscape in Europe», 3 *UCLA J. Int'l & Foreign Art.* 557, 588 (1999) (cantons have some authority over rights of non-citizens). On the U.S., see Schuck, «The Treatment of Aliens in the United States», in *Paths to Inclusion*, *supra* n. 5, chap. 7.

<sup>116</sup> See U.S. Constitution, Art. IV, Sec. 2 and Amendment 14, Sec. 1 (Privileges and Immunities Clauses); Australia Constitution, Sec. 117 (non-discrimination by states). Some recent U.S. developments on point are discussed in part V *infra*.

many's Basic Law also seems to do so<sup>117</sup>. Apparently, however, Canadian provinces are permitted to discriminate against citizens of other provinces in some respects<sup>118</sup>.

### *Citizenship in the U.S.*

The U.S. is perhaps the paradigmatic example of a federation providing for dual sovereignty and dual citizenship. Indeed, the Supreme Court recently reaffirmed these principles<sup>119</sup>. This seems evident when one reconsiders, in the American context, the four factors just discussed—the motives animating the creation of the federation, and its social diversity, power allocations, and protection of individual rights.

The origins of the American Republic seem almost to have pre-ordained a federative form. This despite the fact that, as the Framers knew<sup>120</sup>, no such system had ever been successfully implemented on so large a scale. In the American case, no imperial sovereign had imposed federalism on its colonies, nor was a unitary state fissioning. The Articles of Confederation constituted a consensual federation of polities that, as the Declaration of Independence had earlier recited, considered themselves free and independent states that were simulta-

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<sup>117</sup> German Basic Law, Arts. 10 and 11 (freedom of mobility and occupational choice).

<sup>118</sup> See Sedlar, «Constitutional Protection of Individual Rights in Canada», 59 *Notre Dame L. Rev.* 1191 (1984) («Apart from the right to pursue a livelihood in another province, a non-resident is not protected from discriminatory provincial laws, such as those barring landholding by non-residents.»).

<sup>119</sup> «The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other ... each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.» Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999), quoting from *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779,838 (1995) (Kennedy, J., concurring).

<sup>120</sup> *Id.* («Federalism was our Nation's own discovery.») In 1786, James Madison undertook an exhaustive study of all past and present confederacies. The editor of Madison's papers notes that «The fundamental lesson that [Madison] drew from his study was that confederacies were fragile creations, continually tending toward dissolution or impotency. [Madison] saw the same fate in store for the American confederation unless drastic corrective surgery were applied.» *The Papers of James Madison*, Vol. 9 (Robert Rutland, ed., 1975), at 4.

neously creating a new sovereignty and retaining much of their former sovereignty<sup>121</sup>. Having recently emerged from a long war of liberation in which disunity had brought the states perilously close to defeat, they viewed federation as a military and diplomatic necessity. As a loose confederation of sovereign states whose beggar-thy-neighbor policies had caused monetary, fiscal, and commercial chaos, the Framers also wanted the Constitution to establish an embryonic common market and monetary union<sup>122</sup>.

The states' remarkable social diversity also dictated a federation. Their British heritage and English language provided only a thin veneer of commonality, concealing important differences among immigrants from disparate parts of the British Isles<sup>123</sup>. Even European visitors were struck by the cultural, religious, geographic, political, and economic heterogeneity among and within the states. Two centuries later, of course, American society is infinitely more diverse and pluralistic in almost every social dimension<sup>124</sup>. Only a federal polity can begin to accommodate such disparate values and interests in such perpetual conflict<sup>125</sup>.

The American federation's vertical allocation of political authority between the nation and the states was designed to structure and facilitate its remarkable diversity, but this allocation also had a second, overriding purpose: to fragment public power in order to limit the reach of government at both levels. This same power-diffusing, liberty-enlarging spirit motivated another constitutional innovation<sup>126</sup>: the horizontal divi-

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<sup>121</sup> According to federalism scholar Daniel Elazar, polities founded by design have always been federal. Elazar, «Contrasting Unitary and Federal Systems», 18 *Int'l Pol. Sci. Rev.* 237 (1997).

<sup>122</sup> See generally, Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1998).

<sup>123</sup> See, e.g., Bernard Bailyn, *The Peopling of British North America: An Introduction* (1986); David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (1989).

<sup>124</sup> This refers to the degree of diversity within the U.S. and thus within the states, not to the diversity among the states, which may well have declined. See generally, *Diversity in America: Keeping Government at a Safe Distance* (2003), which analyzes the nature and extent of this diversity (diversities would be more accurate), and how law understands, constructs, and regulates it.

<sup>125</sup> See Schuck, *supra* n. 33, chap. 3.

<sup>126</sup> See generally, Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996).

sion of authority and competence among separate branches of the national and state governments<sup>127</sup>.

These constitutionally-mandated principles of federalism and separation of powers, however, do not exhaust the decentralizing thrust of the American system. Decentralization of federal-level domestic programs, at least those not geared to war, has always been a policy norm. The U.S. Department of Agriculture, for example, from its origins in the 1860s has organized its most important programs around state and local extension services dominated by local political elites<sup>128</sup>. The federal regulatory programs launched during the Progressive, New Deal, and Great Society eras and augmented since the 1970s<sup>129</sup> usually divide policy, fiscal, administrative, and enforcement responsibilities between the federal and state governments<sup>130</sup>. State and local prerogatives are even greater in federal environmental, health, education, welfare, and other social service programs<sup>131</sup>. Pending legislation in Congress with broad, bipartisan support would make it more difficult for the federal government to legislate and regulate in ways that pre-empt the states on a wide range of issues<sup>132</sup>. The shibboleth of «states' rights», moreover, is increasingly invoked on behalf of liberal or libertarian causes<sup>133</sup>, as well as traditionally conservative ones.

Congress often decentralizes policymaking even more radically by circumventing even the states and localities. Devolving federal authori-

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<sup>127</sup> Separation of powers principles are in some respects even more robust in state constitutional law. See Rossi, «Institutional Design and the Lingering Legacy of Anti-federalist Separation of Powers Ideals in the States», 52 *Vand. L. Rev.* 1167 (1999).

<sup>128</sup> See Theodore A. Lowi, *The End of Liberalism* (2d ed., 1979). This was true even of the U.S. military establishment. See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982).

<sup>129</sup> For a summary of recent developments, see Schuck, supra n. 33, chaps. 7 and 13.

<sup>130</sup> An important example of this divided responsibility is federal legislation regulating occupational safety and health.

<sup>131</sup> Some of the major exceptions are the Social Security retirement, Food Stamp, Medicare, and federal tax programs, which are federally administered.

<sup>132</sup> See, Stephen Labaton, «Anti-Federalism Measures Have Bipartisan Support», *N.Y. Times*, Sept. 6, 1999, at A8. In the hopes of heading off this legislation, President Clinton issued an executive order requiring agencies to be more conscious of the effects of federal regulations on states and localities. *Id.*

<sup>133</sup> See, e.g., Sam Howe Verhovek, «Oregon Chafes at Measure to Stop Assisted Suicides», *N.Y. Times*, Oct. 29, 1999, at A1 (Oregon demanding right to legalize assisted suicide, marijuana use, and other practices condemned at federal level); Richard Perez-Pena, «Pataki to Impose Strict New Limits on Auto Emissions», *N.Y. Times*, Nov. 7, at 1 (New York will join California in exceeding national standards).

ty to private groups rather than to state and local governments in effect privatizes public law<sup>134</sup>. By allowing a highly diffuse court system to shape the content and enforcement of federal law through private litigation<sup>135</sup>, Congress in effect renounces any realistic prospect of national uniformity. When Congress goes beyond decentralization to deregulate, as it has in many industries, it ordains that private contracts rather than federal or state public law will define our rights and duties. Whatever the policy or political merits of these devolutions<sup>136</sup>, they are redefining the meaning of U.S. citizenship by transforming the relationship between the public and private in American life<sup>137</sup>.

Finally, the states have adopted (or in some cases retained from colonial times) quasi-federative arrangements of their own, devolving significant authority to their localities and, increasingly, to the private sector—but without thereby creating the system of multiple citizenships that is a defining element of a federation<sup>138</sup>. For example, the fiscal systems of most states depend heavily on locally voted and administered property, school, and utility taxes—so much so that many of these systems have been challenged as unconstitutional for magnifying inequalities in local communities' ability to finance public education<sup>139</sup>. Moreover, the constitutions and legislation of many states contain «home rule» provisions delegating significant political and policymaking authority to municipalities. In addition, the states have traditionally decentralized many of their administrative functions to counties and other local units,

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<sup>134</sup> In some cases, private groups are authorized to develop and enforce government standards. See Schuck, *supra* n. 33, chap. 13 for examples.

<sup>135</sup> See, e.g., R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (1994). Congress also allows private litigants in some federal civil rights cases to sue in the *state* courts. See, e.g., 42 U.S.C. Section 1983.

<sup>136</sup> For a schematic analysis of this question, see Schuck, *supra* n. 33, chap. 13.

<sup>137</sup> Sociologist Theda Skocpol notes that federalism and decentralization historically have affected the nature of Americans' conceptions and practice of citizenship through their membership in federated civic organizations. Skocpol, «How Americans Became Civic», in *Civic Engagement in American Democracy* (Morris P. Fiorina & Theda Skocpol, eds., 1999).

<sup>138</sup> In contrast, the Austrian Constitution establishes a third tier of citizenship at the communal level for certain purposes. See Jackson, *supra* n. 17, at n.15.

<sup>139</sup> The Supreme Court rejected the challenge under the federal Equal Protection Clause in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). Challenges on state constitutional grounds have been somewhat more successful. See, e.g., *Sheff v. O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996).

particularly in education, child welfare, and other social service programs. The extent and terms of all of these devolutions, of course, are perpetual sources of political strife between the different levels of government<sup>140</sup>.

I noted in part IV that courts in the U.S. often interpret federally-created rights differently than they interpret state-created rights, even when the legal language is identical, and that these inter-state differences in legal rights are even greater in the statutory and common law contexts than they are in constitutional law. This brings us to the final pair of issues raised there but now focused on American federalism. First, as a constitutional matter, do U.S. citizens enjoy greater rights than aliens do? Second, do citizens of one state enjoy greater rights than citizens of another state who enter, or reside in, the first state?

The answer to the first question is «yes» if Congress decides to discriminate, and probably «no» if a state does so in an area of exercised or dormant federal authority, although the law is considerably more complex than this<sup>141</sup>. Courts traditionally upheld discrimination by federal or state law against legal permanent resident aliens and aliens with lesser status with respect to public employment, access to public services, and even in some private spheres unless the discrimination was based on race rather than alienage. However, the Supreme Court's decisions in *Takahashi v. Fish & Game Commission*<sup>142</sup> and *Graham v. Richardson*<sup>143</sup> created a strong presumption against state laws that discriminate against aliens<sup>144</sup>. According to *Graham's* rationales, such laws involve a constitutionally suspect classification and also conflict with Congress's plenary power over immigration. Several years after *Graham*, the Court struck down citizenship requirements for admission to a state bar<sup>145</sup>.

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<sup>140</sup> This is evidently true in all federations. See, «Undoing Britain», supra n. 44, at 6 (nations with federal or quasi-federal systems in constant tug of war over power and resources between center and regions).

<sup>141</sup> This jurisprudence is detailed in Spiro, «The States and Immigration in an Era of Demi-Sovereignities», 35 *Va. J. Int'l L.* 121 (1994).

<sup>142</sup> 334 U.S. 410 (1948) (invalidating statute barring issuance of commercial fishing license to person ineligible for citizenship).

<sup>143</sup> 403 U.S. 365 (1971) (invalidating alienage classification in state welfare law).

<sup>144</sup> Other decisions have recognized an exception, permitting states to discriminate against aliens where necessary to express the state's «political sovereignty». See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding state law excluding aliens from certain public jobs).

<sup>145</sup> In re Griffiths, 413 U.S. 717 (1973). The same reasoning invalidated a citizenship requirement for eligibility for state-funded scholarships. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In contrast, the Court in *Mathews v. Diaz*<sup>146</sup> recognized an even stronger presumption that *favours* discrimination against aliens if Congress enacts it. Congress exploited this principle in 1996 when it enacted, and a federal court upheld, welfare reforms that not only allowed states to discriminate against legal resident aliens but actually mandated it as a matter of national policy in certain situations<sup>147</sup>. After much public criticism, Congress eased this policy but continues to adhere to the principle that discrimination against aliens is often justified.

The answer to the second question —whether the rights of U.S. citizens change as they move from one American state to another— is murkier. Policy heterogeneity among the American states, always great, is further encouraged by three recent developments. First, Congress has ceded greater autonomy to the states in many important domestic policy domains such as health care, welfare, public education, highways and mass transit, legal gambling, urban renewal, and insurance. Second, the states and even some localities are also establishing direct trade and diplomatic ties with other nations, relationships that are not only independent of national policies but sometimes in deep conflict with them<sup>148</sup>. This, despite the fact that the American states do not exercise any of the independent authority in the area of immigration and naturalization policies that sub-units in some other nation-states do, often at some cost to the value of national uniformity<sup>149</sup>. Indeed, the desire of regions with-

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<sup>146</sup> 426 U.S. 67 (1976) (upholding alienage classification in federal Medicare law).

<sup>147</sup> See discussion in Schuck, *supra* n. 1, at 193-202. The discriminatory provisions of the 1996 law were upheld in *Abreu v. Callaban*, 971 F.Supp. 799 (S.D.N.Y. 1997). Certain state law discrimination against undocumented aliens were struck down in *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755 (C.D. Cal. 1995) and CV 94-7569 MRP (Nov. 14, 1997).

<sup>148</sup> It is now increasingly common, for example, for states and cities to refuse on human rights or environmental grounds to contract with or invest in particular foreign nations with whom the U.S. has or seeks friendly relations. Although some scholars applaud this development, see, e.g., Spiro, «Foreign Relations Federalism», 70 *U. Colo. L. Rev.* 331 (1999); Spiro, *supra* n. 141; Goldsmith, «Federal Courts, Foreign Affairs, and Federalism», 83 *Va. L. Rev.* 1617 (1997), the notion that states may properly play independent roles in foreign policy remains a decidedly minority view. *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts law requiring state agencies to boycott companies that do business in Myanmar).

<sup>149</sup> See Jackson, *supra* n. 17, at 18-20 (discussing Germany and Canada).

in unitary European states to forge independent political links to the EU has helped to fuel the demands of some regions for outright sovereignty<sup>150</sup>.

A third development affecting equality of federative citizenship is the Supreme Court's campaign of constitutional reinterpretation<sup>151</sup> designed to limit Congress's power to adopt nationally uniform policies enforceable in the federal<sup>152</sup> or state<sup>153</sup> courts. It remains to be seen how great an obstacle these rulings pose to congressional power as a practical matter<sup>154</sup>. It also remains to be seen whether they are best understood as a return to an earlier, only recently-abandoned Court jurisprudence, as the current Court majority maintains, or instead as a novel, even radical departure, as the dissenters claim<sup>155</sup>. In either event, the rulings in effect give the states more freedom to develop their own policies and to reduce legal accountability in certain domains.

Accordingly, the rights and duties of U.S. citizens and aliens alike now depend more on state law and less on federal law than at any time since the New Deal. At the same time, federal or state constitutional limits on the power of states to discriminate against citizens of other states and against aliens become relatively more significant. Given greater inter-state diversity in public policies, the stakes in *state* citizenship could become higher than ever before.

Yet the precise nature and significance of state citizenship remain uncertain. The 14th Amendment's Citizenship Clause made state citizenship a matter of federal constitutional law, defining it simply as

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<sup>150</sup> «Undoing Britain», supra n. 44, at 18 (example of Scotland).

<sup>151</sup> This campaign is being conducted along at least four different salients: the Commerce Clause (see, e.g., *U.S. v. Lopez*, 514 U.S. 549 (1995)); the Tenth Amendment (see, e.g., *Printz v. U.S.*, 521 U.S. 898 (1997)); the Eleventh Amendment (see, e.g., *College Savings Bank*, supra n. 43); and the Fourteenth Amendment (see, e.g., *Kimel v. Florida Bd. of Regents*, supra n. 43). The Court has also accorded the states some regulatory flexibility in the sensitive, and perhaps *sui generis*, area of abortion rights. E.g., *Planned Parenthood of Southeastern Pennsylvania v. Caser*, 505 U.S. 833 (1992).

<sup>152</sup> See, *Kimel v. Florida Bd. of Regents*, supra n. 43; *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, supra n. 43.

<sup>153</sup> See, *Alden v. Maine*, supra n. 43.

<sup>154</sup> As Larry Kramer points out, the Court's recent Tenth Amendment decisions «are essentially procedural and easily evaded (with conditional preemption and conditional spending, for example).» Communication to author, dated November 29, 1999.

<sup>155</sup> See 529 U.S. 598 (2000) (striking down Violence Against Women Act on Commerce Clause grounds).

residence in a state, and according to constitutional scholar Laurence Tribe, «the state has nothing to say about the matter»<sup>156</sup>. But Tribe's addition seems to be a *non sequitur*. The Clause does indeed provide that people are citizens of the state «in which they reside», but a state presumably retains the power, within constitutional limits, to define what conduct constitutes «residence»<sup>157</sup>.

What, then, are those limits? The Supreme Court recently addressed this question and, as often occurs, raised new ones. In *Saenz v. Roe*<sup>158</sup>, the Court struck down a California law that limited the amount of welfare benefits payable to families residing in the state for less than a year to the (generally lower) amount that they would have received in the state of previous residence<sup>159</sup>. The Court, which had previously protected U.S. citizens' «right to travel» from one state to another for any legitimate reason<sup>160</sup>, distinguished three elements of that right: the right to enter or leave a state; to be treated as a welcome visitor while temporarily in another state; and to reside permanently in another state and be treated like the state's other citizens. *Saenz*, the Court noted, only involved the last of these rights<sup>161</sup>.

The Court held that California's reasons for treating its citizens differently depending on their previous residence were not sufficiently com-

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<sup>156</sup> Tribe, *N.Y. Rev. of Books*, Sept. 24, 1998, at p. 33 (reviewing Charles Black, Jr., *A New Birth of Freedom*).

<sup>157</sup> Peter Spiro suggests, intriguingly, that states could grant state citizenship to non-residents and might even grant it to people who lack U.S. citizenship. Spiro, «The Citizenship Dilemma», 51 *Stan. L. Rev.* 597, 619 n.111 (explaining why immigrant-friendly states might wish to do this).

<sup>158</sup> 526 U.S. 489 (1999).

<sup>159</sup> The relevant federal agency had reviewed this law and issued it a waiver, permitting California to receive federal reimbursement for welfare payments made under the state's law. In the 1996 welfare reform, Congress specifically authorized such state laws. California's limitation applied only to migrants from other states, not to immigrants from other countries.

<sup>160</sup> I say «legitimate» because while the Court has held that inter-state movement in order to increase one's welfare benefits is not only legitimate but constitutionally protected, *Shapiro v. Thompson*, 394 U.S. 618 (1969), Congress sometimes criminalizes the crossing of state lines for purposes it deems illegitimate. Thus, the Mann Act prohibits transporting women across state lines for immoral purposes, and a pending bill would bar inter-state travel for the purpose of avoiding a state's abortion restrictions. See also the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (barring states from giving full faith and credit to homosexual marriages contracted in other states).

<sup>161</sup> 526 U.S. at 500-03.

elling to satisfy the 14th Amendment's Citizenship Clause, which not only confers state citizenship on residents but also bars states from abridging the «privileges and immunities» of U.S. citizens who reside in, and thus are citizens of, that state<sup>162</sup>. The Court stunned the legal community, however, by basing this right on the latter. In so doing, the Court exhumed a moribund provision that the Court had seemingly buried in 1872, one that has been considered a dead letter ever since, and one whose meaning—and thus its implications for the meaning of state citizenship—remains exceedingly opaque<sup>163</sup>.

One measure of this opacity is the Court majority's concession in *Saenz* that a state might justify discriminating against out-of-staters if it could either challenge the *bona fides* of their residency and hence of their state citizenship, or show that they might «establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that will be enjoyed after they return to their original domicile»<sup>164</sup>. The two dissenters pressed both possibilities. They stressed, first, that states must be allowed to «use *bona fide* residence requirements to ferret out those who intend to take the privileges and run», and second, that even welfare benefits are portable—they free up other resources and help one acquire permanent skills—and thus invite the kinds of abuse by out-of-staters that states can properly regulate<sup>165</sup>. The possible expansion of these ratio-

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<sup>162</sup> Nevertheless, the Court reaffirmed the principle that under the U.S. Constitution's Privileges and Immunities Clause, Art. IV, Sec. 2, a state may not disadvantage a visitor without a «substantial reason ... beyond the mere fact that» he is from another state. It noted, however, that under certain circumstances a state might be justified in charging a visitor more for a service (e.g., state college tuition) than it charged its own citizens. *Id.* at 505.

<sup>163</sup> See, e.g., Varat, «State Citizenship and Interstate Equality», 48 *U. Chi. L. Rev.* 487 (1981) (exploring possible meanings). On the other hand, *Saenz's* interpretation of that provision to protect interstate travel was prefigured in some earlier Court decisions. See Laurence H. Tribe, *American Constitutional Law* (3d ed., Vol. 1, Sec. 7-5, 1999) (reviewing the evolution of the doctrine).

<sup>164</sup> *Id.* at 505. See, Hills, Jr., «'Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers», 1999 *Sup. Ct. Rev.* 127 (analyzing intersection of residency and equal treatment requirements in light of *Saenz*)

<sup>165</sup> *Id.* at 517-20. The dissenters also maintained that the 14th Amendment Privileges and Immunities Clause, like the one in Art. IV, Sec. 2, was meant to protect only «fundamental rights, rather than every public benefit established by positive law». *Id.* at 524-27.

nales for discrimination leaves uncertain the kind of federation that the Court will permit or require. Even saying that the Court favors states' rights would be simplistic; after all, the same Court that protects the states' policymaking autonomy<sup>166</sup> also limits that autonomy<sup>167</sup>. What cannot be gainsaid is that the current Court majority takes the principle of a constitutionally-protected dual sovereignty far more seriously than the Court has since the advent of the New Deal.

Whether state citizenship will once again become a meaningful constitutional category, however, ultimately depends less on constitutional jurisprudence than on political factors: whether and to what extent Congress continues to devolve policymaking initiative to the states, how diverse the states' laws in different policy domains become, and how much equality those state policies accord to out-of-state Americans and to aliens. Similar factors will also affect the meaning of *federal* citizenship, albeit in different ways. Diverse policies among states, for example, reduce the equality-among-citizens value of federal citizenship. Conversely, federal permission for states to discriminate against aliens in effect enhances the distinctive status and hence the value (in that sense) of federal citizens' rights.

### *Conclusion*

The forces of globalization notwithstanding, the nation-state, with its national citizenship, will remain the fundament of international law and politics for the foreseeable future. On the whole, this should be a source of relief, not regret, to friends of liberal democracy and the rule of law<sup>168</sup>. The implosion of collapsing empires and failed states has ignited an ethnic explosion whose violent and chaotic reverberations are only now beginning to be felt. Ironically, it is the more robust rhetoric of human rights and the new geopolitics of ethnic autonomy that are reinforcing ethnic demands for more self-rule. This geopolitics of ethnic autonomy is foreshadowed both by continuing conflicts in the former Yugoslavia, central Africa, central Asia, and even the British Isles and

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<sup>166</sup> See supra nn. 151-55.

<sup>167</sup> In addition to *Saenz*, for example, the Court has barred states from imposing term limits in congressional elections. See Thornton, supra n. 119.

<sup>168</sup> See Schuck, supra n. 1, at 202-05.

Europe, and by a growing but highly circumscribed willingness by outside powers to violate national sovereignty in the hopes of forestalling ethnic wars, mass refugee movements, rogue state nuclearization, and other vital concerns.

In this turbulent new world, federation and sub-national citizenship, in their many variants, will be increasingly attractive modalities for resolving entrenched political, legal, psychological, and sociological conflicts —while of course engendering new but hopefully more tractable ones<sup>169</sup>. Only a federal system can hope to exploit the advantages of both scale and decentralization in order to adjust the contending interests and perspectives of center and periphery.

As always, however, the devil will be in the details. The details in turn will depend on a number of conditions: the distinctive historical and political motives animating the federation's origins, the diversity of the civil societies in the federating populations, the formal and informal allocations of power within and among levels of government and private actors, and the distribution of rights and resources among national citizens, sub-national citizens, and the non-citizens who will be affected by each of these polities<sup>170</sup>.

Because the American dual sovereignty model reflects these differentiating factors, its utility as a model for polities with very different histories, values, constitutional structures, and civil societies is limited. This American model's limited generalizability is underscored by the remarkable dynamism and adaptability of its federal system. Neither the recent devolutions of national power by the Supreme Court, Congress, and federal agencies<sup>171</sup>, nor the Court's nationalizing decision in *Saenz*, was anticipated by either politicians or constitutional scholars. This humbling fact reminds us that the complexities and contradictions of American federalism defy easy comprehension, even by certified experts.

Other polities desperately searching for new forms of power-sharing to contain the centripetal forces of political, economic, cultural, and

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<sup>169</sup> See part 111, *supra*.

<sup>170</sup> See part IV, *supra*. For an example of informal practices that undermine formal ones, see Jackson, *supra* n. 17, at 16-17 (Russian citizenship roles).

<sup>171</sup> Administrative agency devolution to states and private actors is most evident in the policy domains of education, health, and other social services. The contested political legitimacy of administrative agencies, however, makes their innovations in federalism more episodic and equivocal.

social fragmentation, and to accommodate more assertive minorities<sup>172</sup>, may find more serviceable other federal systems like the Australian, German, Swiss, Belgian, and Canadian. Like American federalism, each of these systems is a creature of its unique history, political and social structure, ideology, legal rules, and civil society. The federating polities, however, may nonetheless draw some more general lessons from the American experience<sup>173</sup>: the importance of flexible institutions and pragmatic ideology, the need to nurture cross-cutting diversities capable of muting social cleavages rather than reinforcing them, the value of power-sharing arrangements between center and periphery, the virtues of generous and inclusive citizenships, and the wisdom of accomplishing all of this before fire and steel impose their own more illiberal solutions.

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<sup>172</sup> For an account of how politically difficult it is to design such arrangements, see «Undoing Britain», supra n. 44.

<sup>173</sup> President Clinton recently drew on this experience in a politically extraordinary speech in Ottawa urging Canada to view a reformed federalism as the key to preserving its national unity. See, James Brooke, «Clinton Jolts Canadians With a Plea On Federalism», *N. Y. Times*, Oct. 10, 1999, at 4.

# Value Pluralism and Multinational Federalism

Por  
Ferrán Requejo

*Je hay toute sorte de tyrannie, et la parliere,  
et l'effectuelle (I detest all kinds of tyranny,  
those of words and those of facts)*  
Montaigne, Essais, Book III, VIII

Federalism is designed to prevent tyranny without preventing governance  
D. Elazar, *Exploring Federalism*

The debate that has taken place over the past decade as to whether liberal democracies are suitably equipped from a normative and institutional point of view to deal with cultural pluralism has revealed the need to revise both the way that liberal democracies perceive their own universalist normativity in an increasingly globalised world as well as the need to update a number of their institutions. This debate has also shown the cultural limits of traditional liberal theories and the partiality of the theoretical interpretations and practical applications of values such as freedom, equality, autonomy, pluralism or dignity in liberal-democratic multinational federalism.

This paper is mainly concerned with the notion of value pluralism in liberal multinational federations. In the first section I understand *value pluralism* as a theory of the structure of moral normativity in liberal democracies. I defend the greater suitability of value pluralism over its rival theories when one is attempting to revise democratic liberalism from the perspective of the cultural, national and normative pluralism of present-day democracies. In the second section, I link value pluralism with multinational federations in order to discuss the suitability of establishing the recognition of national pluralism, a plurinational division of powers, the participation in the processes of constitutional reform and

the constitutional regulation of the right of self-determination, following the decision of the Canadian Supreme Court in 1998.

*Liberal Democracy and Value Pluralism*  
(I)

Let's start with two observations of a more general nature. Firstly, when one is attempting to «improve» liberal democracies, both ethically and functionally, in relation to cultural and national pluralism, two strategies may be used:

a) In the first, we may place ourselves within the theoretical tradition of political liberalism in order to be able to point out the limits, biases, prejudices and partial interpretations that it displays both in its ethical, anthropological and constitutional aspects and in its institutional aspects - such as federalism. This perspective allows us to carry out a theoretical revision in order to refine liberal values themselves and the legitimation of democracies as well as permitting us to put forward a number of proposals for practical reform that are more suitable for refining liberal values. The aim of these refinements and reforms is to achieve a higher degree of accommodation for cultural and national pluralism within contemporary societies<sup>1</sup>.

b) In the second, we may use liberal tradition as one of many possible approaches in order to build democratic polities that go beyond western liberalism and which are more in tune with the normative, linguistic, historical and cultural diversity of contemporary societies.

In terms of political theory, the first strategy attempts to create a liberal theory of cultural pluralism (or multiculturalism) and national pluralism. The second strategy is designed to produce a more ambitious multicultural theory of democracy and political liberalism<sup>2</sup>.

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<sup>1</sup> The debate of recent years between political liberalism and cultural pluralism, among other things, prompts one to: i) maintain that the «well-ordered society» should not only include political and economic issues (freedoms and resources), but also issues involving political accommodation (cultural rights, recognition and, where relevant, the institutions of self-government and/or shared rule); ii) distrust those moral theories or theories of «justice» which are strongly deductive in nature when one is dealing with heterogeneous values, interests, identities and contexts. Even if we accept that justice is the main objective to achieve in the public arena —which is by no means clear— there appears to be no rational and uncontroversial way to establish its «principles» or its rules of priority.

<sup>2</sup> An example of the contrast between these two intellectual strategies may be found in the debate between B. Parekh and W. Kymlicka in *Constellations* 4/1, 1997.

Secondly, it is possible to identify four general types of theory, including liberalism, in relation to how they understand the internal structure of moral normativity—in other words, its basic ontology:

- 1) Monist theories
- 2) Culturally pluralist theories
- 3) Pluralist theories with fully rank-ordered values
- 4) Pluralist theories without fully rank-ordered values (value pluralism)

By monist theories I mean those that defend that only one way of life is the best. A way of life that is based on a value that is considered to be a priority, or on a single combination of several values, and which is preferable to any other way of life. Moral monism normally understands its position to be the most «rational» or «human» and of universal application, both for the members of any given collective and for humanity as a whole. This position is usually based on a conception of «human nature», which is given a moral-ontological superiority over any differences of a cultural origin that individuals or groups display. The good life cannot be lived differently to that which is defended and there are no equivalent good ways of life (for example, Plato and usual interpretations of monotheistic religions). In contrast, culturally pluralist theories establish the impossibility of any anthropology (or ethics) that fails to take into account the cultural characteristics that define individuals and groups. Inevitably, any conception of the good way of life will depend more on the particular cultures of a given group of individuals than on any characteristics that may be shared by all of them. Humanity itself and its moral answers are plural. Cultures, and their particular «centres of gravity» (Herder) are normally understood here to mean autonomous, global, separate, valuable, static and more or less homogeneous groups that should be preserved by each collective (ex. Vico, Herder). On the other hand, pluralist theories with fully rank-ordered values accept both the heterogeneity of a series of values that cannot be reduced to a single value, and the possibility of establishing a permanent and universal priority of these heterogeneous values for all individuals (for example, the lexicographical priority between Rawls' two principles). In this sense, these theories refer once again to a kind of conception of human nature. Finally, pluralist theories without fully rank-ordered values, or value pluralism, defend the existence of a multiplicity of heterogeneous values that cannot be reduced to a single value, nor to a permanent and universal order of priority for all individuals and for all cases (I. Berlin is obviously

the main reference here<sup>3</sup>). It is important to point out that political liberalism has mainly been based, philosophically speaking, both on monist principles and on pluralist principles with or without a fixed ranking of values. These positions are logically mutually exclusive in philosophical terms.

From now on, we will place ourselves in strategy (a) mentioned above and value pluralism (type 4). On the one hand, the reason for adopting strategy (a) of the internal revision of liberalism is based on our general interest in the revision and reform of liberal federalism in multinational contexts. The general objective is two-fold: improve the normative perspective of liberalism when there is more than one national *demos* within a single democracy, and establish a more suitable institutionalisation for the accommodation of national pluralism than that offered by traditional federalism. In general terms, and using the main western multinational democracies as our reference point (Canada, Belgium, United Kingdom and Spain), it appears that disagreement on what is meant by a liberal democracy in a multinational context is not so much related to different ways of life, but to issues regarding the national identity of individuals. On the other hand, the reason for adopting value pluralism as a meta-ethical perspective of political liberalism is based on its greater ability to provide a version of political liberalism that is more sensitive to the goods, values and identities of national and cultural pluralism. This version contrasts with the monist «*philosophia perennis*» that has so influenced the moral and political philosophy from classical Greece until our era<sup>4</sup>. In principle, this base permits a more open and less dogmatic position when establishing any kind of dialogue or deliberation than that permitted by alternative theories. A dialogue which, especially in the case of cultural pluralism, is preceded by the difficulty to find a language that is morally neutral and acceptable to all, and which at the same time is as open as possible to incorporate the «possibilities» that cultural frameworks offer, as well as their «limits»<sup>5</sup>. Moreover, this greater theoretical prudence of value pluralism means, in principle, that it is able to show interest in practical experiences and in

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<sup>3</sup> Information about Berlin and his work is available at [www.wolfson.ox.ac.uk/berlin/vl/](http://www.wolfson.ox.ac.uk/berlin/vl/)

<sup>4</sup> Berlin insists that monism is in the base of any extremism, «My Intellectual Path», *New York Review of Books*, 14 May, 1998. The classical reference is I. Berlin, *Four Essays on Liberty*, Oxford, Oxford University Press, 1969

<sup>5</sup> I. Berlin, *Vico and Herder: Two Studies in the History of Ideas*, London, Hogarth Press, 1976

comparative politics<sup>6</sup>. Finally, value pluralism accepts the inevitability of disagreement in those practical situations in which a series of values that are both desirable but contradictory coincide; values which cannot be synthesised, nor easily prioritised<sup>7</sup>.

The perspective of value pluralism also brings us closer to the typical cases of rational undecidability in the moral world and to the dilemmas and rivalry of moral values that are so attractively dramatised in Greek and Shakespearian tragedies. Tragedies are usually beyond the boundaries of human languages. In these tragedies we never completely understand the motives of characters whose actions are not totally decidable from a rational point of view. But these characters must act and with their doubts, questions with many answers and actions they force the spectators' most insecure side of their character to participate in the action. We are faced with an *agonist* plurality that at times will be «tragic», not only because it represents some kind of loss, but because we cannot avoid some negative consequences, whatever we decide to do. Tragedies such as Euripides' *Medea* or Shakespeare's *King Lear*, to mention but two of my favourites, reinforce individuals' moral perspective, the awareness of the limitations of their rational systems (monists or pluralists), and the possibility to become better moral thinkers when they perceive the difficulty of obtaining clear answers to what is happening on stage<sup>8</sup>. Moreover, and despite the «objectivity» of Berlin's conception of values, men and women are historical beings that transform themselves, partly because of decisions they have taken. From a more epistemological standpoint, value pluralism also relates to the modern attitude of the humanists of the 16<sup>th</sup> century; an attitude which is more

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<sup>6</sup> As also Berlin stresses, in politics it will be always important to know that there are «regions» in which gardeners obtain better results than botanicals, «Realism in Politics», *Spectator* 193, 1954.

<sup>7</sup> Value pluralism is perfectly compatible with partial orderings of values and goods established for specific subjects and contexts. That is, value pluralism is compatible with *particularly*, not fully, rank-ordered values. This is one of the potential functions for practical processes of deliberative democracy.

<sup>8</sup> From a complementary psychological perspective, see for example Harold Bloom's analysis of *Macbeth*, «The enigma of *Macbeth*, as a drama, always will remain its protagonist's hold upon our terrified sympathy. Shakespeare surmised the guilty imaginings we share with Macbeth, who is Mr Hyde to our Dr. Jekyll (...) Clearly the ironies of *Macbeth* are not born of clashing perspectives but of divisions in the self -in Macbeth and in the audience», H. Bloom, *Shakespeare. The Invention of the Human*, London, Fourth Estate, 1998: 523, 535.

sceptical, tolerant and concerned with the practical aspects of human existence than that of the more «systematic» theorisation of Cartesian philosophy and the scientific revolution of the following century, which influenced contemporary moral thought<sup>9</sup>.

(II)

When one is situated in the (a)(4) perspective, the first condition will be to show if there is or is not any compatibility between political liberalism and value pluralism. Berlin himself warns that there is no logical link between them. Following the Berlinian path itself, this leads us to the existence or not of some kind of normative priority for liberty — previously defined — in political liberalism. I believe that Berlin's arguments in favour of compatibility are not totally conclusive, but they are more persuasive when we are dealing with the political and practical dimensions of value pluralism in diverse cultural and national societies.

One of Berlin's most important contributions is to understand that the universal contents of morality generate unavoidable conflicts among its values<sup>10</sup>. As it is well known, value pluralism makes «harmonious» moral and political projects, even those of a liberal character, not only impracticable but incoherent<sup>11</sup>. Berlin's answer to the link between value

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<sup>9</sup> Similarly, Stephen Toulmin reminds us how, at the beginning of the modern age, Montaigne turns out to be nearer the linguistic pluralism of Wittgenstein than the more systematic authors of the 17<sup>th</sup> and 18<sup>th</sup> centuries, S. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity*, Chicago, The University of Chicago Press, 1990.

<sup>10</sup> This refers to the classic discussion on the incomparability, incommensurability and incompatibility of values. I do not develop this point here. See J. Raz, *The Morality of Freedom*, Oxford, Oxford University Press, 1986, ch. 13 and *Ethics in the Public Domain*, Oxford, Clarendon, 1994; Gray 1995, ch 2; M. Walzer, «Are there limits to Liberalism?», *The New York Review of Books*, 19 Oct, 1995; B. Barry, *Political Argument*, Berkeley, University of California Press, 1990; W. Galston, *Liberal Purposes: Goods, Virtues and Diversity in the Liberal State*, Cambridge, Cambridge University Press, 1991; Ch. Taylor, «The Diversity of Goods», in A. Sen - B. Williams (eds), *Utilitarianism and Beyond*, Cambridge, Cambridge University Press, 1982

<sup>11</sup> Other criticisms of monist and culturally pluralist positions as partial and incoherent in J. Gray, *Isaiah Berlin*, London, Harper Collins, 1995, ch 9; B. Parekh, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*, London, Macmillan 2000, ch 1 and 2. In this latter work the author says: «Historically speaking liberalism began, at least in the English-speaking world, as a doctrine stressing the contingency of and abstracting away ethnic, religious, cultural and other differences. Not surprisingly it faces acute

pluralism and liberalism is negative liberty. This approach has been criticised in several ways. I will mention but two. On the one hand, Charles Taylor has emphasised some relevant difficulties in the conceptual separation between negative and positive liberties, even when we consider more sophisticated versions of negative liberty (exercise concept) than those that associate it to a mere absence of interference from outside sources (opportunity concept). In the *opportunity concept* of freedom one individual is considered free regardless what he/she does in that sphere. It is included in classical Hobbes' and Bentham's approaches. In the *exercise concept*, freedom is linked to some activated human capacity, such as autonomy or self-rule. In this concept, the lack of outside interference is just a condition but not a sufficient requirement of freedom. Following a similar path of S. Mill, Taylor defends a qualitative approach about what practices deserve a higher moral status in any consideration about freedom. Non-interference does not work as a workable discriminatory criteria among negative liberties. Negative and positive liberties can not but interfere (in education, for example)<sup>12</sup>. On the other hand, John Gray observes that autonomy neither can be considered as a «fundamental» value of liberalism from the perspective of value pluralism —because there are valuable ways of life that are not autonomous but stem from tradition— nor can negative liberty be considered but one value among others. Moreover, negative liberties are also diverse and incommensurable and they can be ordered and combined in different ways. By the same token, it is not possible to maintain that liberal democracy is the only legitimate model of political organisation but simply one of many. So, strictly speaking, it would be a matter of choosing between liberalism and value pluralism. Nevertheless, what seems to be unacceptable in practice, after a certain basic level of morality has been

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structural difficulties getting these differences back into its views of man and politics» («Introduction», footnote 12, p. 346)

<sup>12</sup> Obviously, here we would need the always difficult question of establishing some kind of rank-ordering of human wants, as well as to decide about some potential transcultural requirements of these wants at the moment of protecting negative liberties in different «backgrounds understandings». See Ch. Taylor, *Philosophical Papers II: Philosophy and the Human Sciences*, Cambridge, Cambridge University Press, 1985. Berlin is certainly not a systematic thinker. In his theory there is a constant lack of determination about the theoretical status of «values», between a Herderian-Hegelian perspective of self-transformation within specific cultures and a Kantian perspective where values are similar to the categories of the Transcendental Analytics of the first Critique.

achieved and the «universal evils» have been avoided (slavery, torture, etc), is to oblige individuals and groups to accept specific ways of life when they reject them. In Hirschmann's terms, it is not the job of a political system to ensure that individuals and groups are *loyal* to a set of values or a certain way of life, it must ensure that they have *voice* within them and an *exit* from them. Although in theoretical terms we can not have a conclusive defense of the priority of negative liberties (and perhaps a clear criteria of demarcation), they can usually be presented as the moral (and internally potentially agonic) basic layer of liberal politics.

A second related but different question will be if there are other models of political organisation, apart from liberal democracy, which are able to ensure the kind of individual freedom represented by dissidence and diversity. This is a more empirical than logical question. There are different positions and internal dissidence in all cultures. It seems that it is not legitimate to use «culture» to justify the repression of internal dissidence. Authors such as Taylor, Gray and Parekh are right to urge us to pay attention to certain values and ways of life ignored by liberal tradition. Many of them display moral virtues that liberalism is blind to or barely sees, and whose presence is not only acceptable but desirable in democracies which show more normative and institutional sensitivity to cultural and national pluralism. In any case, value pluralism warns about the internal *plural* and *agonist* nature of politics, something that Kantian and Utilitarian theories try to avoid. Moreover, we may add that the legitimising values in politics are not always related to morality but to functional and other normative perspectives.

The conclusion about this second question is that it is more difficult to be persuaded of the practical possibility of pluralism and dissidence within a regime in which negative individual freedom, even in its «opportunity concept», and an *exit* from the dominant ways of life of a society are not guaranteed<sup>13</sup>. Negative liberty belongs to the historical and

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<sup>13</sup> See G. Crowder, «John Gray's Pluralist Critique of Liberalism», *Journal of Applied Philosophy*, 15, 3, 1998: 287-98; D. Weinstock, «The Graying of Berlin», *Critical Review*, 11, 1997: 481-501. Gray coherently recommends to go from Kantian to Hobbesian legitimising patterns in politics. What is needed is not a set of common values in society but a set of common institutions that are able to deal with rival values and interests. In fact, he says, the liberal state was born from the search to a *modus vivendi* agreement. (He also insists that Hobbes did not necessarily need to defend an absolutist perspective in order to maintain peace, in contrast with C. Schmitt's criticism on Hobbes' theory for being

organisational core of these kinds of democracies. Value pluralism highlights the fact that liberal democracies represent a historical, institutional and practical sedimentation, which has shown its compatibility with those objectives. In any case, the adoption of the perspective of value pluralism as the basis for the moral structure of political liberalism favours the adoption of a less arrogant attitude by the defenders of the latter than what normally occurs with monist and fully rank-ordered pluralist theories.

### (III)

In an earlier work, I mentioned the *linguistic pluralism* that underlies the legitimacy of present-day democracies after the pragmatic revolution brought about by Wittgenstein's *Investigations*. At that time, I pointed out that

«epistemologically, the emphasis is now on contextualisation and cognitive plurality. This dilutes the idea of a single fundamental rationality, whether it be of a scientific or of a different nature. It could be said that plurality and contextualisation explode within the very interior of the discourse of scientific disciplines: there is neither a single language, nor is there, in existing languages, the same «logical form». Obviously, contextualising the different theoretical approaches as well as underlining their plurality does not imply the acceptance of an epistemological or moral relativism of a «post-modern» nature, but rather questions the claims of the 'fundamental uniqueness' made by certain contemporary theories of democracy»<sup>14</sup>.

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«too liberal» when it maintains the distinction between society and state). See J. Gray, *Two faces of Liberalism*, Polity-Blackwell, Cambridge 2000, esp. ch 4 «*Modus vivendi*». However, I think that the limits for any legitimate practical polity are led by the need of protecting the value of negative liberty that I. Berlin had in mind. Under this perspective, liberalism still maintains the *practical* «negative» legitimising strength based on avoiding evil rather than achieving good in institutions and practical life, that is present in Berlin' and (partially) in Stuart Mill's approaches. This is something more than coexistence. See also M. Oakshott, *Hobbes on Civil Association*, Oxford, Blackwell, 1975.

<sup>14</sup> F. Requejo, «Democratic legitimacy and national pluralism», in F. Requejo (ed), *Democracy and National Pluralism*, London, Routledge 2001: 158-9. Here I point out the complementarity between the epistemological perspective opened by Wittgenstein's *Investigations* and the ethical perspective based on value pluralism.

But legitimising normativity, moreover, is not just the morality of values. Faced with this normative pluralism which, in general terms includes moral, cultural and functional dimensions, the main political theories (liberalism, conservatism, socialism, communitarianism, nationalism, etc.) have tended to choose one particular element or a combination of them by means of a plurality of philosophical approaches (deontological, consequentialist, particularist, theological, perfectionist, etc.). In this way, each one of these theories tends to:

- 1) give priority to a number of specific questions on political legitimation;
- 2) use a particular conceptual framework;
- 3) concentrate on specific goods, values, etc; and
- 4) propose specific solutions for questions that have been selected as most relevant in the political sphere: individual freedom and the limitation of power; social equality and the criticism of capitalism; the development of civic virtue and legitimised links with the political community; political stability and social cohesion based on shared feelings, values and customs; or the recognition and promotion of different identities considered as priorities by the individuals of any given group. On the other hand,
- 5) these same theories interpret in a different way, marginalise, or fail completely to take into account the questions, concepts, values and institutional references defended by rival theories<sup>15</sup>.

In purely descriptive terms, the inevitable and desirable<sup>16</sup> linguistic and normative pluralism which exists in the legitimation processes of the democracies of culturally-plural societies may be seen as nine linguistic and normative *dominant poles* from which the main political traditions have conceived the political legitimacy in liberal democracies (regardless of the perspective and the internal theoretical focus adopted): the liberal (L) (sphere of individual rights, separation of private and

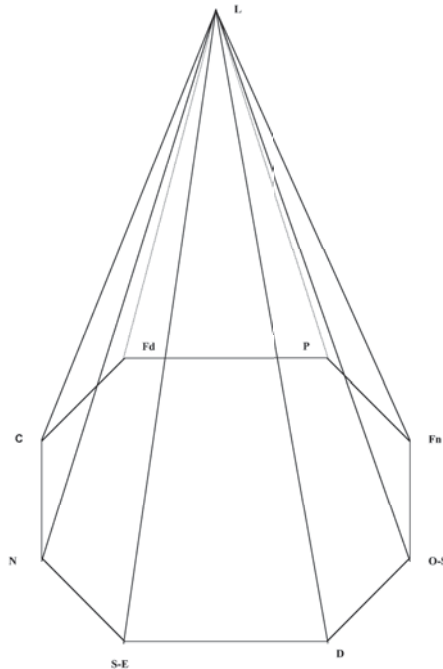
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<sup>15</sup> In addition to this *omission strategy*, Charles Taylor has rightly pointed out Berlin's intention in «Two Concepts of Liberty» against what we can call the *redefinition strategy*: «(to) try to finesse the clash between liberty and some other goal —solidarity, justice, social harmony, equality— by telling ourselves that these other goals are internal to the definition of freedom, properly understood ..... This kind of fudging goes back to Plato, at least... Conflict is finessed by redefinition», Ch. Taylor, «Plurality of Goods», in R. Working-M. Lilla-R. Silvers, *The Legacy of Isaiah Berlin*, New York Review Books, New York, 2001:114-115.

<sup>16</sup> This paper only deals with the inevitability of pluralism and not its desirability in present-day democracies. For treatment of this issue, see Parekh 2000, ch 3,4,5 and 11, and F. Requejo, «Federalism and the Quality of Democracy in Plurinational Contexts: Present Shortcomings and Possible Improvements, 2001b (Princeton University, paper).

public spheres, limitation and control of power), the democratic (D) (equality of citizenship, participation), the socio-economic (SE) (production and distribution of goods and services), the social order (O) (internal peace and external security), the national (N) (collective identity/ies as political unit/s), the cultural (C) (religious, linguistic, ethnic, etc), the federal (Fd) (territorial self-rule and self-government), the functional (Fn) (stability, efficiency, efficacy), and the post-materialist (P) (ecology, pacifism). Each pole synthesises a *general type* of questions, concepts, values, institutions and references that the theories usually develop and combine in different ways.

*Legitimising normative poles in liberal democracies*



The majority of the edges and the diagonals of the base of the pyramid illustrate the tensions between two of its poles—for example, the classic clash between the liberal and democratic normative perspectives which has been developed in some of the political theories of the last two centuries. Other relationships have been developed theoretically

much more recently<sup>17</sup>. There are also tensions within each normative pole (between liberties and equalities within the liberal pole, for example, and even between liberties themselves<sup>18</sup>). The pyramid illustrates the not so «liberal» nature of the normativity of western societies. This also allows us to distinguish between «wider» and «narrower» theories of democracy depending on whether they embrace more or less normative poles in their conception of political legitimacy—a question which is not related to the «strong» or «weak» nature of some of the normative poles considered in these theories.

This normative and linguistic complexity, which is present in the legitimisation processes of present-day democracies, also endorses the adoption of the theoretical perspective of value pluralism simply for Aristotelian reasons of ethical and epistemological «prudence». None of these theories is able to synthesise these normative poles; none is superior in all theoretical and practical aspects of morality and political legitimation to give it the right to be the only voice for the development of a «good society». This is a question which, as Berlin also argued, liberalism might incorporate into its theory and put into

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<sup>17</sup> Depending on the values, questions, etc. under consideration we may also place the theories, the political players, the discourse, etc. on the pyramid like a topographical map. Nevertheless, to take value pluralism as the most promising metapolitical perspective in relation to political liberalism is just a theoretical consideration whose practical applications should be evaluated carefully as they include many other normative and contextual factors. It would be inconsistent to deduce from value pluralism that every single political decision should be taken according to the principles only decided by the corresponding decision-maker (governments, parliaments, courts, etc.). It is likely that such a practice would introduce elements of arbitrariness and political and juridical insecurity which some principles such as the defense of «human rights», constitutionalism and the rule of law attempt to avoid. For example, in many contexts to defend the «decisionism of the judges» would in all probability have extremely negative consequences for the functioning and the very normativity of liberal democracies. What one should do is regard value pluralism as a conception of existing democratic liberalism that introduces more open attitudes to the change of perspective than rival meta-conceptions when one has to make decisions about questions related to cultural and national pluralism. This would probably influence the attitudes and practices of both political decision-makers and public opinion. However, the practical starting point should be located in the political, cultural and institutional reality that already exists in liberal democracies. Here, value pluralism is a promising way to refine the liberal-democratic normativity and to reform its political institutions and decision-making processes.

<sup>18</sup> This is something not developed in some fully rank-ordered theories such as Rawl's.

practice through the pluralisation of its normative and institutional bases.

### *Value Pluralism and Multinational Federalism*

The question concerning whether federalism is a promising road to take to achieve the political accommodation of *national pluralism* within a democracy remains an open one. This question has received increasing research interest in recent years in the fields of political theory and comparative studies. However, there are few empirical cases of multinational federations and almost none of them are free from structural problems. Canada, India, and Spain, to mention only three, have yet to achieve a satisfactory constitutional articulation which is acceptable to all parties in the cases of Quebec, Kashmir, Punjab, the Basque Country or Catalonia. This is in spite of the doses of constitutional asymmetry built into these cases. Obviously, to ask about federalism's chances is to ask a wider question than just to ask about federations. The existence of other kinds of federal agreements (confederations, federacies, associated states, etc.) allows us to respond differently regarding the possibilities of political accommodation that each one offers in relation to multinational societies.

Despite the fact that it is important to bear in mind that the logic of federalism is not only applicable to federations, in this paper and following from earlier work, I will concentrate on the case of multinational liberal-democratic federations. The key point here is to deal with these federations from the perspective of value pluralism, shown in section 1, in order to point out some of the reasons why these federations find it difficult to accommodate national pluralism within the same democratic polity (I), as well as to comment on potential institutional reforms in these kinds of federations from the perspective of value pluralism (II).

#### *(I)*

The current challenge facing multinational federations may be summed up as a liberal, democratic and national challenge to achieve polity-building. A challenge that must tackle the implicit conceptual and institutional biases associated with statist and nationalist monism usu-

ally present in democratic federations. The question, in short, is whether it is possible to combine, in the same federation, the perspective of a *federal union* of different national collectivities and the more *confederal* perspective that tends to predominate in the national constituent units. This is a question that cannot be answered in abstract terms; we must refer to institutional practice and case analysis<sup>19</sup>.

It is well known that, in contrast to some of the pre-modern federal agreements (cities, leagues, provinces, etc.), the theory and practice of modern federalism have developed in parallel to the theory and practice of the evolution of the state and its territorial element. This is obviously not a «neutral» question in the case of multinational societies which becomes clearer under the perspective of value pluralism than under the perspective of monist and fully rank-ordered theories. Although this affects the federations more than federalism itself, the situation of the former may, I believe, be described in terms of the overshadowing or the concealment of its internal logic.

The history of modern federations is the history of two concealments of classic federalism. The latter is understood here, in contrast to Elazar, not as a theory that is «designed to achieve some degree of political *integration* based on a combination of self-rule and shared rule», but more generally as one that is «designed to achieve some degree of political *agreement*<sup>20</sup>». Federal logic has been concealed first by modern processes of state-building and secondly by processes of nation-building promoted by the states. As the consequences of federalism of the latter have been amply commented on, I will briefly deal with the former.

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<sup>19</sup> Given the mainly theoretical nature of this paper, this question will not be answered directly here. A more institutional analysis developed for the case of Spain can be found in my works, «Political liberalism in multinational states: the legitimacy of plural and asymmetrical federalism», in A. Gagnon-J. Tully (eds), *Multinational Democracies*, Cambridge, Cambridge University Press, 2001a: 110-132; «Federalism and the Quality of Democracy in Plurinational Contexts: Present Shortcomings and Possible Improvements, 2001b (Princeton University, paper); «Cultural Pluralism, nationalism and federalism: A revision of democratic citizenship in plurinational states», *European Journal of Political Research*, 35, 1999: 2555-286; *Federalisme, per a què?*, Valencia, Tres i Quatre, 1998. See also L. Moreno, «Ethnoterritorial concurrence in multinational societies: the Spanish *comunidades autónomas*» in Gagnon-Tully (eds) 2001 op cit: 201-221

<sup>20</sup> D. Elazar, *Exploring Federalism*, Tuscaloosa, The University of Alabama Press, 1987:84 (emphasis added). The term «integration» is ambiguous when it refers to the link between the parties, and encourages one to think of a «strong» permanent agreement.

Despite the fact that the contribution of contemporary federations to the process of state-building (sometimes based on previous confederations) has been usually regarded as an alternative to the process of creation of centralised states —first with absolutism and then with democratic Jacobinism— federations still share a centralisation process with these states which is incorporated into the idea of a common or general authority that demands loyalty from all the individuals within a fixed territory. This, in turn defines, firstly, the notion of subject and, subsequently, that of citizen. In federations it is true that «sovereignty» and government become plural when faced with the monism of the sovereignty of the king or the people in centralised states. However, when a «central» or «national» government is established, a form of collective monism may be reintroduced, the people of the whole federation, in competition with the diverse subjects of the federal agreement. How much this phenomenon affects each federation is an empirical question, but it is of crucial importance for multinational federations. In descriptive terms, the existence of the latter not only indicates that there are a number of different nations within a polity —it also indicates, in a value pluralist vein, that these nations have their own ways of interpreting history, valuing their languages, customs and traditions, or of understanding what is or should be their political, economic, cultural, etc, role in the present and future. These interpretations are likely to be different from those of other national collectivities within the polity. They will all be plural, but their plurality will not be identical.

On the other hand, in modern federations it would appear that the tension between the liberal and democratic logics has been «nationally» resolved in favour of the latter. Moreover, the fact that the first and most influential modern federation was the United States of America— which was built on strong uninational foundations and with a powerful Supreme Court acting as politics-maker for its practical development —is not unconnected with an evolution of federations that is far removed from the most «confederal» logic of the polities of classic federalism (which in the modern era survived, albeit briefly, in the Netherlands and Switzerland). At the end of the day it would seem that most federations, instead of refuting Bodin's theory that their existence is impossible if one wishes to maintain indivisible state sovereignty, only refute the thesis of indivisibility but not that of a hierarchy which favours statehood or unity in contrast to the diversity of its component parts. Rather than centralisation, which as we know is open to a wide range of practical interpretations, this partial evaporation of classic federalism is the product of state political unity.

This first concealment of classic federalism by the state or, in other words, this statist swing of federalism by a number of federations based on the unity of a territorial *demos* is present in the main conceptions of contemporary liberalism and federalism<sup>21</sup>. This situation is reinforced by the second concealment of federalism: the consequences of the powerful presence of a single dominant state nationalism in federations. One result of all this has been the difficulties experienced by classic federations in contexts in which «the national *demos*» is not regarded as a single or predominant entity by large groups of citizens. This is a problem that has yet to be resolved by traditional liberalism and constitutionalism.

Naturally, the above does not imply the assimilation of federal state-building processes into the processes of centralised state-building, nor does it ignore the important differences that exist between the two processes and the possible repercussions for the practical functioning of the political system or the political culture of a given collectivity. In fact, as has been widely recognised, both processes represent two conceptions of democracy: the Jacobin conception fought the federal agreements existing in Europe in the name of democracy. Neither does the above imply any dismissal of the teachings of comparative politics on the instability of confederations in contemporary times. Rather it is a matter of highlighting the problems that federations will have —albeit fewer than centralised states— to develop the normative and constitutional consequences of the existence of a plurality of *demos* (or *demoi*) within the same federal democracy, in contrast to the more frequent statist conception of a single *demos* (and despite the fact that the latter will be described as an internally «plural» reality in terms of language, culture, etc.)

## (II)

Unlike other phenomena associated with cultural pluralism (immigration, indigenous groups), it is sometimes possible to observe a harmony or similarity between the moral values and ways of life of the members of the different national collectivities within western democracies. This is a kind of pluralism that is rather the product of characteristics and relations relat-

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<sup>21</sup> Think, for example, of the analyses of federalism as an instrumental, subsidiary, transitory element, or one that is associated with the decentralisation of the political system, in the works of S. Mill or K.C. Wheare.

ed to the history, culture, territory and, above all, power, of these collectivities. Inevitably, and also unlike other cultural movements, both majority and minority national collectivities are the product of processes of nation-building that will to a certain extent have to compete with each other, when they try to make collective decisions within the same territory (division of powers, use of political symbols, institutions, presence in the international arena, languages, national holidays, educational curricula, etc.).

Using value pluralism as the theoretical perspective of multinational liberal federations has at least two advantages over rival theoretical perspectives:

*i)* Concerning political liberalism, it allows one to investigate and constitutionally define individual and collectivities freedom as well as mutual recognition between different collectivities or national *demoi* in a more open way. From the beginning, fewer things will be left off the political agenda and the dialogue between the different parties will not be based on deductive theories that also display theoretical biases and a lack of information regarding the most relevant aspects of specific political legitimacy. In this way, for example, the legitimacy of collective liberty will not be the exclusive preserve of the state as a collective subject<sup>22</sup>. Value pluralism will also promote the practical perspective of reaching agreements between players who are more sceptical of the potential of the theories, but who do not wish to damage a minimal normative nucleus that they like to be more open to cultural interpretation than in other manifestations of liberalism and constitutionalism.

*ii)* Regarding federalism, value pluralism allows for an easier recovery of the liberal and federal logic of the pact when establishing the content of self-government, shared rule and reform processes by diverse national collectivities that are unable to show any kind of normative hierarchy between them<sup>23</sup>. This makes it easier to occasionally

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<sup>22</sup> Statism is a position that is also present in liberalism and most minority nationalisms. See Y. Tamir, *Liberal Nationalism*, Princeton, Princeton University Press, 1993.

<sup>23</sup> Federalism is also a dynamic institutional and normative perspective that allows one to take into account Taylor's criticism on Berlin's approach because «he seems to have stated the conflict of goods as though it were written into the goods themselves. Whereas I think it arises from the complexity and limitations of human life», Ch. Taylor, «Plurality of Goods», in R. Dworkin-M.Lilla-R.Silvers (eds), *The Legacy of Isaiah Berlin*, New York Review of Books, New York, 2001:117. Values and their agonistic relationships are historical. This allows a renewal of political pacts and «contracts» within democratic politics that are at the basis of a normative and institutional renewal of federalism.

change the constitutional rules when neither the national federated units nor the federation is in exclusive possession of their unilateral interpretation. These units may display a form of symmetry when they aspire to state-building and nation-building that goes beyond that which federations have enjoyed until the end of the 20<sup>th</sup> century<sup>24</sup>.

Both aspects refer to the predominance of freedom, both individual and collective in this case, in value pluralism as a perspective of federal liberalism. There are obviously other basic values and principles of a legitimising nature (the different interpretations of political equality, respect for minorities, constitutionalism, etc.). However, in the case we are dealing with here collective freedom plays a similar role to Berlin's negative individual freedom in order to guarantee that undesired external coercion is avoided, adding the positive participatory dimension that defines the shared-rule of federations. Once again, «improving» the practical functioning of federal democracies of liberal origin involves doing so both in an ethical sense which affects how one interprets the legitimising values and principles, among which is freedom in multinational contexts, and in a functional sense of governance, that is of results and effective conflict management. Or, put another way, borrowing Lincoln's phrase, which has been quoted by Elazar, improving federalism means improving the way it judges individuals (plus national collectives and the federations themselves, I would add) «warts and all»<sup>25</sup>. Nevertheless, both objectives (improving normativity and governance) may in practice turn out to be contradictory. It will then be necessary, if it is possible in federations, to adopt some kind of balanced solution based on procedures that reflect the accommodation of the national pluralism of the polity.

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<sup>24</sup> This does not prevent one from recommending caution regarding possible conclusions about multinational federalism given the small number of existing cases in comparative politics, of cases of mixed peoples, as well as the biases and mutual differences displayed by the majority of theoretical approaches to nationalism, federalism and liberalism. See F. Requejo, «Federalism and the Quality of Democracy in Plurinational Contexts: Present Shortcomings and Possible Improvements», University of Princeton, paper.

<sup>25</sup> Elazar, *op. cit.*, note 20, at. 86. Berlin points out that the feeling of belonging to a nation is totally natural and cannot be condemned or criticised in itself. However, in the form of «pathological extremism that may lead to unimaginable horrors» is absolutely incompatible with value pluralism. See I. Berlin, «Pluralism» in «My Intellectual Path», *New York Review of Books*, 14 May, 1998. Faced with the insistence on the value of the equality of democratic traditions, both Berlin and Elazar coincide in considering freedom (negative for the former) as the most important value for liberal democracies and liberal-democratic federalism, respectively. See Berlin 1969, «Two Concepts of Liberty» and Elazar 1987, ch 3.

This is a question that affects the three basic aspects which, in my opinion, make up an adequate federal accommodation of multinational polities:

- 1) constitutional and political recognition of their national pluralism,
- 2) high degree of self-government for national groups,
- 3) the participation of the latter in the shared-rule of the federation and in its reform processes.

These three aspects also highlight the relationship between collective negative and positive liberties in federations. At this stage it would be appropriate to consider some of the conclusions drawn from the analyses of comparative federalism. Comparative politics shows us, first of all, that multinational federations have normally been reluctant to permit explicit recognition of national pluralism in their constitutional agreements. In fact, this recognition is less common in these federations than the regulation of high degrees of self-government in some federated units. The reason for this may be related to the monism, which is a feature of the statist and nationalist conception of the polity also in contemporary federal tradition. The political collectivity, the «federal union», is normally understood to be a unit rather than an expression of national plurality<sup>26</sup>. A fact that has repercussions for the constitutionalisation of the internal rules of federal systems, as well as the interpretation of liberal freedom (negative and positive), more in individual than group terms. The debate of recent years has shown that formal equality of citizenship based on an identical formulation of civic, political, and social rights fails to guarantee the recognition of plurinationality and therefore its political accommodation. Citizenship is not available at the same cultural price, in terms of self-esteem and self-image, for all the citizens of the federation. Moreover, in some cases (Canada, Spain) the hegemonic nationalisms of the federation tend often to deny their plurinational character in favour of a pluricultural and plurilinguistic conception of a federation that is often considered uninational.

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<sup>26</sup> An exception is Ethiopia, whose constitution states that: «We the Nations, Nationalities and Peoples of Ethiopia ... ratified the Constitution of the Federal Republic of Ethiopia», defining these terms as «a group of people who have or share a large measure of common culture, or similar customs, mutual intelligibility of language, belief in a common or related identity, and who predominantly inhabit an identifiable contiguous territory.» See Hashim Tewfik Mohammed, «Ethiopia: the challenge of many nationalities», *Federations*, 5, 2001.

I believe that the explicit constitutionalisation and institutionalisation of *a politics of recognition* of national plurality is the first element for the accommodation of this kind of society. In Rawlsian terms, it is something that must be included in the «constitutional essentials» and «basic justice» of society. Berlin himself pointed out that nationalism springs, quite often, from a sense of outraged and wounded human dignity, and from the desire for recognition. He also stressed that the demand to be treated as an equal is at the core of the social and national revolutions and represents the modern version of recognition —«violent, dangerous, but respectable and fair»<sup>27</sup>.

One decisive element for the regulation of recognition is the symbolic and linguistic aspects of each national collective inside and outside the frontiers of the federation<sup>28</sup>. Recognition implies multilaterality; in other words, it must be done in a number of directions: from each national collective to the others and vice versa. It is not, therefore, a question that can be assimilated into the distribution of a system of freedoms or material resources.

Secondly, minority nations have achieved a variety of levels of self-government. This affects the regulation of collective negative freedom in the federation. In spite of the difficulty of producing uncontroversial and comparable indices of the level of non-centralisation and decentralisation of different federations, the results of comparative and case studies show a lesser gradient for multinational federations in the differences of self-government than in federations in general. The same results also show higher levels of constitutional asymmetry<sup>29</sup>. The interpretation of what «should be» the level of self-government of a national collectivity within a multinational federation is a question for the political debate of each specific case. However, a federated self-government, which in this

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<sup>27</sup> I. Berlin, «Rabindranath Tagore and the Consciousness of Nationality» (1961), in *The Sense of Reality. Studies and Ideas and their History*, London, Chatoo & Windus, 1996.

<sup>28</sup> I have developed this point in Requejo 2001b, 1998. See Ch. Taylor, «The Politics of Recognition», in A. Gutmann (ed), *Multiculturalism and the 'Politics of Recognition'*, Princeton, Princeton University Press, 1992: 25-73; A. Gagnon, «The moral foundations of asymmetrical federalism: a normative exploration of the case of Quebec and Canada», in A.Gagnon-J.Tully (eds), *Multinational democracies*, Cambridge, Cambridge University Press, 2001: 319-337.

<sup>29</sup> R. Watts, *Comparing Federal Systems*, Montreal&Kingston, McGill-Queen's University Press, 1999, ch 3,4,6 and 8; B. De Villiers (ed), *Evaluating Federal Systems*, Cape Town-Dordrecht, Juta&Co - Martinus Nijhoff Publishers, 1994.

case is a federated national self-government, should have sufficient symbolic, institutional, legislative, executive, judicial, and financial resources to proceed to a set of hegemonic liberal-democratic policies of nation-building. If this is not the case, it will not be possible to ensure the correct treatment of collective freedom within the federation. This includes responsibilities, for example, in the spheres of foreign affairs or, if applicable, immigration policy. Something which is far from true for most federations.

Thirdly, there is agreement among analysts of federalism regarding the importance of inter-governmental relations and of the institutions that guarantee the participation of federated units for the smooth functioning of the federation. In the same way that the principles of «cooperation» and «subsidiarity» may attack the logic of the federal division of powers<sup>30</sup>, a wholly confederal approach in the relationship between the federated units and the central power or a very competitive relationship between the units themselves is often an informal but permanent threat to the continuity of the federation. As far as multinational states are concerned, it is easier to develop a «federalism of trust» (or to minimise a «federalism of distrust») if both the rules of participation of the national collectives in the institutions of the union and the possibility of changing these rules include secession as one of the potential outcomes of the collective right of self-determination. Both aspects also represent manifestations of the collective freedom of national units in federations.

Participation in the union may be achieved through various classic techniques and institutions of federalism: consociational processes and institutions; a second chamber which defends minority rights through, for example, the right of veto for minorities; a supreme or constitutional court whose composition and functions include the national pluralism of the federation, etc. On the other hand, the case of constitutional reform on the initiative of the different national collectives and, above all, the right to self-determination represent a bigger rupture for federations taking into account the aversion of federal constitutionalism towards the same concept of national pluralism and towards the self-determination

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<sup>30</sup> See Bertelsmann Commission, *Disentanglement 2005*, Bertelsmann Foundation Publishers, Berlin, 2000; G. Bermann, «Taking subsidiarity seriously: federalism in the European Community and the United States», *Columbia Law Review*, 94, 2: 331-455; E. Rubin-M Feeley, «Federalism: Some notes on a national neurosis», *Ucla Law Review*, 41: 903-952; F. Requejo, «Federalism and National Groups», *International Social Science Journal*, 167: 41-49.

right for any collective other than the state itself. However, although the debate of recent years on this latter question has produced arguments, particularly of a mainly functional nature, based on the stability and the governance of the system, this debate also seems to indicate that there is no definitive normative argument that discourages the regulation of this right in the case of multinational federations<sup>31</sup>.

Furthermore, even the important decision taken by the Supreme Court of Canada in 1998 (Secession Reference) endorses the legitimacy of the «peoples» of a multinational federation to propose a change to the constitution, as well as the duty of the other members to enter into a process of negotiation which, either readjusts the federation through changes in the politics of recognition of multinationality or the division of powers, results in secession, or establishes a result somewhere between the two. The Court's Reference also establishes the need for a series of procedural rules that do not impede the development of the reform process (simplified amending procedure). As we know, the Supreme Court indicates four inherent principles in the Canadian constitution and its reform process — federalism, democracy, the rule of law and constitutionalism, and the protection of minorities—, adding, also in a value pluralist token, that none of them predominates over the others and that in this kind of federation the juridical framework can never be considered closed.

In this way, in accordance with this Reference, the mere existence of a series of self-governments and federal agreements cannot by itself

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<sup>31</sup> Here I am obviously referring to liberal-democratic federal processes in which individual freedom must be guaranteed. See J. Tully, «Introduction», in A. Gagnon-J. Tully (eds), *Multinational Democracies*, Cambridge, Cambridge University Press, 2001; McKim-J. McMahan (eds), *The Morality of Nationalism*, Oxford, Oxford University Press, 1997; M. Moore (ed), *National Self-Determination and Secession*, Oxford, Oxford University Press, 1998; A. Buchanan, «Theories of Secession», *Philosophy and Public Affairs*, 26,1:31-61, 1997. See also J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995; A. Gagnon-F. Rocher (eds), *Répliques aux detracteurs de la souveraineté du Québec*, Montréal, VLB Éditeur, 1992; R. Beiner (ed), *Theorising Nationalism*, Albany, State University of New York Press, 1999; K. McRoberts, *Misconceiving Canada: The Struggle for National Unity*, Toronto, Oxford University Press, 1997; N. MacCormick, «Liberalism, Nationalism and the Post-sovereign State», *Political Studies*, 44, 1996: 553-67; W. Kymlicka-W. Norman (eds), *Citizenship in Diverse Societies*, Oxford, Oxford University Press, 2000; M. Guibernau-J. Hutchinson, *Understanding Nationalism*, Cambridge, Polity, 2001; R. Gibbins-G. Laforest (eds), *Beyond the Impasse*, Montreal, IRPP, 1998; W. Kymlicka, «The new debate over minority rights» in F. Requejo (ed) *Democracy and National Pluralism*, Routledge 2001:15-34.

be seen as sufficient guarantee and expression of the democratic freedom of a multinational collectivity. This all seems to indicate that it is probably not a good idea for the basic rules of democratic states that affect collectivities, including federal ones, to be the same for uninationals and for multinational liberal democracies. This is an issue that has been sometimes rejected by traditional democratic constitutionalism when interpreting notions of freedom, equality and pluralism, and when it arbitrarily equates the democratic polity with a single national *demos*. In fact, the Reference establishes the legitimacy of the right of self-determination for the peoples of a multinational federation. We can say, moreover, that this right is regulated from a *federal* rather than from a *nationalist* perspective: unilateral decisions from both sides are constitutionally forbidden; the obligation to negotiate must be implemented according to institutional and procedural rules<sup>32</sup>. We also can say that the Canadian Court has taken an hermeneutic path from the formal and written regulations of the *federation* to the unwritten values of *federalism*. So, what is needed in multinational federations is a new form of constitutionalism in which the right to self-determination embodies the collective freedom of the national groups both in its negative aspect of the defence of the collective personality, and in its positive aspect of participation in a general decision-making process that may result in different constitutional results following negotiation with the other members of the federation. This does not question the potential virtues of federalism in multinational democracies<sup>33</sup>. These processes may be regulated by implementing difficult rules to be applied in the case of secession —time, majorities, referenda, economic imbalances, etc— in order to avoid or decrease functional problems or non-reasonable blackmail uses by political elites<sup>34</sup>. As we have seen in the previous section, no political theory of democracy or justice is able to synthesise this complexity of perspectives and the-

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<sup>32</sup> This right of self-determination has been partly overshadowed by the Clarity Act (Bill C-20) adopted by the federal government (June 2000). This Act interprets in a non-value pluralist and debatable way the requirements of clarity mentioned but not developed in the Secession Reference.

<sup>33</sup> R. Simeon-D. P. Conway, «Federalism and the management of conflict in multinational societies», in A. Gagnon-J. Tully, *Multinational democracies*, Cambridge, Cambridge University Press, 2001: 338-365; J. Linz, «Democracy, Multinationalism and Federalism», *WP 103*, Madrid, Instituto Juan March, 1997.

<sup>34</sup> W. Norman, «Secession and (constitutional) democracy», in F. Requejo (ed) *Democracy and National Pluralism*, Routledge 2001.

oretical and practical levels. That is why it is crucial to ensure the equality of the positions of power among the parties to the negotiation.

The linguistic and normative pluralism of the negotiation, the different logics or types of rationality that govern the normative questions and issues associated with governance, as well as the different uses of the language that will probably participate in the negotiation mean that the agreements to be reached will inevitably be of the *modus vivendi* type, at least partially, even when the legitimising language, rights, institutions and processes will be strictly liberal-democratic<sup>35</sup>. Obviously, from this perspective the configuration of the reform procedures and the results will vary according to the specific characteristics of each multinational federation (history, economy, political leadership, the existence of supra-state entities such as the European Union, international relations, etc.). The answers will be plural, but never definitive. Nevertheless, in this way it is possible to safeguard an interpretation of collective freedom that is closer to national pluralism and to the logic of the kind of federalism concealed by contemporary federations<sup>36</sup>. The experimental nature of federalism continues to be one of its biggest advantages in this case.

Nowadays, as I said, the question of whether federal solutions are suitable to achieve a political accommodation of multinational societies remains

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<sup>35</sup> According to J.Elster, when the parties are a long way from reaching a consensus, the process may include two kinds of verbal exchange: argumentation and strict negotiation as well as one non-verbal act – voting, J. Elster, «Introduction», in J. Elster, *Deliberative Democracy*, Cambridge, The Press Syndicate of the University of Cambridge, 1998. Concerning the main subject of this paper, all three elements will take place, the first and second among the elites and the first and the third among the citizens. In this latter case, the argumentation would appear to be decisive when discussing the existence or not of deficiencies in the recognition of the national pluralism of the federal democracy as well as the advisability or not of changing the federal rules of the game (referenda), while the strict negotiation will be the job of the elites in power at the time.

<sup>36</sup> This position implies the predominance of the principle of equality between national groups when one is attempting to guarantee their collective freedoms over the principle of formal equality of the sub-units of the federation. See J. Webber, *Reimagining Canada: Language, Culture and the Canadian Constitution*, Montreal&Kingston, McGill-Queen's University Press, 1994 and E. Fossas, «National plurality and equality», in F. Requejo (ed), *Democracy and National Pluralism*, Routledge 2001: 63-83. An analysis on the debate about the language, constitutionality and the issue of a «clear majority» in the Clarity Act in F. Rocher-N.Verrelli, «Recognition of Diversity and Constitutional Democracy in Canada: The case of the Clarity Act» and S. Tierney, «Mediating diversity in multi-national societies: the judicial safety-value?» (papers presented at the International Conference *The Institutional Accommodation of Diversity*, Saint-Marc-sur-le-Richelieu, Quebec, 20-22 September, 2001).

unanswered. Nevertheless, if comparative federalism teaches us anything it is the desirability of establishing normative and institutional frameworks which are appropriate for each specific case. But in order to do this it is also desirable to overcome the conceptual and practical barriers and biases which the combination of traditional political liberalism and federalism has created in contemporary constitutionalism. From a theoretical standpoint, I believe that to adopt a perspective of value pluralism makes it easier to find ways to establish a political accommodation of national pluralism in contemporary liberal democracies. Therefore, I think it would be accurate to say of Berlin what Nelson Riddle, who in 1959 arranged the songs of George Gershwin for a record by Ella Fitzgerald, said of the New York composer: «He wrote tomorrow's music yesterday».



The Canadian Federal Experiment, or Legalism  
without Federalism?  
Toward a *Legal* Theory of Federalism

Por  
Jean-François Gaudreault-DesBiens\*

*Introduction*

[W]e do not value (care about) federalism as much as we might because we have made too little effort to value (weight or measure) the worth of the values (ideals) federalism is said to serve. (Friedman, 1997: 317)

[L]e meilleur n'est concevable que par le parfait (Weill, 1955: 85)

Whether or not the Canadian federal experiment is a success is not directly the question I purport to answer in this paper. But that question is nevertheless in and of itself interesting because of the further ones that it raises. Indeed, what are the criteria of success of a federation? And from which vantage points must these criteria be identified? Political ones? Legal ones? If, for instance, one chooses to assess Canadian federalism from a legal standpoint, should that person focus solely on for-

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mal law, in that case the division of powers enshrined in the Constitution and interpreted by the Courts, or should she, on the contrary, extend her inquiry so as to examine concrete constitutional practices and to measure the impact of court rulings on federal actors' actual behaviour? Probably due to the perennial debate about the very existence of the federation, that kind of questioning has become a national sport in Canada.

As far as Canadian legal scholars are concerned, it is interesting to note that while they have extensively debated the ups and downs of Canadian federalism, very few have actually reflected on the Canadian federal experiment from the standpoint of a normative theory of the values implied by the federal principle itself. Speaking from the standpoint of political philosophy, Wayne Norman was noting a few years ago that «(...) it is not overstatement to suggest that there does not exist in any detail an adequate political philosophy of federalism itself.» (Norman, 1994: 81) The same could be said of the legal theory of federalism, especially in Canada. Actually, it is probably fair to say that, from a legal standpoint, federalism in that country has been overdiscussed and undertheorized. The approach that has dominated in Canadian constitutional law scholarship has indeed essentially consisted of understanding and systematizing cases using classical common law methods, and criticizing them from a certain normative vision of what *Canada* should be as a nation rather than from a normative vision of what *federalism* implies in the Canadian context.

While this was perhaps inevitable—as citizens, scholars cannot be expected to show absolute neutrality towards the political evolution of their country—, this approach has led very able commentators to fall into the intellectual trap of systematically valuing decentralization or centralization over the other, exactly as if decentralization or centralization were intrinsically—and abstractly—valuable for their own sake<sup>1</sup>. However, as Robert Howse (1995) has argued, the claim that decentralization is intrinsically good is undefensible<sup>2</sup>. As well, it cannot be said, without further nuance, that centralization is valuable for its own sake. Both decentralization and centralization may be appropriate in certain

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<sup>1</sup> There are obviously exceptions such as Lederman (1975), and Brun & Tremblay (2002) in the field of law, and Simeon (1983), in the field of political science.

<sup>2</sup> It should be noted that decentralization is not a synonym of subsidiarity, the former often implying a stronger ideological component than the latter. Actually, decentralization may be a consequence of a subsidiarity-induced reflection, but not a necessary one.

circumstances, and problematic in others, and neither can be said to be intrinsically «progressive» or «conservative» (Noël, 1999). The fact is that, when made systematically and unreflectively, claims such as «more powers to the federated entities» or «more powers to the federal government» become mere intellectual automatism and, as such, epistemological obstacles (Bachelard, 1983). In no way can they lead to the elaboration of a complex *legal theory* of federalism, or usefully inform such a theory. As ideological artifacts, such claims offer very little insight into the complex nature of federalism, and shed no light on the normative ideals embodied in that system of government or on the behavioral principles consubstantial to it.

For its part, the judicial doctrine of federalism that has been elaborated since Canada's inception as a federal state in 1867 roughly reflects the same dynamic as academic scholarship, oscillating between centralization and decentralization *without* any substantive reflection on the normative values underlying federalism, except in some exceptional cases where allusion is made in passing to these values or to some broader, but relatively undefined, conception of federalism<sup>3</sup>. In most cases, however, no such allusion is made. On the contrary, it would not be unfair to say that the judicial reasoning on federalism has been plagued by a formalistic and legalistic method under which federalism itself has come to be seen as a mere technical issue (Russell, 1986) rather than as a constitutional regime which, by definition, entails political, if not moral, aspirations (La Selva, 1996)<sup>4</sup>. While it is true that federalism necessarily implies a certain dose of legalism, in that its mere existence presupposes the supremacy of a relatively rigid constitution construed by the judiciary (Dicey, 1885), legalism alone, if not constantly checked by

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<sup>3</sup> On this level, despite what some early commentators who were also Canadian nationalists have described as a decentralizing bias, the record of the Judicial Committee of the Privy Council, which was the ultimate appellate tribunal in Canada until 1949, is probably slightly better than that of the Supreme Court of Canada. See generally: Cairns, 1971. The exceptional cases to which I am referring are *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, and they cannot be characterized as entirely satisfying from the standpoint of a «deep» reflection on federalism.

<sup>4</sup> Despite the rhetoric found in some cases applying so-called «objective tests» which contained prongs supposedly designed to prevent the creation of undue imbalances in the Canadian federal structure, the Supreme Court has more than often paid lip service to these prongs. See, for example, *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

a reference to the broader values underpinning this specific type of regime, is also likely to lead to highly formalistic, if not byzantine, decision-making.

More to the point, the formalistic legalism that has inspired a significant portion of the judicial apprehension of federalism in Canada has actually allowed the kind of purely ideological argument described above to creep into the law of federalism, which has had the legal and political effect of impoverishing Canadian federalism itself by inducing federal actors to mold their discourse and their actions in accordance with the basic tenets of that formalistic legalistic approach. In other words, by building into the law of federalism an unduly formalistic interpretation of the constitutional division of powers, without necessarily supporting it with a strong normative vision of the values underlying federalism itself, court decisions have substantially—and negatively—affected the political culture in Canada, at least as it regards federalism.

Paradoxically, an equivalent comment can be made about another type of interpretation—this one deliberately less formalistic—that has gained currency in recent decades. While this interpretive approach has correctly sought to acknowledge the inevitability of situations of jurisdictional overlaps in federal regimes, it might nevertheless be faulted for having fallen into the same trap as its formalistic counterpart, as the «realism» inspiring it has proven to be a fertile ground for the predominance of efficiency-based arguments or justifications that tend to obliterate not only the core values underpinning federalism (save a few remarks here and there, which essentially play a rhetorical role), but also, or so could it be argued, federalism itself. Unprincipled realism is no better than barely principled formalism. Moreover, utilitarianism disguised as legal realism is nothing but another visage of legalism, as its success rests on the conscription of the law for legitimation purposes. Federal actors in Canada have thus been confronted with highly conflicting judicial messages, but, more importantly, have had to make sense of a strange form of «legalism without federalism». Since I am inclined to say that law in advanced societies has more to do with the management of uncertainties than with the production of certainty, I will not argue in this paper that courts should, or even can, provide federal actors with absolute certainty. However, I will argue that the margin of uncertainty with which they have to live has to be conceived of as a limited interval the boundaries of which are to be found in some core federal *legal* principles.

The purpose of this paper is to briefly explore that basic hypothesis of «legalism without federalism», and to imagine what a different approach, under which federalism would prevail, could entail. This will be done, after a few preliminary remarks (1), by focusing on the discursive uses of sovereignty and jurisdictional exclusivity, as they relate to Canadian federalism (2), and by reflecting, through a case study, on how a legal theory of federalism could inform federative adjudication and possibly lead to outcomes that are more respectful of the values implied by this form of constitutional regime (3). In doing so, I will have no choice but to challenge some basic givens of Canadian constitutional law as it relates to federalism, as well as some fundamental assumptions of certain «alternative» federalist discourses, such as systematically «centralist» or «provincialist» ones. I will finally argue that, from a legal standpoint, laying down the foundations of such a normative theory of federalism represents a categorical imperative in order to systematize and reinvigorate the law of federalism, and this, not only in Canada but also elsewhere. For federal cultures, even old and relatively strong ones, need to be sustained. As such, the superficially Canadocentric perspective of this paper should not discourage or mislead my non-Canadian readers. Clearly, the main thrust of this paper is to advocate the need for the elaboration of a legal theory of federalism, to identify, in a tentative and admittedly sketchy manner, some its core normative principles, and to illustrate how they could be used in the judicial adjudication of intergovernmental disputes.

### *Preliminary Remarks*

Some preliminary remarks are warranted before going further. Firstly, it must be noted that the interrogation mark in this paper's title has not yet been dealt with. This interrogation mark somehow compels me to clarify at the outset my position concerning the state of Canadian federalism. Simply put, in no way do I claim that the Canadian federal experiment is a failure, or, as some Quebec scholars say, that it should be considered as a thing of the past as a result of a series of «centralist» rulings by the Supreme Court of Canada in recent decades. For example, Professors Brun and Tremblay (2002: 437) go as far as saying that, due to such rulings, Canada has become a quasi-federation the existence of which is maintained simply as a result of a «tol-

erant attitude» of the federal government towards provinces<sup>5</sup>. The problem with such claims is that they ignore large segments of the contemporary Canadian constitutional «reality», which, to say the least, comprises much more than court rulings. Moreover, claims of that kind allow ideology to harness methodology, which is highly problematic from a scientific perspective.

While it is probably true that, except for some brief moments, the Supreme Court of Canada's case law has shown a certain bent in favour of constitutional interpretations supporting the federal government's nation-building ambitions (Lajoie, Mulazzi & Gamache, 1986), which is hardly surprising for a court that practically acts as the «constitutional court» of the federation (Bzedra, 1993), all this is still not enough, I believe, to conclude that the Canadian federal experiment is a failure. First, such a position embodies a rather manichean «all or nothing» logic, which evacuates any complexity from the analysis. However, their opponents who, adopting a Polyanna-like vision of Canadian federalism, deny the existence of significant problems in the working of the federation fare no better in that regard.

Secondly, the position that Canadian federalism is a failure because of the potentially centralizing consequences of some court rulings is also problematic in that it seems to equate federalism not only to *legal* federalism but also to *judicial* federalism. The problem is that such a reduction of federalism to its judicial expression leads its proponents to ignore both relevant and significant non-judicial data without which it is hard to fully appraise any particular expression of federalism, including the Canadian one. Therefore, sweeping statements regarding the complete failure of a given federal experiment which are made solely on the basis of an appraisal of the evolution of the case law should be viewed with suspicion. Formal law, especially case law, does not and cannot exhaust all the meanings of federalism, nor should it be used, from a methodological standpoint, as the sole variable determining the success or failure of a given federal experiment. Acknowledging that, however, should not lead one to ignore or unduly minimize the impact of judicial pronouncements on the constitutional and political cultures of a federation.

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<sup>5</sup> Their views on this somehow rejoin those expressed by K.C. Wheare, when he characterized Canada as having a «quasi-federal Constitution» because of the number of powers allocated to the federal Parliament that could allow it to bypass provincial jurisdictions should it exercise them on a regular basis (Wheare, 1963: 19).

As much as formal law is influenced by extrinsic variables, it itself shapes, to some extent at least, these variables.

Furthermore, the strategy of reducing Canadian federalism to its formal legal expression for the purpose of ascertaining its success or failure also appears dubious in that it reduces the law itself to its most formal and *statufied* expression. Indeed, can one soundly make a statement as to the success or failure of a given federal experiment by simply looking at judicial pronouncements on it and without examining their concrete consequences in the daily life of the federation? This raises the question of the actual implementation of such rulings. For example, while it can be argued that, from the standpoint of a normative theory of federalism, the Supreme Court of Canada's interpretation of the national *concern branch* of the federal jurisdiction to legislate for the peace, order and good government of Canada in the case *R. v. Crown Zellerbach*<sup>6</sup> is conceptually problematic, in addition to virtually giving free reign to the federal government to extend its jurisdiction over fields which were until then under provincial jurisdiction (see : Brun & Tremblay, 2002: 556-559), it is however a bit of an overstretch to use this jurisprudence as evidence of the global failure of Canadian federalism. For law is about more than written law, be it found in the text of the Constitution or in the case law interpreting it. Law is also about living law, that is, law as implemented and experienced by social actors. So situations in which what is formally enshrined in the formal law is never actually implemented and therefore experienced should not be left aside as irrelevant data. To go back to the example given above, it bears noting, for instance, that the ruling of the Supreme Court in *Crown Zellerbach* did *not* trigger the enactment of a wave of laws purporting to assert federal jurisdiction over provincial matters deemed to have acquired a national dimension.

The conclusion stemming from the above is that my assessment of the state of the formal law of federalism, as bleak as it will sometimes look, can in no way be equated to a global assessment of the Canadian federal experiment at large. Actually, when I say that the elaboration of a legal theory of federalism is a categorical imperative given the need to systematize and reinvigorate the law of federalism in Canada, I proceed from the assumption that, indeed, judicial pronouncements may be more or less helpful in fostering federalist values and attitudes. More precise-

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<sup>6</sup> *Supra*, footnote 4.

ly, my (relatively modest) claim is that in a federation as diverse and complex as Canada, such pronouncements could be more helpful if they were proceeding from a normative reflection on the fundamental values informing federalism, and implied by this regime, rather than from a merely technical perspective. That technical perspective frequently induces decision-makers, judicial or not, to ignore federalism's aspirational dimension, and prevents federal actors and ordinary citizens from really thinking through burning issues such as the constitutional apprehension of «deep diversity», the possibility of complex citizenship in a federation (Gaudreault-DesBiens, 2001), the notion of equality (individual and collective) in a federal regime, or the reengineering of fiscal federalism. In sum, an unduly formalistic and technical approach to the law of federalism will often allow legalism to prevail over federalism. But approaches that are unduly utilitarian or realistic may also entail negative consequences from the standpoint of federalism, as this regime's basic requirements might end up being overlooked for purposes which, while important, cannot in and of themselves allow for their trumping. It is the main argument of this paper that, without providing any intellectual panacea, a legal theory of federalism such as the one sketched hereinafter could help avoid such «all or nothing» approaches. Ultimately, this argument is that of a skeptic who prefers half empty or half full glasses to either full or empty ones. While it might not be the sexiest or the boldest position to embrace, this essentially moderate approach is, I submit, the best possible one in the context of any federal state, where power is, by definition, divided.

*Sovereignty and jurisdictional exclusivity between  
judicial byzantinism and political opportunism*

A. Conflicting judicial messages

The Constitution Act of 1867, which establishes the Canadian federation, allocates the federal Parliament (in section 91) and provincial legislatures (in sections 92, 92A, 93) the *exclusive* power to make laws in relation to certain matters. The two levels of government are also expressly granted concurrent jurisdiction over a few subjects (sections 94A, 95). This hypothesis will not be examined in this paper given its limited scope.

As to the exclusive fields of jurisdiction granted to the two levels of governments by the Canadian Constitution, it is to be noted that two sep-

arate lists of powers, one federal, the other provincial, are provided. This stands in sharp contrast with the situation that exists in federations such as Australia and the United States of America, where the Constitution only enumerates federal powers, while broadly allocating residual powers to the federated units.

The choice of expressly providing for two different sets of powers has predictably influenced the method used to determine the constitutionality of legislation from the standpoint of the federal division of powers<sup>7</sup>. The first step of the inquiry is to determine the matter of the impugned legislation, that is, its «pith and substance» or dominant characteristic. To proceed to that determination, courts will examine both the purpose and the effects of the impugned legislation, the idea here being that its effects may provide information as to its «true» purpose. Indeed, a law that superficially appears to be targeted at a matter that falls under the constitutional authority of the enacting legislature may in fact seek to do indirectly what that legislature could not do directly, thereby rendering that law «colourable». Once the pith and substance of the impugned law has been ascertained, the next step is to associate that pith and substance to one or more of the topics that have been expressly allocated to the federal Parliament and to provincial legislatures. For example, if a law can be characterized as purporting to regulate consumer contracts, the competing heads of power that could be considered for the sake of determining the constitutionality of that law would most likely be «property and civil rights», which is under provincial jurisdiction, and «trade and commerce», which is under federal jurisdiction. Deciding which head of power is the relevant one given the dominant «matter» addressed by the law will then be a function of the past judicial interpretation of the meaning and scope of the competing heads of power at stake. In the example above, the impugned law would most likely be characterized as falling under provincial jurisdiction.

Inevitably, the identification of the dominant characteristic of a law is a value-laden process. So is the delimitation of the scope of the heads of power allocated to either level of government. As such, determining the constitutionality of a law from the standpoint of the federal division of powers is not, as a matter of principle, a formalistic exercise. Rather, it could be more aptly characterized as a purposive one. Such an approach is warranted, I think, not only by the wording of the relevant

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<sup>7</sup> For a classical and thorough analysis of that method, see Lederman, 1981.

sections of the Canadian Constitution, but also by the nature of legal interpretation itself. As a result, the problem raised by what I have described as the formalistic-legalistic dimension of the Canadian law of federalism lies elsewhere. Actually, it lies in the various side effects of the method focusing on the «pith and substance» of the impugned laws.

The first side effect relates to the center-periphery dialectic, especially as it affects the identification of the normative content of a law or of a rule. Once one has determined that the normative core of a law renders it constitutionally valid, it follows that the incidental effects of that law are also likely to be found valid. But what if these effects extend beyond what falls under the enacting legislature's constitutional jurisdiction? What criterion should then be used to ascertain whether or not they *unduly* infringe on the other level of government's jurisdiction? But while a broad interpretation of a level of government's ancillary powers is not problematic *per se*, what is problematic is rather the lack of a coherent normative framework that could indicate, on a consistent basis, beyond which point the exercise of such powers becomes unacceptable. How can one determine the threshold where a jurisdiction expressly characterized as exclusive is not longer exclusive? What do Canadian courts have to say about this problem?

For the external observer, three things are startling: firstly, the gap that exists between the concept of exclusivity, as understood and reiterated in some political circles, and the actual judicial interpretation of that concept (Frémont, 1998: 46); secondly, the absence of any significant reference to any foundational principle underlying federalism to help find solutions to constitutional puzzles —hence my remark on the formalism of the law; thirdly, the corollary, and probably unconscious, reduction of the law of federalism to the status of a mere legal toolbox—hence my remark on the legalism of that law, but also, and paradoxically, on the risk of obscuring federalism's basic requirements for the sake of «efficiency» or of a so-called «realism». Something that is conceived of as a mere tool in the achievement of a higher purpose, e.g. social justice, can indeed be easily forgotten. What is true for the carpenter's hammer is also true for federalism when it is reduced to the status of means.

While it is superficially true that when a matter falls within the core jurisdiction of a federal actor, that federal actor may indeed pretend to exercise «exclusive jurisdiction» over that matter, it would nevertheless be deceptive to believe that courts have adopted a radical concept of exclusivity. Firstly, by allowing incidental infringements on the other level of government's supposedly exclusive fields of jurisdiction, they

have somehow accepted that the consequences of one's exclusive exercise of a constitutional power may lead to an infringement on the other's own exclusive fields. From a purely formalistic perspective, one could probably argue that that other's pretense to exclusivity remains conceptually intact, and that such ancillary effects do not really affect that exclusivity. However, from a less formalistic standpoint, this argument is not really convincing. Moreover, it is well recognized in Canadian constitutional law that some matters may present a «double aspect». This means that they can be validly regulated by both levels of government, each exercising one of its exclusive powers to regulate a specific dimension of the matter. For example, drunk driving, which is not a matter expressly allocated to any level of government, can be regulated by the provinces on the basis of their power to enact laws relating to property and civil rights (that allows them to determine the conditions under which one may obtain and retain a driver's license) and relating to local affairs, as well as by the federal Parliament on the basis of its power to enact criminal laws. Many topics which were not contemplated when the division of powers was devised in 1867 raise such a «double aspect» question. All this is to say that the court's interpretation of the Constitution itself has substantially relativized the meaning of the notion of «exclusivity», this, to the extent that it could now be argued that the provisions granting these exclusive powers often serve more as conflict rules in cases where jurisdiction may reasonably be asserted by both governments each from a different angle than as really protecting a constitutional position that is genuinely «exclusive». At the very least, it should be acknowledged that the notion of exclusivity that is now enforced in the Canadian law of federalism is a weak one, as is the case in several other federations (Aja, 2003: 30). This approach, represents what Bruce Ryder (1991) calls the «modern paradigm» of the judicial interpretation of the federal division of powers, as opposed to the once fashionable «classical paradigm», which sought to prevent any overlap between federal and provincial fields of jurisdiction. The triumph of the modern paradigm was probably inevitable, given the intrinsically interdependent relation that exists between federal and provincial governments, as well as socioeconomic evolutions that, at least since World War II, have tended to blur jurisdictional boundaries.

That the concept of exclusivity that now governs the interpretation of the federal division of powers be weak is not necessarily a problem. It essentially stems from the acknowledgement that positive legal categories cannot aspire at entirely and forever capturing the convoluted evolution of peoples' and institutions' lives. What is more problematic, however, is that the

discourse found in some cases<sup>8</sup> and in segments of the legal scholarship<sup>9</sup> still resonates with allusions referring to exclusivity as if this concept had remained relatively unqualified. For example, at the same time it was talking about jurisdictional overlaps as inherent to federalism<sup>10</sup>, the Supreme Court of Canada was expanding the application of the doctrine of inter-jurisdictional immunity, which, in a nutshell, may render otherwise valid provincial laws inapplicable to undertakings over which the federal Parliament possesses a plenary, primary and exclusive jurisdiction, if these provincial laws affect an essential part—this concept being more and more broadly defined—of these federal undertakings<sup>11</sup>. Interestingly, this doctrine, which relies on a radical and extreme vision of exclusivity, was said not to apply in respect of provincial undertakings where one of their «essential parts» are affected by an otherwise valid federal law<sup>12</sup>.

Thus, the famous metaphor once coined by Lord Atkin that federal and provincial areas of jurisdiction were separated by «watertight compartments»<sup>13</sup> still exerts considerable influence on legal and non-legal minds and prevents a more realistic appreciation of the legal evolution of the concept of exclusivity. It is however to be noted that, from a strictly legal standpoint, the metaphor now seems to be restricted in its application to some areas of federal jurisdiction protected by the doctrine of interjurisdictional immunity. The fact remains that the Supreme Court is, to say the least, sending conflicting messages to its different audiences about the nature and dynamic of legal federalism in Canada, the least charitable interpretation of these conflicting messages being that, in federalist adjudication, the ends justify the means.

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<sup>8</sup> As Ryder (1991: 357) notes, two applications of the «classical» approach to exclusivity can be found in the cases of *C.S.S.T. v. Bell*, [1988] 1 S.C.R. 749 (where the doctrine of interjurisdictional immunity is relied upon to prevent the application of a provincial law to a federal enterprise; see *infra*) and *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (where the doctrine of federal paramountcy is relied upon and expanded to prevent the application of a more generous provincial law to the case of a debtor governed by a federal law).

<sup>9</sup> This is especially the case in the writings of scholars from Québec (or, for instance, from Western Canada), who tend to associate the stronger view of exclusivity to a better protection of provincial autonomy, a claim which is highly debatable (Ryder, 1991: 362).

<sup>10</sup> *General Motors of Canada Ltd. v. City National Leasing*, *supra*, footnote 3.

<sup>11</sup> *C.S.S.T. v. Bell*, *supra*, footnote 8.

<sup>12</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. In that case, the view that interjurisdictional immunity may operate both ways is brushed aside as «erroneous», and this, without satisfying justification.

<sup>13</sup> *A.G. Canada v. A.G. Ontario*, [1937] A.C. 326.

## B. Opportunistic political appropriations

Even more problematic is the fact that this «extreme» vision of exclusivity encourages insularity on the part of federal actors. Except in a few recent cases where the Supreme Court has appeared willing to provide a more complex account of the relations between federal actors<sup>14</sup>, the rhetoric of jurisdictional exclusivity that still permeates some of its rulings as well as certain segments of constitutional scholarship have created among political actors and citizens expectations that do not reflect the actual state of the law. My point here is not that political expectations should necessarily be in tune with positive law. On the contrary, such an occurrence would practically prevent any type of reform by uniting the *sein* with the *sollen* —the ideal of totalitarian states... My claim is simply that political expectations should ideally be informed by an understanding of relevant legal concepts that is sufficient enough so as to allow political actors and citizens not to get fooled by rhetorical abuses of these concepts. My corollary claim is that courts bear a special responsibility not to send messages that are likely to induce the creation of «false expectations». Of course, they cannot realistically be expected to monitor all possible misinterpretations of their rulings, since the audiences affected by these rulings also participate in the determination of their meaning (Lajoie, 1997). But it is nonetheless my view that courts should do their best to send messages that are clear enough so as to avoid the most extreme interpretations. Rulings relying upon a radical view of exclusivity in a federal context or, on the contrary, rulings implicitly condoning the irrelevance of the relative autonomy of federated units could be characterized as such.

Political expectations about the actual impact of jurisdictional exclusivity may also have been increased as a result of the resilience of the concept of sovereignty in federalist discourse, where federal actors are often described as being «sovereign» in their respective fields of jurisdiction. Indeed, it must be noted that the discourse of sovereignty induces, almost by definition, political actors to adopt absolutist positions. As Nagel (2001: 31) points out, «[b]oth the substance and symbolism of sovereignty have direct and obvious connections to the attitudes of citizens (...)». It has actually been argued that the very concept of sovereignty was ill-adapted to the nature and structure of federal countries (Friedrich, 1968; Beaud, 1998). For that reason, alternative concepts should be explored from a legal standpoint, especially in a context

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<sup>14</sup> See, for example, *Hunt v. T & N plc*, [1993] 4 S.C.R. 289.

where the concept of sovereignty is itself going through a process of «de-absolutization» (Villaamil, Gutiérrez & Zapata, 2001: 121). The concept of «autonomy» is undoubtedly one of them, as I will allude to in my conclusion.

What is to be remembered for now, however, is that in the Canadian context, the coupling of an extreme vision of jurisdictional exclusivity, reinforced by the formalistic-legalistic judicial grasp of the federal division of powers<sup>15</sup>, and of the use of an unproblematized concept of sovereignty, have often allowed federal actors to hide themselves behind the veil of the law to mask attitudes or to justify actions that directly contradicted the basic values underlying federalism as well as those implied by this regime. In other words, the legal discourse on federalism has often been appropriated and distorted by federal actors seeking to implement anti-federalist policies. As such, «exclusivity» has essentially become an ideological tool, and has thus exhausted its potential as a useful heuristic device. It is even truer when one considers that federal actors in Canada, especially provinces, have used it as a kind of «self-service paradigm», by which I mean that they have used it frequently, but only when it was in their political interest to do it.

The problem posed by misuses of the concept of exclusivity is related to another one, which I have identified earlier as the quasi-absence of any substantive judicial reflection on the values and principles underlying federalism, or necessarily implied by it, and, *a fortiori*, of any reference to such values or principles, and this, despite the fact that they could help in finding *principled* rather than merely technical or efficiency-inspired solutions to disputes between federal actors.

It is probably fair to say that referring to broader federal values or principles still remains a contentious issue in judicial circles. For example, in a case dealing with the scope of the unilateral and discretionary federal power to declare works for the general advantage of Canada<sup>16</sup>, Justice Laforest, writing for himself and two other Supreme Court judges, rebutted as follows a claim that this power should be narrowly interpreted because of the dangers it posed to the federal structure in Canada:

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<sup>15</sup> Professor A. W. Mackay (2001) has recently argued that the Supreme Court of Canada's approach to federalism in the past twenty years has not been as purely legalistic as it used to be. This would notably be reflected in the Court's efforts to contextualize federalism cases a little bit more by relying, for example, on extrinsic evidence. Professor Mackay is correct on this point, but, in my view, the Court's jurisprudence still remains unduly legalistic and technical. First and foremost, it is notably devoid of any fundamental reflection on federalism.

<sup>16</sup> Such a declaration has the effect of unilaterally transferring under federal jurisdiction that work which was initially under provincial jurisdiction.

It was argued that the declaratory power must be read narrowly to make it conform to principles of federalism. There is no doubt that the declaratory power is an unusual one that fits uncomfortably in an ideal conceptual view of federalism. *But the Constitution must be read as it is, and not in accordance with abstract notions of theorists.* It expressly provides for the transfer of provincial powers to the federal Parliament over certain works. (...) The restricted view advanced here for the first time appears to be based on the danger thought to be posed to the structure of Canadian federalism if the courts do not confine federal power in this area. (...) But more fundamentally I think the argument evinces a misunderstanding of the respective roles of law and politics in the specifically Canadian form of federalism established by the Constitution. (...) It is the very breadth of these powers that protects against their frequent or inappropriate use. It was not the courts but political forces that dictated their near demise. They are, as was said of the power of disallowance, «delicate» and «difficult» powers to exercise and «will always be considered a harsh exercise of power, unless in cases of great and manifest necessity . . .» (...) Their inappropriate use will always raise grave political issues, issues that the provincial authorities and the citizenry would be quick to raise. In a word, protection against abuse of these draconian powers is left to the inchoate but very real and effective political forces that undergird federalism<sup>17</sup>. (My italics)

Justice Laforest was then reacting to the following view expressed by Justice Iacobucci, with whom three other judges concurred<sup>18</sup>:

The federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities. While the use of the declaratory power is not as dramatic as the unilateral amending of the Constitution, in my view the federal principle should be respected nonetheless. Parliament's jurisdiction over a declared work must be limited so as to respect the powers of the provincial legislatures but consistent with the appropriate recognition of the federal interests involved<sup>19</sup>.

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<sup>17</sup> *Ontario Hydro v. Ontario*, [1993] 3 S.C.R. 327, 370-372.

<sup>18</sup> Cory and Sopinka JJ's co-signed Iacobucci J.'s opinion, while Chief Justice Lamer agreed with him in a separate opinion as far as the principles were concerned.

<sup>19</sup> *Ontario Hydro, supra*, at 404.

Beyond federalism, this debate reflects a deeper disagreement about the nature of legal interpretation and the appropriate degree of judicial «activism» in a constitutional democracy. But while I share Laforest J.'s concerns about the danger of ignoring the text of the Constitution, I am nonetheless inclined to believe that an interpretive approach purporting to be purely literal is first and foremost a rhetorical strategy—if not an authoritarian one (Van de Kerchove, 1988)—and, as such, is intellectually self-defeating since it somehow presupposes the *absolute* clarity and determinacy of the text to be construed<sup>20</sup>. For instance, even if one acknowledges that the Constitution «clearly» grants a given level of government the discretionary power to do something, does that mean that the discretion conferred is absolute and unfettered? Couldn't it be argued, on the contrary, that this discretion has to be exercised in a manner that is compatible with some basic federalist values and in a way that does not jeopardize the equilibrium of the federation, just as an administrative discretion has to be exercised in a manner that is compatible with the objectives of its enabling statute? Thus, the seemingly innocuous statement that the Constitution «expressly provides for the transfer of provincial powers to the federal Parliament over certain works» is not merely declaratory of the law, it is a law-creating iteration.

A last point remains to be briefly examined. Once we have identified the problematic side effects flowing from the most basic concepts inspiring the formalistic-legalistic interpretation of the law of federalism, a question still lingers, that is, why has nothing been done so far to improve the situation? More specifically, what are the interests involved in perpetuating this type of interpretation? Different factors probably contribute in maintaining the status quo.

I would first mention the internal legal culture (Friedman, 1975), that is, the culture of the legal community, which tends to be rather conservative and relatively unwelcoming to change.

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<sup>20</sup> It would not be accurate to conclude, on the basis of the above, that Justice Laforest's judicial career was characterized by a systematic and constant opposition to using implicit foundational principles in constitutional adjudication. On the contrary, he authored some judgments in which such principles played a central role in deciding the issues at bar. The most notable of these judgements is probably the one he authored on behalf of the Supreme Court in *Hunt v. T & N plc*, *supra*, footnote 14.

Secondly, the legal tradition that inspires federalist adjudication in Canada must be looked at as a possible explanation. Subject to the special case of Québec in the field of private law, Canada is essentially a common law jurisdiction. One could therefore partly attribute the rather technical and sometimes less than consistent nature of the Canadian law of federalism to the features traditionally associated with that legal tradition. Indeed, a stereotypical image of the common law emphasizes that tradition's casuistic approach, its corollary suspicion towards broad principles or standards, and the pivotal role of *stare decisis*. These features, which are present in Canada as in other common law jurisdictions, may certainly help in perpetuating the status quo. For example, a long-standing reluctance to affirm the existence of some meta-principles may actually serve to mask the actual existence of such principles, which, in turn, makes them more difficult to change. Denying the existence of paradigms undoubtably makes paradigm shifts more difficult to operate. Moreover, the *stare decisis* doctrine, which plays an important role in ensuring the law's coherence in common law jurisdictions, has indeed a stabilizing effect on that law, but may at the same time impede change that is long overdue.

That being said, while all of these traditional characteristics of the common law may still play a role in Canadian constitutional law, they certainly do not have today the same impact that they have had in the past. For characteristics perceived as intangible also evolve over time. As a result, the common law tradition is much more complex than the clichés it has given rise to (Glenn, 2000: 205-250). This is why what may be more likely to have an inhibiting effect on the evolution of the Canadian law of federalism is not the common law itself, which has more often than not proven to be flexible and open to change, but rather the resilience of a certain traditional —and archaic— *image* of the said common law.

The third factor, and possibly the most important one, that may explain the perpetuation of the formalistic-legalistic approach in the Canadian law of federalism is to be found in the vested political interests of federal actors themselves. It might indeed very well be that both provinces and the federal government prefer to keep the law of federalism as it is, since the formalistic-legalistic approach that inspires it provides for a level of predictability that, all things considered, is relatively acceptable. For provincial governments and «provincialist» scholars, while far from being entirely satisfying, such formalistic legalism is perceived as providing safeguards against abrupt changes in the law. This,

in turn, might create the illusion that provincial areas of jurisdiction are really «exclusive». As for the federal government and its «centralist» supporters, that approach has proven to be extremely expedient given the Supreme Court's overall tendency to support the expansion of federal jurisdiction in the past decades. Ultimately, this points to a most important variable in the shaping of political actors' attitudes towards the evolution of federal systems, that is, their primary identification with a given state or sub-state polity, and the nationalism or regionalism that may flow from it.

### *A case study*

I shall critically examine in this section the dominant legal approach to the federal spending power in Canada. More specifically, it will be argued that the formalistic «legicentricism» of the Canadian law of federalism prevents that law from fully appreciating the intrinsically regulatory nature of several governmental contractual endeavours which may sometimes undermine the very federal structure of the state. It will moreover be argued that countering such a tendency may require a reflection on the fundamental values and principles underlying federalism as a *legal* concept.

As a matter of principle, the existence of a federation implies, amongst other things, «a formal constitutional distribution of legislative and executive authority and allocation of revenue sources between the two orders of government ensuring some areas of genuine autonomy for each order» (Watts, 1999: 7). This requires from federal actors that they behave in a way that is respectful of that division of powers. Obviously, what is «respectful» and what is not can be debated. There are indeed instances where no specific level of government is *clearly* allocated jurisdiction over a given topic. The task of the courts will then be to «clarify», through an interpretation process that is value-laden, «the» meaning of the Constitution, a meaning that is most of the times far from univocal. That kind of task may lead courts to devise highly complex, if not complicated, analytical grids that will often fall into the traps of formalism and byzantinism. Despite my previous critique of the Supreme Court of Canada's record in that respect, intellectual honesty compels me to say that its record is no worse than that of its counterparts in several federations.

A second type of question raised by this basic, almost trite, idea that federal actors must respect the division of powers, relates to the manner in which they interact with each other and, most importantly, the means

by which they interact. For example, we know that in some federations, such as Canada and the U.S.A., executive powers follow legislative jurisdictions, while the two are dissociated in others such as Switzerland and Germany. Although comparing the different types of institutional mechanisms that regulate the interaction between these two branches of the state tells us something about the framework within which such an interaction takes place, it tells us very little about the *means* which are sometimes taken to reach some predetermined outcomes. This question points to the actual *reach* of constitutionally-entrenched federal divisions of powers. At what stage do they stop producing legal effects?

I want to focus here on a rather thorny issue in some federal states, that is, the issue of the spending power. It goes without saying that, as a matter of principle, governments have the legal capacity to spend their monies the way they want. In unitary states, spending cannot, by definition, pose any problem since only one government can constitutionally claim the monopoly of sovereignty over its citizens. In other words, this government has no constitutionally legitimate normative competitor. This, however, cannot conceptually be the case in federal states given their intrinsically dual structure. Even if one applies to federal states an «extreme» concept of shared sovereignty and adopts accordingly a «watertight compartments» approach to the legal interaction between the two levels of government, there may still be grey areas that simply cannot be conceived of in unitary states because of the constitutionally subordinate and unprotected status of lower governmental entities. On the contrary, in federal states, there is always a possibility of normative entanglement which may lead to normative competition. More or less tangible or virtual depending on the federation, that competition will often materialize in the daily life of the federation either as a result of disagreements between federal actors as to the interpretation to be given to the constitutional provisions governing their interactions, or as a result of the almost natural tendency of bureaucracies to expand their scope of action, albeit sometimes unduly<sup>21</sup>. When this happens, conflicts may

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<sup>21</sup> The use of the word «unduly» presupposes that there are sometimes instances of *legitimate* competition in federations, normative or otherwise. This is indeed a presupposition of this paper. In any event, in my view, the very structure of a federation renders inevitable a certain level of competition between federal actors. Thus, the important question is not whether or not competition is good or bad in a federation, but how can this competition be tamed or managed in order to prevent it from hurting core federal values.

arise, especially if one actor is perceived by the other as doing indirectly what it cannot do directly.

In Canada, this is in essence the question raised by some uses of the federal spending power. It is to be noted here that debates in that country have focused on the *federal* spending power because of what is perceived by some as a «fiscal imbalance» existing between the federal government and the provinces. The former, the argument goes, constitutionally enjoys broader taxation powers than the latter, while being allocated constitutional responsibilities that do not imply a high level of expenditures. On the contrary, provinces, being constitutionally responsible for high maintenance areas such as education and health services, do not enjoy taxation powers as broad as those of the federal government. Coupled to the fact that economic rationales practically prevent provinces from raising taxes beyond a certain threshold, this has resulted in the creation of the said «fiscal imbalance», a term that essentially seeks to designate the gap between the respective revenues and constitutional responsibilities of the two levels of government. While debates are raging in Canada as to the existence of such imbalance, or as to its characterization as «problematic»<sup>22</sup>, it clearly becomes so when one considers that the federal government sometimes uses its extra revenues not only to spend in areas which are under provincial jurisdiction but also to impose upon provinces conditions that they must respect so as to obtain much needed «federal money»<sup>23</sup>.

It is necessary at this stage to briefly canvass the state of Canadian law concerning the federal spending power, which will lead me to focus on the most contentious uses of this power.

First, no one in Canada questions the validity of expenditures made by a given level of government in areas over which it possesses constitutional jurisdiction. This means that the federal and provincial govern-

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<sup>22</sup> For example, on the basis of a report presented by its own Commission on Fiscal Imbalance (Government of Québec, 2002), the Québec government argues that such a fiscal imbalance exists while the federal government denies its existence (Dion, 2002). However, a recent study on that question made by the Conference Board of Canada (2002), an independent organization, tends to confirm the view of the government of Québec.

<sup>23</sup> Admittedly, these occurrences are less frequent today than they were two decades ago, and the actual enforcement of such conditions is uneven. That being said, the scarcity of occurrences does not change the problematic nature of any single one, since, as we shall see later, federal conditional spending in provincial areas of jurisdictions potentially breaches several core federal principles.

ments may legally and legitimately raise monies and spend them the way they want in these areas. There is no need to expand further on this hypothesis. It is at another stage that the situation becomes less clear. Contrary, for example, to Australia where a provision of the Constitution unquestionably vests the federal government with the right to spend in federal as well as in state jurisdictions<sup>24</sup>, the Canadian Constitution can hardly be characterized as «unquestionably» allocating similar powers to the federal government. There is indeed no provision that expressly or clearly authorizes the Canadian parliament and government to grant financial assistance to any province «on such terms and conditions» as they think fit. Actually, the problem is not that the federal government spends; it is *where* and *how* it spends. We have seen in that regard that the federal government may without problem spend in areas which are under its constitutional jurisdiction. However, does the Canadian Constitution allow that government to spend monies in areas which are not under it? This is where the *how* overlaps with the *where*. Three main situations may occur when the federal government decides to spend in such areas. First, the federal government may grant money directly to individuals in the context of programmes established to achieve objectives that can reasonably be linked to provincial areas of jurisdiction. Such would be the case of federal scholarships to students. Secondly, the federal government may unconditionally grant monies to provinces to help them fulfill their constitutional responsibilities, mainly through a constitutionally-entrenched mechanism called «equalization payments». This is a common occurrence in federal-provincial relations in Canada. Thirdly, the federal government may grant monies to provinces, often through «cost-sharing agreements», on the condition that the programmes that they set up while exercising their constitutional powers meet a certain number of criteria. This is by far the most contentious question, and scholars have given it very different answers. For their part, courts have not really provided a conclusive and binding opinion on the issue<sup>25</sup>.

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<sup>24</sup> Section 96 of the Commonwealth of Australia Constitution Act 1900 provides that «[d]uring a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit».

<sup>25</sup> The clearest case dealing with this issue comes from the Alberta Court of Appeal, where the federal power to impose conditions upon provinces receiving monies from the federal government in areas under the latter's jurisdiction was upheld in the ratio of the ruling: *Winterhaven Stables v. Canada (A.G.)*, (1986) 29 D.L.R. (4<sup>th</sup>) 394 (leave to appeal

Legal scholars have historically been divided on the question of the constitutionality of the «federal spending power». However, a majority of them opine in favour of it<sup>26</sup>. They infer this power from the explicit powers granted to the federal Parliament to levy taxes [s. 91(3)]<sup>27</sup>, to legislate in relation to public debt and property [s. 91 (1A)]<sup>28</sup>, to create the Consolidated Revenue Fund (s. 102)<sup>29</sup>, or to appropriate federal funds (s. 106)<sup>30</sup>. The proponents of an unfettered federal spending power derive the following reasoning from the explicit allocation of these powers to the federal Parliament: since Parliament was given the constitutional power to raise taxes (s. 91(3)) so as to pay expenses related to public debt and property (s. 91 (1A)) with monies drawn from the Consolidated Revenue Fund (s. 102) and appropriated through so-called «appropriation acts» (s. 106), this, without any explicit distinction between the government acting in its public capacity and the government

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refused by the Supreme Court of Canada). This refusal to grant leave is not enough, in my view, to say that the law is really «settled» on that matter. However, it is probably fair to say that the Supreme Court of Canada seems inclined to share a similar view. It did opine in that direction, albeit in obiter: *YMHA Jewish Community Center v. Brown*, [1989] 1 R.C.S. 1532. The clearest sign that the Supreme Court might indeed find in favour of an unfettered federal spending power is probably to be found in *Reference Re Canada Assistance Plan*, [1991] 2 S.C.R. 525. However, once again, the ratio is not directly concerned with this issue. Other cases have also indirectly addressed the issue, but none is conclusive. Even more important is that the Supreme Court of Canada has never fully addressed in any ruling the arguments that can potentially be made in support, or against, an absolutely unfettered federal spending power. Interestingly, no province has ever mounted a full frontal judicial challenge to the federal spending power.

<sup>26</sup> To name a few: Hogg, 2002; Chevrette, 1988; Driedger, 1981; LaForest, 1980-81. Scott, 1955. For authors who have recently questioned the constitutionality of that power, see: Petter, 1989; Yudim, 2002.

<sup>27</sup> Section 91 (3) refers to «the raising of money by any mode or system of taxation».

<sup>28</sup> Section 91 (1A) speaks of «the public debt and property».

<sup>29</sup> Section 102 reads as follows: «All duties and Revenues over which the respective legislatures of Canada, Nova Scotia, and New Brunswick before and at the union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective legislatures of the provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided».

<sup>30</sup> Section 106 reads as follows: «Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the parliament of Canada».

acting as a mere legal entity, it follows that it does possess the unfettered power to spend its money the way it wants, notably through «gifts» to which it can attach any condition it wants. There are obviously further subtleties to this line of argument, but suffice it to remember that defenses of an unfettered federal spending power essentially rest upon the federal government's proprietary authority and the federal Parliament's legislative authority.

What is especially interesting about this reasoning is that the federal government is essentially characterized as a *private* holder of the monies collected through taxes. This «de-publicization» somehow renders unproblematic the authority under which it spends these monies, be it the royal prerogative, an appropriation statute, or a contract. One of the reasons that has been suggested for reaching that conclusion is that it is impossible to distinguish between monies collected by the government through taxes, that is, monies collected by the government acting *qua* government, and monies collected by the government acting as any other private legal entity would (for example, profits derived from rents in buildings belonging to the government). While it is indeed difficult to ascertain the exact purpose for which monies were *collected*, it might however be easier to identify the purpose for which they are *used*. And when the federal government grants monies to provinces, through administrative agreements passed between them, under the condition that the provinces will comply with a certain number of substantive obligations in the delivery of services which, from a constitutional law standpoint, fall under *their* jurisdiction, the purpose of the federal government in using the monies collected through taxes or otherwise is crystal clear: that purpose is to *regulate* the delivery of services, which is one way amongst others to implement a specific government policy. The question then becomes whether or not the federal division of powers applies to that form of public «regulation by contract» (Daintith, 1979). The classical doctrinal answer to that question is negative. For instance, in spite of his own admission that discrepancies in bargaining power between the federal government and the provinces may raise doubts as to the «voluntary» nature of the latter's acceptance of the terms and conditions of the agreement under which they receive the funds, Dean Peter Hogg (2002: 166) nevertheless relies as follows on the traditional and highly formalistic distinction between legislation and contract as means to create legal obligations:

«It seems to me that the better view of the law is that the federal Parliament may spend or lend its funds to any govern-

ment or institution or individual it chooses, for any purpose it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits of legislative power, and spending or lending or contracting, which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, *because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects*». (My italics)

Firstly, from a technical standpoint, it is far from clear that such a narrow interpretation of the scope of the federal division of powers and such a narrow focus on «legislation» are warranted by the terms used in section 91 of the Constitution Act, 1867. Indeed, that section speaks both of the federal Parliament's «powers to make laws» and of matters under its «exclusive legislative authority». With respect, it indeed seems a bit far fetched to draw from these mere references to «laws» and «legislative authority» the conclusion that they necessarily preclude the application of section 91 to the federal government's contractual activities, especially given the fact that it was decided long ago that the division of powers applies to prerogative and executive powers as well as to legislative ones<sup>31</sup>. Allocating a constitutional jurisdiction over a certain number of matters—which is what sections 91 and 92 purport to do—is not the same thing as specifying the exact means by which that authority is to be carried out or exercised. And in Canada, the allocation of constitutional jurisdictions is based on topics, and not on the means or instruments used to carry out policies concerning these topics. Moreover, it is arguable that an overly narrow interpretation of the words «laws» and «legislative authority», which allows one level of government to do indirectly what it could not do directly under the Constitution defeats the constitutional principle of constitutionalism.

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<sup>31</sup> *Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick*, [1892] A.C. 437 (J.C.P.C.).

Secondly, and more importantly, Hogg's quotation is interesting because it seems to rely on the ontological assumption that the means chosen necessarily dictate the purpose of the action: because spending, lending, and contracting are, *by definition*, not used to achieve public goals, they simply cannot be used for the purpose of exercising «any peculiarly governmental authority». In other words, this idea is a non-starter<sup>32</sup>. The problem with that dichotomy is that it blindly applies to state action a model based on private law presuppositions, which obscure the peculiarities of state action<sup>33</sup>. The resilience of that model, at least two decades after the emergence in common law jurisdictions of a critical theory of public law which would finally conceive of the state as the presence-that-is rather than as some absence-that-should-be (Prosser, 1982), is quite fascinating and says a lot about the efficiency and resilience of formalistic approaches to the law. A further problem of the dichotomy is that, in addition to obscuring the specificities of state action in general, it ignores the peculiarities of state action in federal countries

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<sup>32</sup> Interestingly, Hogg quotes a case of the Exchequer Court, where it had been peremptorily declared that «Legislation and contract are entirely different methods of creating rights and liabilities and it is essential to keep them distinct». See: *AGBC v. Esquimalt & Nanaimo Railway Co.*, [1950] A.C. 87, at 110.

<sup>33</sup> A further interesting paradox is worth noting with respect to the distinction between legislation and contract. In the case law concerning s. 32 of the Canadian Charter of Rights and Freedoms, which defines the scope of application of that other part of the Constitution, the Supreme Court of Canada has construed the mention that the Charter «applies to the Parliament and government of Canada in respect of all matters within the authority of Parliament (...)», and to «the legislatures and government of each province in respect of all matters within the authority of the legislature of each province» as referring to «governmental action» at large, whatever the means chosen for implementing a given policy. This interpretation has the effect of preventing a legislature from doing indirectly, for example by contract, what it cannot do directly, that is, abridging the rights and freedoms entrenched in the Charter. One could argue that the explicit reference to «government» in section 32 allows for that broader interpretation and that, absent a similar reference in section 91 or section 92, a narrow interpretation of «legislation» and «legislative authority» is warranted. However, this would not be entirely convincing since, as was mentioned earlier, executive powers are divided along the lines applying to legislative powers. As a result, when it can be said that these executive powers are exercised by the «government» —and it is what generally happens—, it becomes harder to sustain an interpretation that would exclude at the outset any possible application of the division of powers to governmental contracts if it can be demonstrated that, in pith and substance, these contracts serve the purpose of allowing one party who is in a favourable position to regulate, for reasons related to public policy, the behaviour of one party acting itself in a governmental capacity.

in particular. It is indeed quite striking to see how Professor Hogg ends up trivializing federalist concerns when he analogizes the withholding of monies when provinces refuse to comply with contractual conditions that the federal government seeks to impose upon them in areas that constitutionally fall under their jurisdiction, to situations involving similar strategies in contexts of family allowances or business contracts. For there is a significant qualitative difference between withholding money until private institutions or individual citizens comply with pre-determined conditions, and doing the same with provincial governments purporting to act not only within their areas of jurisdiction but also as federal actors, the status of which is constitutionally entrenched. The interests involved in these two situations are simply not the same; neither is the scale of impact on federalism. And it is worth repeating Hogg's formulation here: «(...) because in those functions the government is not purporting to exercise any peculiarly governmental authority over its *subjects*.» (Italics are mine) One could precisely argue the opposite: when the federal government seeks to impose conditions upon provincial governments which, due to their insufficient revenues, desperately need money to carry out public policies that fall under their jurisdiction and that their residents forcefully claim, it is actually using its dominant position to coerce them to legislate or to act in a direction that they might not have taken otherwise<sup>34</sup>. In such a context, an obligation that superficially seems to have been voluntarily accepted results in fact from a situation of pure coercion (Maziade, 1995), the economic origins of which should not necessarily make it ungraspable from a legal standpoint<sup>35</sup>. Nor does the fact that here is no «legal» sanction, in the strictest positivist sense of this word, attached to a breach of a condition making such a situation ontologically and epistemologically impossible to grasp from a legal standpoint. In that sense, the «law as compliance» model of normativity is probably much more helpful than the traditional «law as sanction» model in making sense of contemporary evolutions of constitutional normativity<sup>36</sup>. At the very least, less

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<sup>34</sup> The argument that, in contract law, a dominant party may impose standard conditions to a less advantaged one obscures the fact that no compelling constitutional interest is at stake in such a private relationship.

<sup>35</sup> There are indeed areas of the law where grave instances of economic imbalance that result in an abuse by one party of its dominant position are justiciable.

<sup>36</sup> «Compliance theories» are mostly relied upon by public international law and international relations scholars. See, *inter alia*: Kingsbury, 1998; Slaughter, Tutumello &

obsessed with the form norms take than the «law as sanction» model, the «law as compliance» model presents the advantage of allowing interpreters to take into account a greater number of variables that are relevant to the concrete implementation and operation of legal norms. In any event, by so coercing its provincial counterparts, the federal government somehow transforms them into its subjects, to use the word coined by Hogg, this, contrary to at least three basic interrelated principles that, in my view, are consubstantial to any federal structure: the loyalty principle, the equality principle, and the autonomy principle. I will first deal with those, after which I shall briefly investigate into the notion of «condition» since it is far from clear that every federal «requirement» imposes upon provinces genuinely regulatory conditions.

I have now reached the stage where the scope of this paper most evidently expands beyond the borders of the Canadian federation. Indeed, it is time to identify, on a tentative basis, some core elements of a legal theory of federalism. My first assumption is that, while the legal principles identified in that process as necessarily underlying federalism are subject to debate, they could nevertheless potentially play a very useful role in the adjudication of concrete situations about which federal or quasi-federal constitutions are silent or ambiguous. My second and most fundamental assumption is that, as a political regime, federalism is not neutral.

As Ronald Watts (1999: 6) puts it, «[f]ederalism is basically not a descriptive but a normative term and refers to the advocacy of multi-tiered government combining elements of shared rules and regional self rule. It is based on the presumed value and validity of combining unity and diversity and of accommodating, preserving and promoting distinct identities within a larger political union. The essence of federalism as a normative principle is the perpetuation of both union and non-centralization at the same time».

To use a Fullerian expression, there is, I think, something like an «internal morality» to this regime, an internal morality that may help

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Wood, 1998. While these scholars obviously attempt to make sense of public international law's «soft» normativity, it is to be noted that «soft» law grows in importance in domestic law as well, that is, even within the apparently «hard» framework provided for by the nation-state. Such is especially the case in the field of constitutional law. At the very least, reflecting on the relevance of «law as compliance» models in the field of constitutional law represents an interesting line of inquiry...

maintain the federal structure's integrity while preventing federal actors from adopting fundamentalist attitudes. Once its contours delineated, reference could be made to that internal morality in order to protect the interests of federal actors *qua* constitutionally recognized institutional actors rather than the interests of the ephemeral governments temporarily responsible for the fate of these institutional actors. But that «internal morality» should not to be considered solely from the standpoint of philosophy or political science. It should as well be considered from the standpoint of law, which raises questions related to the selection, the juridification, and the concrete implementation of certain specific federal «principles» in the context of federative adjudication.

In essence, the selection, from a legal standpoint, of the foundational normative principles implied by federalism proceeds from the following inquiry: *once a federation exists, and assuming that the federal system in place is not likely to be abolished, what are the minimum requirements that must be constantly met so as to preserve a constitutional structure and a dynamic that are conceived of, and designed, as federal?* My endeavour here is to be distinguished from others where the line of inquiry focuses on the criteria from which to evaluate the success or failure of federalism, or on the merits of federalism as a structure designed to achieve certain values or to fulfill certain goals. Richard Simeon's (1983) seminal article on the «criteria for choice» in federal systems illustrates that kind of approach. Simeon identifies in this article three sets of criteria on the basis of which federal systems can be evaluated. According to him, federalism can be assessed from the standpoint of the community of identification of the different «federated» groups, from the perspective of democratic theory, and under the angle of functional effectiveness. These criteria are undoubtedly appropriate in order to reflect on what is deemed to be the *mission* of federal systems, something that necessarily refers to the objectives that federations are supposed to *achieve*, be they political, social or economical. But a legal theory of federalism does not purport to assess federal systems in light of such *external* objectives; it merely purports to identify some core legal principles that must constantly be present so that these systems, or the dynamic presiding over relations between federal actors, remain truly federal. As well, it seeks to ensure that these principles be operationalized in constitutional adjudication, and to reflect on how they can be.

It is to be noted in passing that, while the embryonic legal theory of federalism that is proposed in this paper focuses on the relationships between federal actors in a state context, one should not discard outright

the hypothesis that such a theory could also be useful for the purposes of understanding and regulating relationships that take place in *non-state* contexts. Indeed, this theory could help make sense of, and adjudicate upon, relationships that, although embodying a certain form of «alliance», cannot be characterized as falling under a pre-existing legal category such as «contract», or «corporation». A potential example of such relationships could be found in the webs of contracts that constitute corporate networks, and which, although they involve particular «contracts» or «corporations», represent much more than that when they are envisaged globally. These networks are in fact alliances that are concluded for a certain period of time and that impose some basic explicit or implicit obligations upon their participants. However, the identity of such alliances cannot be subsumed under any existing legal category. This hypothesis obviously implies a prior extension of the scope of application of the concept of «federalism» to non-state entities. I will just say in that regard that such an extension seems plausible both theoretically and empirically.

That being said, it would be ludicrous to pretend that there is absolutely no connection or «affinity» (Wittgenstein, 1961: 147) between these legal principles and the socio-political or philosophical values that may be relied upon in order to assess whether or not a federal system has «succeeded». For example, being first and foremost a philosophical concept which has been given several hundred meanings over the past millennia, it is quite clear that «equality» is far from having a strictly legal meaning. Bearing that in mind, a legal theory of federalism would merely purport to extract the legal potentialities of such a concept, an endeavour which, admittedly, can in no way exhaust the philosophical meanings of that concept. But much more importantly, the actual implementation of such core legal values would likely prevent federal actors from undermining the federal nature of a jurisdiction by unduly emphasizing one of the objectives identified by Simeon at the expense of the others. For instance, one could give so much weight to functionalist concerns in his or her interpretation of federalism that other equally legitimate concerns related to community or democracy would be obscured or neglected. By circumscribing a discursive interval of acceptable federalist legal discourse, and by identifying core legal principles to be used in the policing of this discourse, a legal theory of federalism would provide checks on abusive «objectives-based» arguments, that is, arguments that tend to trump fundamental federal principles for purely ideological purposes, albeit legitimate or popular ones. For example, that it might seem «appropriate» that a jurisdiction constitutionally allocated to the federated enti-

ties be transferred, through judicial interpretation, to the federal government because one of these federated entities does not legislate in accordance with the wishes of the national majority, although its legislative policies reflect the wishes of a local majority, is not *alone* a reason to effect that jurisdictional transfer. Such a transfer could only be effectuated if other valid *federal* reasons mandate it. As a result, my hypothesis is that without systematically dictating specific outcomes<sup>37</sup>, reliance on a legal theory of federalism for adjudicative purposes would very likely impose upon federal actors the duty to provide not only a specific justification for their actions but also a valid federal one, that justification being examined from the standpoint of the theory of federalism. The theory could obviously play a significant role in cases where a court is being asked to construe an ambiguous constitutional provision, a constitutional provision that grants a discretionary power to a federal actor, or even a constitutional silence, assuming here that «[t]he meaning of silence can be ascertained on the basis of both the global and the immediate circumstances in which the silence takes place» (Kurzon, 1994: 297). In that context, the best legal interpretation would be one that satisfies to the highest possible extent all or most of the «core federal legal principles» relevant in the case at bar. Conversely, any interpretation too easily allowing for the trumping of any relevant principle in that context would be viewed with suspicion. It is thus clear that the legal theory of federalism, the contours of which I am outlining here, is first and foremost an interpretive theory centered around a set of core principles deemed consubstantial to federalism.

Such a fundamental reflection transcends specific legal traditions, like the civilian and the common law ones, since it is inspired by a questioning on the meaning of «federalism» itself, rather than by an empirical examination of specific federal regimes or practices. As such, a serious reflection on a legal theory of federalism would not only benefit Canada, but other federations and «complex states» as well. In that respect, fears as to the uniformization of federalism through such a theory seem misguided since formal and informal constraints that are peculiar to each jurisdiction would inform the judicial interpretation of the legal principles identified as «core» federal ones. But while these empirical peculiarities may very well inform the judicial reflection on the actu-

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<sup>37</sup> Indeed, my endeavour here is to identify *principles*, in a Dworkinian sense (Dworkin, 1977), rather than *rules* strictly speaking.

al implementation of these principles, they should not play any determining role for the purpose of identifying them. Let me give an example. Assuming for the sake of the discussion that federal loyalty is characterized as stemming from the very nature of federalism and is therefore recognized as one of the basic principles underlying *any* federal structure<sup>38</sup>, its concrete legal implementation could nevertheless vary depending on the federations involved. So could the level of juridification of the principle. Indeed, judges and political actors would approach that principle through the lens of their own preconceptions informed by the political and legal cultures in which they have evolved, and the specific circumstances of their federation. However, reliance on such a normative principle would enable them to distance themselves from the dictates of these preconceptions and to provide new meanings, hopefully more in tune with the core legal values of federalism. Assuming that interpretation is a value-laden process and that choices made in the context of federative disputes and concerning the legal characterization of issues raised in making these disputes are no less value-laden, informed as they are by preconceptions as to the nature and the objectives of the federal regime at stake, and as to how it should function, reliance on normative principles susceptible to legal sanction would probably reduce the incidence of arbitrariness in making these choices. Here, one can easily trace back the influence of Hans Georg Gadamer's hermeneutics on my understanding of legal interpretation (Gadamer, 1996).

A further point needs to be made. It is of the utmost importance to note that I am *not* advocating here inconsiderate «legal transplants», a concept that designates the process by which a legal «rule»<sup>39</sup> is moved «from one country to another, or from one people to another» (Watson, 1993: 21). Indeed, the logic inspiring such transplants is most often superficial. To caricature a little bit, it proceeds from a belief that «if it works there, it might work here as well, so let's import it.» In the case of federal loyalty, for example, a «legal transplant» logic would lead one to import that principle into his or her own domestic law not only because that principle is, in and of itself, inspiring and interesting, but first and

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<sup>38</sup> The German Constitutional Court has reached the conclusion that the principle of federal loyalty («Bundestreue»), which is not expressly provided for anywhere in the Basic Law, stemmed from the very federal nature of the German state.

<sup>39</sup> What a legal rule is for the purpose of examining the manner in which these transplants take place is susceptible of various interpretations. See: Legrand, 2001: 57.

foremost because it has proven to be useful in the «exporting» jurisdiction and has yielded some desired results. The transplant is then operated not in the *hope* that the same results could be obtained in the «importing» jurisdiction, but on the *assumption* that they will be obtained. Such epistemically naïve borrowing, which completely obscures the cultural content of the law, is definitely not what I am advocating.

That being said, how can we circumscribe what participates in federalism's legalized «internal morality»? Given the limited scope of this paper, I will just say for now that this inquiry can intuitively be launched by simply reflecting on the etymology of the word «federalism». Etymology may indeed provide us with a certain number of useful indications as to what may be found at the core of the federal idea.

Federalism comes from the latin word "foedus", which refers to the concept of «alliance». From this deceptively simple starting point, I think that it would be fair to hypothesize that a federal alliance necessarily implies a minimum level, first, of *trust* between the parties (Weinstock, 1999 & 2000), second, of *equality* between them, third of autonomy; and fourth, of *transparency, flexibility, proximity, and efficiency* in the functioning of the alliance, elements that point, on the one hand, to the concept of *subsidiarity* and, on the other hand, to the concept of *federal arbitration*. Altogether, these requirements, the principles that may be drawn from them, and possibly some ontologically similar requirements, are likely to ensure the stability of the federation, and, hopefully, to provide the law of federalism with rationales on the basis of which actual cases can be adjudicated.

The requirement of trust implies the acknowledgment of some degree of federal loyalty, which should be roughly understood as imposing a negative duty of self-restraint when a federal actor's actions are likely to unduly (or disproportionately) affect the others, a positive duty to act in good faith while legitimately protecting one's own interests, and a fidelity to the federal principle, which seeks to emphasize the importance of *philia* in a federation, and the corollary existence of a federal common good that should transcend the federated units' local interests. Thus, *federal loyalty* is one of the core principles of my tentative legal theory of federalism.

The requirement of equality refers to the equality of status of federal actors. One level of government may have been allocated jurisdictions that are, from a political, economic, or social standpoint, more important than those allocated to the other level of government, but, in terms of constitutional status, these two levels are equal. However, equal-

ity as I understand it does not impose any *absolute* requirement of identical constitutional treatment which, in any event, would run counter the *fact* of diversity that is present in every federation, at least to some extent, and that each federation, by being structured as such, values, once again to a certain extent. For example, equality of status would not be breached if the immediate beneficiaries of a given measure are, as a result of that measure, prevented from losing ground within the federation, and if the position of the non-beneficiaries of that measure is merely not improved as a result of their incapacity to claim for themselves a similar benefit (Ossipow, 1998: 132). Moreover, and most importantly, the requirement of equality implies that each federal actor is *concretely* able to exercise the relative autonomy that it enjoys under the Constitution, that it is not subjected to strategies that purport to, or have the effect of, subordinating it to the other level of government, and that it is able to maintain its legitimacy by not being subjected to an illegitimate competition from other federal actors. From this we can gather that *equality* and *autonomy* are principles situated at the core of the federal idea. Ultimately, they both imply an acknowledgement of the relative contractarian dynamics of federalism, and this, even if the federation was not initially conceived of as a compact or a contract (Friedrich, 1968: 8). The argument here is that, as a matter of necessity, any federation is either established or perpetuated through a web of agreements that are contractarian in nature. It is commonly stated that federations result from processes of aggregation, where more or less independent entities congregate to create a new one, or of disaggregation, where one single entity gives rise to several others which interact in a looser framework. In the former case, the contractarian dynamic leading to federalism is more obvious than in the latter, since, at its inception, federalism implies the meeting of «collective» minds that represents the essence of a contract. The situation is less clear in the case of disaggregative processes, as the impulse towards disaggregation may come from the central government as well as from sub-state entities that want to change their status within the global polity. There are also cases where the constitution that is alleged to embody a «federal contract» shows no obvious sign of such a contractarian dimension, and this, even if there is historical evidence that, at the very least, some parties to that alleged contract initially believed, and have held on to that belief, that they were to some extent parties to a contract. I have argued elsewhere that constitutional interpretation should at the very least acknowledge the existence of conflicting memories about the nature and aspirations of federations (Gau-

dreault-DesBiens, 1999). But whether evidence is available as to the presence of contractarian rationales at the origins of a federation is immaterial for the sake of my discussion. Indeed, whether conceiving of the federation as a contract was initially contemplated, or if such a dynamic existed at the origins of the federation, a contractarian dynamic is inherent to any federation, since formal and informal agreements passed between all governments, whatever their level, inform and sustain the life of that federation. While a federation cannot be reduced to a mere contract between federal actors, and accordingly has to be viewed as representing more than the sum of its parts, that contractarian dynamic is so pervasive that it cannot be ignored from a legal standpoint. And need I say that acknowledging that dynamic might entail significant legal consequences, for example, in the treatment reserved to federal actors' legitimate expectations. This seems especially true if we consider that contracts are also a method of allocating risks. As such, a federal constitution can be conceived of as a structure the purpose of which is to ensure that the political and financial risks associated to governance constantly remain within reasonable bounds. So, any interpretation of that constitution which, absent a clear and unambiguous provision, would implicitly or explicitly condone the imposition upon a given level of government of what can be characterized as an unreasonable burden of risks (envisaged in terms of externalities, liabilities, etc.) could be characterized as problematic.

That being said, as mentioned, the requirements of *efficiency, transparency, and flexibility* imply a reflection on subsidiarity in a federal context, on the one hand, and on federal arbitration, on the other. I will not purport to define what subsidiarity means since others have done so in various contexts, be it in the European one (Bermann, 1994) or in the Canadian one (Hogg, 1993). I shall simply content myself with quoting Ossipow (1998: 127) who summarizes rather neatly the main thrust of that principle, and its links to other principles:

«Le principe de subsidiarité n'est pas univoque dans la désignation du niveau de décision. Il indique un niveau souhaitable (le niveau le plus bas possible), défendable en termes du principe de dignité politique et d'autonomie. Mais il incorpore également une clause prudentielle visant à la sécurité systémique: au cas où le niveau théoriquement optimal se révélerait incapable de réaliser une tâche, c'est à un autre niveau de prendre en charge cette tâche».

To the extent that subsidiarity is linked, as Ossipow points out, to the principle of autonomy, and to the extent that it serves the purpose of maintaining the «systemic security» of the federation, thereby acting as a sort of relatively indeterminate conflict rule, it is more appropriate, I believe, to conceive of subsidiary as a procedural rule designed to support the realization of the principle of autonomy rather than as a core federal principle in its own right.

As far as the principle of federal arbitration is concerned, I will merely say that it requires that all intergovernmental disputes *concretely* affecting the federal division of powers and governmental *actions* potentially threatening the equilibrium of the federation be susceptible of adjudication by an independent and impartial third party, most likely a judicial authority. This necessarily implies that some disputes of the sort mentioned above will be «juridified», and that courts may be forced to rule on their justiciability. Sooner or later, courts in every federation indeed have, for better or for worse, to enter the fray, which does not imply, however, that other constitutional actors bear no responsibility in enforcing the constitution. When and how they enter the fray may vary from federation to federation, but there always comes a point where they cannot escape ruling on cases of fundamental importance for the federation.

In Canada, some commentators have opposed the judicial arbitration of disputes about the division of powers on the basis that such disputes are better resolved through intergovernmental negotiations the result of which is ultimately assessed by the electorate (Weiler, 1974). Others, while challenging the very existence of a constitutional basis for the federal spending power, have nevertheless opined that debates involving the use of that power are better resolved in the political realm (Petter, 1989). It is probably true that most disputes of that kind are better resolved without judicial interference. For example, assuming, for the sake of the discussion, the existence in Canada of a fiscal imbalance between the two levels of government, the debate about what to do with the federal government's surpluses is something that cannot properly be resolved by a court of law. Should monies be transferred from the federal government directly to the provinces? Should tax points be transferred instead? Or should the Constitution be amended so as to ensure a more equitable balance? These are all solutions that are beyond the powers of any court.

Undeniably, some judicial deference in federative disputes is commendable. But that some, if not most, of these disputes are by nature

beyond the judiciary's reach does not mean that every such dispute is, especially when it raises fundamental questions concerning the nature, evolution, and preservation of federalism. The issue at stake may indeed have attained a degree of specificity sufficient enough so as to allow a court to meaningfully adjudicate upon it. And for reasons mentioned above, I believe that federal conditional spending in provincial areas of jurisdiction, when the conditions involved may be equated to a form of regulation, meets that description. Moreover, it is to be noted that any argument to the effect that intergovernmental disputes are always better resolved through the operation of the democratic process fails to acknowledge that the global federal polity and the sub-communities composing the federation do not necessarily express their «will» on the same issues. For instance, unless some form of national referendum is held, Canadian voters are not normally able to express a choice between the potentially divergent positions taken by the two levels of government for the simple reason that the stakes at both levels are different. One also has to consider that in regular elections, citizens rarely support political parties for a single reason. As such, their «will» is not always easy to decipher. Indeed, «popular will» is rarely unambiguous. For example, nothing prevents the electorate of a province to opt at the provincial level for a staunchly decentralist party and to support a rather centralist one at the federal level. Thus, the inescapable electoral parallelism that is present in all federal systems, and which often results in contradictory stances on the part of the electorate, somehow prevents a real democratic monitoring of some fundamental issues in the life of a federation. In addition to that, it must be borne in mind that national parties which are active on the federal scene rarely tend to campaign on federalism-related issues. All of these factors are therefore likely to perpetuate the status quo in favour of dominant federal actors. That is why a judicial intervention might, in some cases, have the effect of reframing political debates so as to ensure that core federal principles are not unduly trampled. Furthermore, while legitimate, concerns about an «over-juridification» of intergovernmental disputes following a judicial recognition of the legal and justiciable character of a well-circumscribed set of core federal principles should not obscure the fact that federal actors also practice «realpolitik». For this reason, it is fair to hypothesize that they would probably refrain from systematically juridifying intergovernmental disputes, even if their potential constitutional challenge of another federal actor's actions would have reasonable chances of success. Finally, while it is reasonable to believe that the frequency of juridified fed-

erative disputes could slightly augment as a result of an increased judicial reliance on federalism's core legal principles, it is nonetheless arguable that the incidence of juridified disputes would still remain relatively modest. It could be argued, in a somewhat counter-intuitive manner, that the judicial intervention contemplated here could actually raise the profile of the political process and thus enhance its role. Indeed, it must be borne in mind that a large part of the judicial interventions grounded on the legal theory of federalism would take a «negative» dimension. I mean by that that these interventions would essentially purport to *prevent*, on federative grounds, a federal actor from doing something or implementing a given public policy, even if that action or policy can reasonably be defended from a socioeconomic or political standpoint. By saying «no» to that federal actor, a court would simply redirect the debate by asking that actor to redo its homework, not necessarily on the substance of the policy but rather on the means used to materialize it. And while that actor could characterize the effect of that «no» as an undue judicial intrusion, that intrusion might still entail positive consequences in view of preserving the legitimacy of the political process in the long run, as it might have the effect of engaging in the debate citizens who would normally not be seduced by the idea of having to participate in a debate about the ordaining and functioning of institutions perceived as being too abstract or remote, as fundamental as they might be. In that regard, a systematically applied policy of judicial deference with respect to federative disputes is probably not appropriate, as it might foster among citizens a culture of complacency, passivity, if not of contentment, to paraphrase J. K. Galbraith (1992). Why get involved in a public debate about institutions if courts constantly convey the message that political actors alone can frame, and take care of, it? Deference is sometimes pretty close to indifference. And judicial indifference may convey to the citizenry a polyanna-like message that «everything goes well in the best of the worlds», which is not necessarily the case. A court ruling, in appropriate situations, can serve as a much-needed electroshock for a population that tends to defer to its representatives on technical issues. But, as mentioned earlier, technical issues sometimes hide fundamental ones, and ignoring that might prove costly over time. Hence the beneficial «consciousness-raising» dimension of a well-tempered judicial interventionism, which may in turn help institutional actors and citizens alike to internalize the boundaries of acceptable federalist discourse and behaviour. For example, let us imagine that the population of a federation overwhelmingly supports a public policy that has been

adopted in the context of a process that clearly breaches the core legal principles of federalism. Let it be clear at the outset that such a support does not, or cannot, in and of itself, redeem a flawed process. Arguing to the contrary would essentially condone the systematic primacy of utilitarian or functionalist concerns in federative adjudication, a position that stands in contradiction with federalism itself. Let us further imagine that a court declares that the actions taken by the author of that policy in order to implement it are unconstitutional. Is it fair to assume that the population will necessarily remain passive and uninterested? Could it not be envisaged that it will react to that ruling, and that groups lobbying for, say, a constitutional amendment will be formed, and so on, and so forth? My point here is essentially that we cannot always assume that judicial deference sustains the political process. Quite the contrary, judicial intervention may sometimes reinvigorate that process, and redirect debates in such a way that fundamental issues will be addressed, while they would have remained hidden had the court not decided to intervene. This might sometimes lead to excruciating debates, but it is my contention that these debates about what a nation is, and under which conditions it wants to continue growing, are more profitable in the long run than playing the ostrich game. «Silence like a cancer grows», once sung Paul Simon and Art Garfunkel.

Let us now go back to the problem of the federal spending power in Canada. I have argued earlier that when it imposes conditions on provincial governments which, due to their insufficient revenues, desperately need federal money to carry out public policies that fall under their jurisdiction and that their residents forcefully claim, the federal government can be said to use its dominant position to coerce provinces into legislating in a direction that they might not have taken otherwise, this, contrary to the principles of loyalty, equality, and autonomy.

First, the federal government fails to respect the principle of federal loyalty which, at the very least, requires that a level of government does not try to do indirectly what the Constitution forbids to do directly—a concern which, in my mind, also relates to the principle of constitutionalism and to the corollary idea of a *federal rule of law*. Federal loyalty also demands that this government refrains from using tactics that are likely to undermine the equilibrium of the federation, notably by neglecting to take into account the legitimate interests and expectations of its federal partners. Second, by taking advantage of its dominant position, the federal government breaches the equality principle in that it reduces provinces to mere subordinates in areas over which they have

constitutional jurisdiction. Third, and as a matter of consequence, it breaches the autonomy principle, which posits that federated entities must have the power to *freely* decide of their policies and orientations within their own spheres of jurisdiction (Poirier, 2001: 155), subject to the imperative that they do not negatively affect their federal partners' interests and that they acknowledge, in their policy choices, the necessity of some minimum level of cooperation between each level of government. The principle of autonomy also implies that, in a federation, each level of government is presumed to act legitimately within its jurisdictional spheres, but is at the same time accountable to its electorate. It further requires that this government should not be placed, through the willful actions of the other level of government, in a position where its legitimacy could be unduly undermined. Refusing to abide by the conditions imposed by the federal government could undermine the legitimacy of the provincial governments involved since their residents would be submitted to federal taxation without receiving the services resulting from that taxation. The non-delivery of services due to a lack of funds itself caused by the undue withholding of federal monies could thus create a legitimacy problem by forcing provincial governments to assume full responsibility for decisions that cannot genuinely be characterized as having been freely taken. Even more problematic is the fact that, under the guise of the federal spending power, «national majorities [are allowed] to set priorities and to determine policy within spheres of influences allocated under the Constitution to regional majorities». (Petter, 1989: 465) I may not, as a member of a national majority, appreciate a policy that a province has implemented but, absent any unconstitutional encroachment on federal prerogatives or any unconstitutional restriction of individual rights and freedoms, I fail to see why my will should prevail over the will expressed by a majority of the residents of that province, unless, as shall be seen, the policy in question blatantly conflicts with a core federal legal principle.

A counter-argument has been raised against this view. Indeed, some federal government representatives in Canada have argued that, notwithstanding the withholding of federal monies, provinces do decide freely to offer or not some services. More specifically, it has been argued that nothing prevents them from raising their taxes or from not lowering them so as to maintain a level of revenues sufficient enough to provide an appropriate level of services. However, that claim is not entirely convincing since it fails to recognize that while the fiscal space that governments enjoy is almost unlimited in theory, subject of course to the

limits imposed by the Constitution on their respective taxation powers, it is not in practice. Indeed, although nothing constitutionally forbids provinces to impose extremely high taxes — some already do—, doing so might undermine their economic competitiveness in the long term and their capacity to create wealth. Moreover, practically forcing provinces to impose such high taxes so as to be able to offer or maintain a decent level of services might end up undermining their legitimacy vis-à-vis their residents. While a citizen can be presumed to agree, both in principle and in practice, with the sharing of resources so as to ensure that each of his or her fellow citizens has equal access to a certain number of social services of decent quality, and accepts this rationale as one of the justification for the taxes that he or she pays, it cannot be presumed that his or her altruism is unlimited. As John Rawls (1971: 281) stated in his *Theory of Justice*, we should assume «a definite limit on the strength of social and altruistic motivation. It supposes that individuals and groups put forward competing claims, and while they are willing to act justly, they are not prepared to abandon their interests. There is no need to elaborate further that this presumption does not imply that men are selfish in the ordinary sense». Undoubtedly, such limited altruism further reduces the fiscal space concretely available to any government, provincial ones included. A genuinely contextual approach to constitutional law and to constitutional adjudication in a federal system requires that these factors be taken into account when determining the appropriate judicial policy to adopt regarding actions about which the Constitution is far from unambiguous.

That being said, the federal government's argument about the provinces' capacity to levy taxes or, alternatively, not to lower them unduly, is not entirely without merit, as it emphasizes the need to pay attention to the actual facts of each case. From a lawyerly perspective, such an affirmation might seem trite, and to some extent, it undoubtedly is. But it is certainly not irrelevant to reiterate the importance of carefully drawing all the necessary consequences from the factual foundation of a case in a paper the penultimate objective of which is to advocate a greater judicial reliance, in contexts of constitutional adjudication, on a relatively abstract legal theory of federalism. For that theory seeks first and foremost to be a legal one, rather than a mere philosophical one. Reflecting on the importance of the factual background of each case in the context of a study of the federal spending power in Canada raises the question of the degree required for a condition to become a form of «regulation» susceptible of judicial adjudication. It also raises the corollary

question of the need for substantial evidence in juridified intergovernmental disputes.

As to the need for substantial evidence in juridified intergovernmental disputes, I will just say, referring once again to the Canadian debate on the federal spending power, that while the mere fact of placing provincial governments in a situation of fiscal imbalance may be said to breach fundamental federative values in the abstract, whether these governments accept or refuse the conditional grants, it does not entail that this alone is sufficient to trigger the intervention of a tribunal. As I mentioned earlier, «rebalancing» situations of fiscal imbalance is certainly not the province of the judiciary. This question more aptly belongs to the political realm. But the situation is different when the federal government uses the «proceeds» of that fiscal imbalance in view of dictating provincial decisions.

From an evidentiary standpoint, this means that in order to trigger the judicial review of a federal action of that sort, provinces would first have to demonstrate that such a reasonably significant fiscal imbalance actually exists, and that it has reached such proportions that the federal government can reasonably be said to occupy a dominant position that allows it to practically dictate its conditions to provinces that do not concretely enjoy the freedom to accept or refuse the said conditions. For if it is shown that they do enjoy such a freedom, there can be no real coercion from the federal government. While difficult, the demonstration that a fiscal imbalance exists would not be impossible to make, this, assuming that the burden of proof applicable in regard of such matters is the balance of probabilities, as it is in Canada. I emphasize here the importance of that kind of demonstration since no «core» federal legal principle prevents a province from *freely* entering into agreements with the federal government. If, as mentioned earlier, we cannot presume that contractual instruments ontologically exclude forms of regulation that are susceptible of constitutional scrutiny, neither should we presume that such instruments preclude, when used between a province and the federal government, uncoerced meetings of minds. Courts should never, solely on the basis of the legal theory of federalism, prevent the enforcement of *genuinely* contractual intergovernmental endeavours.

Assuming that such a demonstration can be made and that provinces have a prima facie case, we still have to examine the actual conditions—be they of legislative or contractual origins—that the federal government wants to impose upon them. It must indeed be determined

whether or not these conditions really constitute «regulation». That they do constitute «regulation» should not be taken for granted, for each set of conditions must be examined on the merits. Once again, I do not believe that such a determination can be made in a federal context without referring to some core federal principles, since regulation in a federal system seeks to respond to specific imperatives, some of which can be directly related to these core federal principles. At the very least, these principles may certainly inform the level of scrutiny that might be applied in view of examining the diverse uses of the federal spending power.

One of these principles, which, in my mind, ranks alongside those of loyalty, equality, autonomy, and federal arbitration, is the principle of *federal solidarity*, which can undoubtedly be viewed as stemming from the very nature of a federal alliance. It is indeed arguable that such an alliance necessarily requires from each federal actor a commitment to the principle that a certain redistribution of wealth is needed in a federation, so as to cement that federation, and to the principle that some basic services which are intrinsic to the idea of a common and meaningful federal citizenship must be available to every citizen of the federation, wherever he or she resides. That solidarity is not infinite, obviously, but acknowledging its overarching importance as a core principle of legal federalism may allow us to look differently at a federal spending power, the constitutional basis or the scope of which are not beyond doubt. Indeed, while the materialization of the principle of solidarity may take many forms, it is difficult not to ascribe the federal government a special role in its implementation. That role may be expressly mentioned in the Constitution, as it is in Canada in section 36 of the *Constitution Act, 1982*, which provides for equalization payments to poorer provinces, but it would be unduly reductionist to confine the normative impact of the principle of federal solidarity to that specific provision. In my view, that normative impact not only could, but should be felt, first, in the interpretation to be given to the principle of equality in a federal setting, and, second, in the interpretation of the concept of «regulation» in the context of a constitutional analysis of the federal spending power.

As to the principle of equality, which was defined earlier as referring to the equality of status of federal actors, it should now be refined so as to incorporate an element of interpersonal equality. As Ossipow (1998: 118) notes, to the extent that interpersonal equality requires a certain level of uniformity on the territory of a given jurisdiction, federal-

ism might be characterized as conflicting with this ideal as it allows for variations in the treatment of individuals, especially in socio-economic areas. This is where the primarily institutional focus of my legal theory of federalism shifts from the status, interests, and obligations of federal institutional actors to the basic interests, needs, and rights of the individual citizens of the federation, thereby opening the door to a form of polycentric federalism.

As a space of *philia*, it is my belief that a federation cannot tolerate *huge* discrepancies in the delivery and accessibility of basic social services, which does not mean that every discrepancy offends the principles of solidarity and equality, as redefined here. For instance, differences in the manner in which the delivery of these services is organized should not be presumed to offend these principles, the idea here being that some core social services should be *broadly* accessible, not that *specific* policies or practices should be uniformly implemented across the federation.

One way to alleviate the creation and perpetuation of unacceptable discrepancies is for the federal government to unconditionally transfer funds to provincial governments, or to directly fund individuals or organizations, even in areas of provincial jurisdiction, provided that this funding is either unconditional, or, if conditional, that it does not conflict with any specific provincial policy or norm applicable to these individuals or organizations, this obviously excluding any general norm that would purport to prevent them from accepting federal monies. Need I say that acknowledging the constitutionality of such direct federal transfers of funds to individuals or organizations in provincial areas of jurisdiction directly clashes with long-established provincial positions in Canada. However, if I am to give any meaningful interpretation to the principle of federal solidarity, I do not see how I can reach any other conclusion, especially given the fact that, as circumscribed, the federal encroachment on provincial areas of jurisdiction would be kept to a minimum, because of the kind of provincial paramountcy rule that would be embedded in the proposed analytical grid.

This still leaves us with direct federal conditional transfers of funds to provincial governments, which brings us back to the concept of «regulation». This concept, in my view, should not be construed in a manner that is likely to *systematically* frustrate federal attempts at implementing the normative ideal of federal solidarity. A solution to this apparent dilemma could be to distinguish between «rules» and «standards». That distinction could possibly play a useful role in helping courts identify the threshold beyond which their intervention in intergovernmental dis-

putes becomes more acceptable than not. Kathleen Sullivan (1992: 58-59) has defined «rules» as follows:

A legal directive is «rule»-like when it binds the decision-maker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere. A rule necessarily captures the background principle or policy incompletely and so produces errors of over- and under-inclusiveness. But the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy to the facts would produce a different result.

She goes on to say that:

A legal directive is «standard»-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules. Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time» (*ibid.*).

In other words, standards allow decisionmakers responsible for applying them a much broader margin of appreciation, and, provided that the outcome of their decision-making process substantially conforms to the background principle inspiring the standard, that outcome should be presumed to be within the «interval of acceptability» envisaged by the standard. Thus, the relation between the standard and the decision to which its application leads should be conceived of in terms of compatibility rather than in terms of strict legality.

Admittedly, this distinction between rules and standards is not clear-cut. As Sullivan once again notes, «[a] rule may be corrupted by exceptions to the point where it resembles a standard; likewise, a standard may attach such fixed weights to the multiple factors it considers that it resembles a rule» (*ibid.*: 61). It is obviously up to the courts to determine what kind of norm they are facing depending on the circumstances of each case.

My suggestion is simply that this distinction could, in the Canadian context, help them make sense of conditional federal expenditures in a manner that is respectful of at least two core *legal* principles underlying federalism, that of autonomy and that of solidarity. As I have already expounded on these principles, it will suffice to say that schemes under which the federal government imposes as «conditions» to the recipient provinces norms that can be characterized as «standards» would be less likely to be found unconstitutional than schemes imposing norms that fit the definition of «rules». Obviously criticizable, that distinction has nevertheless the merit of offering a relatively high degree of protection to the principle of autonomy, as federal diktats to provinces would be struck down, while obscuring neither the importance of the principle of solidarity nor that of the conflict rule of subsidiarity, thereby allowing a certain leeway to the federal government for the purpose of ensuring that a minimum level of services is available to every citizen of the federation, but without permitting it to regulate provincial behaviour.

This model obviously presupposes that courts would accept to adjudicate disputes triggered by potentially litigious uses of the federal spending power. Actually, the principle of federal arbitration requires in my view that they do so. The ultimate appellate court of a federation that would refuse, relying on technicalities or on a formalistic interpretive approach devoid of any reference to federalism's core principles, to tackle directly a situation where one level of government undermines, through its actions, the entire balance of the federation would simply be refusing to uphold the federal constitution of that federation, and, thus, refusing to do what it has been created for, that is, judging. This model further presupposes that the court that is ultimately responsible for discharging that duty benefits from a sufficient capital of legitimacy among all federal actors<sup>40</sup>, which brings us back to the principle of federal arbitration. Indeed, for the implementation of standards in the above-mentioned context to make any sense, an independent and impartial tribunal needs to exist and be willing to enforce the Constitution. Leaving the implementation of these standards solely to the level of government that has elaborated them is nothing else but to condone the perpetuation of the potential abuses contemplated in this paper. It is nothing but a normative abdication.

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<sup>40</sup> From a political standpoint, the mode of appointment of the judges sitting on that court will undoubtedly influence perceptions as to the legitimacy of its rulings.

### *Conclusion*

The nature of this paper warrants a dual conclusion, that is, one addressing the specific Canadian problem raised in the paper, the other addressing the broader theme of a legal theory of federalism.

On the question of the federal spending power in the Canadian context, the developments above allow me to conclude that absent a clear and conclusive jurisprudence establishing the constitutionality of federal conditional grants to provinces, and absent a clear and genuinely unambiguous constitutional provision allocating that power, it is fair to say that there can be reasonable disagreement on the constitutionality of that specific use of the federal spending power. Moreover, while our case study has shown that the arguments put forward by the proponents of the constitutionality of the federal spending power are not entirely convincing, it should be made clear that neither are those advanced by the proponents of the opposite view, that is, that this power is non-existent. First, the latter also fall into the trap of formalistic legalism as they seem to assume that the silence of the Constitution necessarily amounts to a denial of the claimed power. Second, and most importantly, while they often ground their reflection on a theory of federalism, as embryonic as it may be, they tend to adopt what I have called earlier an «extreme» view of exclusivity, which leads them to reduce an already vague federative principle to a single requirement, i.e. that the formal division of powers be conceived of as establishing watertight compartments, the watertightness of which must be preserved at all costs. Such a view, which is fundamentalist in addition to being reductionist, runs counter another core principle implied by federalism, that of solidarity. Precisely because of its «core» status, this principle should influence the constitutional apprehension of the federal spending power, and especially the manner in which it is implemented.

Beyond these technical conclusions, however, our case study has first and foremost shown that a deeper *legal* reflection on the normative principles underlying federalism could possibly change the way the federal spending power is grasped in Canadian law. It could, amongst other things, force us to reconsider our understanding of notions such as «legislation» and «regulation» for the purposes of federal adjudication. We could also be led to reconsider the way in which the distinction between the state as legislator and the state as proprietor has been applied, so as to ensure that constitutional law is sufficiently in tune with the evolution of state practices and does not rely on an outdated model of state action. But, at a

broader level, it could shed light on the relational nature of federalism as well as on the categorical constitutional imperatives of solidarity, loyalty, equality, autonomy, and federal arbitration in such a regime. It would therefore help us to make sense, in contexts of legal adjudication, of some tensions that are inherent to federative structures and dynamics.

Will this be possible in Canada? My tentative answer is a cautious «yes». Recent developments in the field of constitutional law seem to call for a return to federalism. The most important of these developments is, I think, the renewed and increased reliance by the Supreme Court of Canada on implicit constitutional principles, especially since the release of its advisory opinion in *Re Reference Secession of Quebec*<sup>41</sup>. It must indeed be remembered that the Supreme Court relied on four implicit constitutional principles to «decide» that case<sup>42</sup>, one of which was federalism, the others being democracy, the rule of law and constitutionalism, and the protection of minorities. What is especially interesting in that case is the description that the Court makes of the nature and effects of these principles. Indeed, the Court states that, as basic postulates of the Canadian constitutional order, these implicit constitutional principles «may in certain circumstances give rise to substantive legal obligations (...), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments»<sup>43</sup>. Although the Supreme Court remained deliberately vague as to the specific ways in which they could be judicially enforced, it did not exclude that possibility, far from it<sup>44</sup>.

Since the release of the Court's opinion in the *Quebec Secession Reference*, much has been written about the wisdom of relying on implicit

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<sup>41</sup> [1998] 2 S.C.R. 817 (hereinafter referred to as the «Quebec Secession Reference»). Admittedly, the Quebec Secession Reference is neither the only nor the first case to have relied on implicit constitutional principles

<sup>42</sup> Obviously, my use of the word «decide» here does not refer to the idea of a «legally binding decision» given the advisory nature of a judicial opinion issued in the context of a reference.

<sup>43</sup> *Quebec Secession Reference*, *supra*, footnote 40, par. 54

<sup>44</sup> In a recent case, *Babcock v. Canada (A.G.)*, 2002 CSC 57, July 11, 2002, the Court reiterated that «unwritten constitutional principles are capable of *limiting* government actions» (par. 54) (Italics are mine).

principles that are admittedly vague for purposes of constitutional adjudication<sup>45</sup>. However, while debates on that topic are undoubtedly important, it is not my objective here to join the ongoing conversation on it. Suffice it to say that I view rather favourably the reliance on such principles because that approach provides constitutional scholars—and, hopefully, judges as well—with an opportunity to reflect, reorganize, and, maybe, reconceptualize their notions of juridicity (when is a norm «legal»?), of justiciability, of sources (implicit and explicit), and, more generally, of constitutional normativity. I would even go as far as saying that it *compels* them to reflect on the possibly changing—and therefore dynamic—nature of constitutional normativity in Canada, which may require them to look, at least to a certain extent, at the *sein* (what is) from the standpoint of a carefully circumscribed *sollen* (what ought to be), to use Kelsenian terms.

The law of federalism undoubtedly qualifies as one of these *sein*. In my view, the mere fact that the Supreme Court has characterized the constitutional principle of federalism, along with others, as normative and susceptible of judicial sanction—as unprecise as this last possibility remains—is sufficient to compel us to reflect on the meaning that can and should be given to that principle. Moreover, what I have characterized earlier as the sorry state of the law of federalism in Canada should prompt jurists to reflect on what the (over)broad constitutional principle of federalism normatively entails, and to infuse enough meaning into it so as to avoid paradoxically unprincipled uses of that principle. But first and foremost, it should prompt jurists to look at these issues from a legal theoretical perspective rather than from the usual positivist standpoint. Such an exercise could very well provide them with useful insights concerning the (re)direction of the positive legal framework governing Canadian federalism. I thus read the *Quebec Secession Reference* as an incitement to rekindle the flame of federalism in Canadian constitutional thought, and, in a way, to prevent legalism from prevailing over federalism<sup>46</sup>.

Could that kind of reflection be useful outside of Canada? I think so. The principles that I have tentatively identified as forming the «normative core» of legal federalism—loyalty, equality, autonomy, federal

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<sup>45</sup> For example, see: Choudhry and Howse, 2000; Walters, 2001; Elliott, 2001; Newman, 2001; Cameron, 2002; Leclair, 2002.

<sup>46</sup> For my full assessment of this case, see: Gaudreault-DesBiens, 1999.

arbitration, and solidarity— are not peculiarly Canadian. They proceed instead from the very idea implied by federalism, that is, an alliance institutionalized by the creation of at least two levels of governments, the existence of which is protected by the constitution, which are equal in status, and which operate in an autonomous, coordinate, but also cooperative manner, and which, while protecting and advancing, sometimes through competition, the legitimate and diverse interests of their respective constituents, must work in view of preserving, and hopefully strengthening, their alliance<sup>47</sup>. Moreover, from these principles can be inferred a set of specific rights and obligations that can actually be adjudicated upon by courts of law. But, obviously, the direction of this judicial implementation will vary from federation to federation depending on their specific constitutional culture and on their specific political circumstances.

At a deeper level, however, legal federalism's «core» principles purport to achieve the fundamental objective that federal actors be concretely able to fully actualize their constitutional potential. Reflecting on individuals as legal subjects, philosopher Paul Ricoeur argues that each individual should ideally realize himself or herself in such a way that he

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<sup>47</sup> A distinction is traditionally operated between «coordinate federalism» and «cooperative federalism». The former conceives of federalism as a regime under which both levels of government are «sovereign» in their fields of jurisdiction and function accordingly. As such, this conception reflects a «watertight compartments» logic, with the problems that it implies (see, *supra*). On the contrary, «cooperative federalism» tends to acknowledge the inevitability of jurisdictional overlaps, and draws the conclusion that cooperation between both levels of government is not only inevitable, but necessary. Heavily concerned with functional preoccupations, this view has been criticized for unduly allowing for a quiet centralization of powers in the hands of the federal government (Croisat, 1999: 89). Moreover, cooperative federalism's emphasis on intergovernmental collaboration has also been criticized for its tendency to create situations of «joint decision trap» (Scharpf, 1988). While useful to some extent, the distinction between «coordinate» and «cooperative» federalism is deceptive, as, from an empirical as well as a normative standpoint the cooperative and coordinate dimensions are inherent to federal structures. In a complex society, jurisdictional overlaps are simply inevitable as social facts or events do not necessarily follow constitutional categories. But for federalism to be preserved, the way in which these overlaps are legally grasped must ensure that the acknowledgment of such overlaps does not lead to condone the domination of one level of government over another. Admittedly, the border between inevitable and legally acceptable overlaps, on the one hand, and instances where these overlaps reach such an extent that federalism itself is undermined, on the other hand, is thin. Hence the usefulness of a legal theory of federalism helps one draw the border in a manner that is respectful of core federal values.

or she could be characterized as a «capable subject» («sujet capable»). With this concept, Ricoeur seeks to embrace the individual who is free while being at the same time constrained and situated. This individual is able to designate himself or herself as the author of his or her life and as equally deserving of «moral respect and of recognition as a legal subject» (Ricoeur, 1995: 30). Such a concept can probably be adapted for the purpose of elaborating a theory of legal federalism, for this regime requires not only that federal actors be autonomous and equal, but that they be, as constrained and situated actors, accountable for their actions before their electorate, between themselves, but also, and most importantly, before the federal principle. William Ossipow (1998: 124) defines the concept of «autonomy» as follows: «Il y a une autonomie lorsqu'un être donné (individu ou collectivité) décide lui-même ce qu'il doit faire ou ne pas faire, lorsqu'il se soumet à une loi à laquelle il consent». That contractarian rationale explaining that citizens accept to submit themselves to the law is obviously intrinsically related to the ideas of democracy and the rule of law, which prompt citizens to conceive of themselves as the authors of the law to which they must obey (Habermas, 2000: 108). Conceiving of oneself as the author of the laws to which one must obey necessarily excludes the idea of being *subjected* by another under the guise of law, thereby transforming the former into an «incapable subject». The application of that proposition must certainly take into consideration the particular circumstances of federations, but, once that caveat is made, I believe that concerns for a genuinely «capable federal subject», and inquiries into the legal means by which this ideal can be achieved, undoubtably transcend Canadian borders. They are indeed central in any federal or quasi-federal state because they ultimately emphasize the importance for all federal actors to concretely enjoy the relative degree of autonomy that is supposedly guaranteed to them in that federal or quasi-federal state's constitution. Neglecting to reflect on the conditions under which this objective can be achieved is likely to facilitate its factual demise. This is especially true in multinational federations, where concerns for autonomy are often more acute. History shows that federations that have failed to constantly seek to genuinely protect that relative autonomy have generally experienced instability and, as this failure nurtured alienation, have sometimes been faced with secessionist threats. That a federation like Canada which, all things considered and despite my previous criticism of its law of federalism, has not fared badly overall in that regard, has faced such threats, is, alone, a sufficient reason to accept the invitation to pursue that reflection further...

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# *The Constitutional Regulation and Practical Functioning of Federalism in Germany*

Por  
Dian Schefold

## *1. Introduction*

Characterising German federalism seems a task well explained by the constitutional model. The German Basic Law gives a constitutional framework well defined, regulated and guaranteed which provides constitutions of the member States, the Länder, their participation in the forming of the will of the Federation and the execution of federal legislation. There may arise problems and conflicts in these fields, but there are judicial remedies to resolve and decide them. Therefore German federalism may seem to be quite a complicated system, but a legal system whose functioning is definitely proved. The old framework of the Holy Roman Empire of German Nation, renewed through the Congress of Vienna creating a Federal Act (1815) for a Federation of States, has been substituted by the constitutions of 1867/71, 1919 and 1949 which have developed the concept of the Federal State, thus creating a specific type of State which may serve as a model for comparative constitutional theory and law.

Nevertheless, a closer look reveals that there are many open questions. From a historical point of view, we can note lingering controversies based on the origins of the federal system as well as its characteristics from the foundation of the Empire in 1871. In a comparative analysis, we may state that every federalism has its own theory and each quite different regulations and institutions. In the actual controversies about regionalization of many states on the one hand and confederation of the European Union on the other, we have to admit that the definition and delimitation of a federal State remains a problem that can be resolved in very many different ways. Furthermore, the existence of a certain solution does not guarantee its functionality.

This situation calls for an analysis of federal systems not according to a theoretical model approach, but to confront the constitutional and legal regulation with the practical functioning in a concrete federal system and State. In that sense, I would like to present the German model characterising the separation of the spheres of Federation and Länder (2) and the distribution of competences (3), mitigated through the influence of the Länder (4), considering then the unifying tendencies (5) and instruments (6), resulting in some final remarks (7).

## *2. The separation of Federation and Länder*

It is a basic principle of German federalism that the Federation and the Länder have the character of States. The Länder, too, historically — before 1867 and, again, after the second world war before 1949— have been seen as partners of the federal system, have the character of complete States and could fulfill, in principle, all the functions of a State.

*a)* It follows from this principle that every Länder has its constitution and is competent to enact and amend it; several of the 16 constitutions (Bavaria, Bremen, Hesse, Rhenania-Palatinate, Saarland) are even older than the federal Basic Law. Therefore every Länder may choose whether and how to guarantee the fundamental rights, and to organise the system of government, the supreme organs and the administration. Certainly, the homogeneity necessary to maintain a federal system does not permit that there are absolutely contradictory solutions; a democratic State cannot be coordinated with a dictatorial one. For that reason, art. 28 BL orders a minimum of principles, institutions and rules that must be enacted in the constitutions of the Länder. These concern the principles of a republican, democratic and social State governed by the rule of law in the sense of the Basic Law (art. 28 I 1) which contains, for the Federation, nearly the same principles in art. 20.

Furthermore, there are two rules for the organisation. On one hand, at the levels of the Länder, the counties (Kreise) and the municipalities must allow for the people have to representation by a body chosen in general, direct, free, equal and secret elections (art. 28 I 2 BL), thus according to the same principles valid for the elections on federal level (art. 38 I 1 BL). In that way, these principles, especially the principle of equality, most important for the limits of electoral legislation, are valid for the Länder and the local authorities, also. Nevertheless, the Basic Law does not prescribe the electoral system, leaving the choice of which

to the legislators —that is, to the legislators having legislative power. Therefore certainly the Federation has power to enact the electoral system for the elections of the central Parliament (Bundestag). However, only the Länder decide about their electoral system, on the level of the Länder, in the counties and the municipalities. Although there is a general tendency of adopting a personalised proportional system as at federal level, there are differences in the singular Länder, and above all for the local elections. Differences of that kind could be increased, as long as the principle of equality is not violated. Moreover, the necessity of popular representation neither specifies details of the system of government—it has always been possible to order the direct election of the mayors in the municipalities, and this solution has been generalised in the last years, while, on the level of the Länder, there is normally (but not necessarily) a parliamentary system whose details, however, may differ—nor does the principle of a popular representation exclude elements of direct democracy like popular initiatives or referendums. Nevertheless solutions of this kind have been limited through judgements of several constitutional courts of the Länder in the last years.

Through prescribing a representation on the levels of Länder, counties and municipalities require that these levels exist. In that way the mentioned rule is important not only for the existence and guaranty of the Länder (cf. art. 28 III BL), but for the administrative organization, too: it orders that, in the field of local government, there are, besides the municipalities, the counties as authorities of a supra-local selfgovernment and of delegated State administration.

On the other hand, art. 28 II BL prescribes that municipalities must be guaranteed the right to regulate all local affairs in their own responsibility, within the limits specified by the laws, and that a similar right of selfgovernment shall be guaranteed to the unions of local authorities, especially the counties. Through this regulation, the principle of selfgovernment, well protected as an institutional guarantee (and like a fundamental right) by the courts jurisprudence, determines the local government.

*b)* In the framework of these limits, and respecting the further limit of the binding force of federal law as far as the Federation has legislative power, the Länder are free in the organization of their constitutional and administrative structures. It is within their power, e.g., to organize the local authorities by law which may concretise this regulation by their own statutes. For these reasons the organization of local authorities can be quite different in the different Länder, according to historical traditions, practical needs and political choices.

Stated more concretely, we observe three types of administrative organization in the single Länder:

- In the larger Länder the central administration is completed by a decentralization by means of administrative districts (Regierungsbezirke, Bezirksregierungen) who operate according to the directives of the government and the ministers of the Land. Under these districts we find the two levels of selfgovernment in the counties and municipalities.
- In the smaller Länder, the level of the districts is missing, so that the two levels of selfgovernment are directly located under the central government of the Land. This has always been the solution in Schleswig-Holstein and the Saarland; it has been adopted in the new Länder of Brandenburg, Mecklenburg, and Thüringen, with the tendency for other Länder to follow these examples in favour of a simplification of the administration.
- In the city-states of Berlin, Hamburg and Bremen, the State is at the same time county and municipality, so that we find only one level of administration, though amplified through an internal decentralization in the city and, in Bremen, through the existence of a second municipality, the city of Bremerhaven.

But this typology does not explain all the phenomena; there are numerous special solutions. Mentioning only some of the most important, it has to be said that the larger towns have always had a special position, especially uniting the functions of county and municipality (kreisfreie Stadt). The principle is always recognized, but the delimitation of these cases is different from Land to Land. On the other hand, often the larger towns are subdivided in town districts with more or less autonomy, and sometimes similar solutions are created for the case of incorporated municipalities, and again, smaller municipalities may be united in a common administration with more or less democratic control on this common level. All that depends on the intensity of the reform of local structures which has been radical in some Länder (like Rhenania-Nord/Westfalia) and more cautious in others.

c) Besides these administrations of the Länder with their counties and municipalities there is a federal administration, on the central level, but deconcentrated, too, in certain fields which I shall mention later. At present it must be present it must be emphasized that the administrations of the Länder are independent from the Federation, that they have their own character and that they are quite different from the federal administration as well as between themselves. Therefore it cannot come as a sur-

prise that the regulation of the administrative procedure is, as a principle, a power of not only the Federation for her administration, but of each Land, although these laws are, in practice, coordinated. But it follows that, for administrative activities, the notion of public authority (Behörde) is essential: it always depends on the authority who has acted which law may be applied. «Public authority in the sense of this law is every office that fulfills tasks of public administration», says § 1 IV of the federal version of the law on administrative procedure; the laws of the Länder contain similar rules. Therefore, different from unitary States, there is no uniform concept of «the administration» of a certain field, but one always has to ask which authority is competent, and a change of competence always concerns the distribution of powers in the federal system.

### 3. *The distribution of competences*

a) It follows from what has been said that there are fields where there is a complete power of the Länder. It is their function to legislate, and either based on this legislation, or, if in accordance with constitutional law, without a legal base, their governments and administrations may operate. Finally, in case of conflicts, their courts may decide, apparently without any influence of the Federation. Nevertheless these fields are rather exceptional. They exist above all in the subjects of internal organisation regarding the Land and its local authorities, of police law and of cultural matters and education, but even within these fields exist exceptions. Besides —and concretising— the constitutional influence of the Federation, federal law will most frequently influence the exercise of power even when the Länder are involved.

But then the Federation has to found its power on the Basic Law: only as far as this provides or permits, the Federation has power; otherwise there is a matter of the Länder, art. 30 BL. Therefore it always has to be asked whether there is a federal power based on the Basic Law. The definition and delimitation of these powers is one of the most delicate problems of German constitutional law.

b) The most important technical instrument for this delimitation can be found in the long catalogues of the constitution, regarding the legislative powers of the Federation, art. 73-75 BL. There are matters of *exclusive legislative power* of the Federation, so that the Länder may legislate in these fields only as an exception when authorized by federal law. Such subjects of exclusive federal legislation are, above all, foreign

affairs and defense, citizenship, freedom of movement and immigration, money, weights, measures, time, customs and foreign commerce, copyright etc. But more important and, one may say, the ordinary case, are the numerous subjects of *concurrent legislation* where the Länder may legislate as long as the Federation has not exercised its legislative power which is conditioned by a necessity of federal regulation similar to the principle of subsidiarity (art. 72 BL, cf. Art.5 ECT). Within that category belongs the major part of subjects, like civil, criminal and procedural law, the law concerning fundamental rights like association, assembly, residence of aliens, economic activities, labor and social law, the main subjects of environmental, traffic and land law, many fields of economic and social promotion etc. In other fields there may exist only *federal framework legislation* which has to be concretised by the legislation of the Länder, e.g. in the fields of public service of the Länder, higher education, press legislation, protection of nature, regional planning etc. This delimitation is completed by the distribution of legislative powers and apportionment in the finance system. It has often been criticised, and therefore there were and are tendencies to reduce the power of federal legislation. But the practical effect of these tendencies, although followed in several constitutional amendments, has been modest. Besides the fact that a big part of the legislative power is today determined by EC-law, for the remaining subjects a uniform legislation appears simply necessary.

c) If, as said above, foreign affairs are a subject of exclusive federal legislation, this fact gives the prevalent weight to the Federation, and it is consequent that art. 32 I BL generally assigns the foreign relations to the Federation. Therefore it is the Federation who may transfer State powers to international organizations (art. 24 I) and to the European Union (art. 23 I 2); it is the Federal President who represents the Federation in terms of international law (art. 59 I), and the foreign service is conducted by the federal administration (art. 87 I). According to this ruling it has been emphasized that the powers transferred to international organizations may also be legislative powers of the Länder. Only the participation of the Bundesrat in giving the consent to the more important treaties (art. 59 II BL) would concede to the Länder a certain influence on foreign affairs.

But, as we have seen, the Länder are States capable of fulfilling all the functions of a State, and therefore functions in foreign affairs as well. Their participation in the Bundesrat, certainly a federal organ according to the constitution, maintains characteristics of a tradition of interna-

tional law, because the Länder have their «representations» in the seat of the federal government. Consequently there are some powers concerning them in foreign affairs: besides the right to be consulted if a treaty concluded by the Federation affects the special circumstances of a Land (art. 32 II BL), the Länder may, with the consent of the federal government, conclude treaties in the fields of their power to legislate (art. 32 III). Thus the parliamentary consent to such a treaty has to be given by the parliament of the Land, and one may conclude that consequently all the treaties concluded in the fields of legislative power of the Länder need the consent of their parliaments. This question, very controversial in the first years of the Federal Republic, was decided in a pragmatic way by means of an agreement concluded in 1957 by the Federation and all the Länder, the so called «Lindauer Abkommen», which provides the necessity of the previous consent of the Länder, in cases of treaties concluded by the Federation about subjects in which the Länder have exclusive legislative power.

This problem and its solution explain that in the field of European unification the legislative powers of the Länder present us with difficult tasks. Since the first European treaties, the problem was seen that a certain participation, at least information, of the Länder would be necessary if their powers were in question, and the laws approving the EEC-treaties established rules in this sense. Finally the Maastricht treaty, coinciding with the discussions on a constitutional reform as a consequence of the German reunification, gave way to a constitutional amendment of December 21, 1992 which regulated the problem. According to the new art. 23 BL as a *lex specialis* which excludes the further application of art. 24 BL on the European Union, not only the aim and the form of consent to the treaties on the European Union are qualified. The new rule prescribes the consent of the Bundesrat and, in case of constitutional relevance, a majority for an amendment majority for an amendment of the Basic Law. It furthermore defines the constitutional framework of German participation in the European Union; for that reason the German Constitutional Court was encouraged to judge on this framework, producing a very problematic judgement if one regards it from the EU-standpoint. Furthermore, the new art. 23 provides, as a general principle in al. II, the participation of the parliament and the Bundesrat in all matters of the European Union. The details are ruled in art. 23 III-VI and were enacted into law on March 12, 1993, one concerning the cooperation with the parliament, the other concerning the cooperation with the Länder. Parliament and Bundesrat shall appoint special Committees on the European Union with the

competence to exercise this cooperation (art. 45, 52 IIIa BL). In detail, for the parliament the ruling contains only a right to be informed and the duty of the government to take the opinion of the parliament in consideration. For the Bundesrat the influence is more specifically regulated. Generally the right to be informed and to give its opinions is similar as to that of the parliament. But as far as the Bundesrat is competent according to German law, the representatives of the Länder have the right to assist in the preparation of the German standpoint, and the more the subject touches the interests of the Länder or is within their exclusive power, the more the federal government has to respect the opinion of the Bundesrat. Art. 23 IV- VI BL and §§ 4-6 of the above mentioned law regulate the details, including the obligation to commit the representation in the European council of ministers to a minister of a Land nominated by the Bundesrat (§ 6 II of the law, cf. Art. 203 I ECT). Furthermore the law allows and regulates explicitly the representations of the German Länder at the organs of the European Union (§ 8). These offices do not have diplomatic character and the position of the representation of the Federal Republic must not be restricted, but the Länder have the possibility themselves to protect their interests in Brussels.

d) In the other fields of federal legislation, the German tradition and principle, different especially from the solution of the USA, provides that the Länder execute not only their own laws, but the federal laws also, insofar as the constitution does not otherwise provide or permit, art. 83 BL. Normally this administration is an «own right» of the Länder, which means the federal control is limited on aspects of legality. The methods existing for that purpose and regulated in detail in the constitution (art. 84 II-V BL) could be quite incisive, but practically their importance, with the exception of the general administrative rules (art. 84 II), is very limited. On the other hand, the principle that in regards to the subjects of their own administration the Länder remain competent to regulate the establishment of the authorities and the administrative procedure (art. 84 I) is, in practice, largely overruled by federal laws which contain regulations on these subjects; nevertheless, laws with such contents necessitate the consent of the Bundesrat — a rule which, as we shall see later, is of essential importance for the German constitutional system.

Besides this form of administration which is the normal and the most frequent case, there are special forms for specific subjects: There is a *execution on federal commission* which permits a more complete control of the federal government, regarding especially the appropriateness of the execution (art. 85 BL); such a control is provided e.g. for the

administration in the field of nuclear energy (art. 87c), in the field of money grants predominantly financed by the Federation (art. 104a III 2), in the field of taxes accruing to the Federation (art. 108 III). In these cases the judicial protection of the Länder against federal instructions is quite weak. Then there are *joint tasks* of Federation and Länder: The execution remains a task of the Länder, but according to federal laws, common agreements and common overall planning which concretise and determinate the execution are required; examples are the construction of universities and university clinics, the improvement of regional economic structures, improvement of agrarian structure and coast preservation, educational planning, promotion of research and federal grants for particularly important investments of the Länder (art. 91a, 91b, 104a IV BL).

e) There are only a few subjects where the federal power to legislate is completed by the power to execute through its own federal administration. Certainly there are the federal ministries for all the branches of federal activities; but their prevalent functions are the preparation of legislation, governmental activities and the above mentioned control on the execution, not the administrative action itself. For that purpose, the BL enumerates a few subjects as federal ones —e.g. foreign service, federal financial administration, some traffic administration, border police and police coordination (art. 87 I BL), some federal corporations under public law in the field of social security (art. 87 II), defense administration (art. 87b), federal bank (art. 88) etc. But a general clause permits that other federal (normally: superior and rather specialized) authorities or corporations may be created by federal law if the Federation has legislative power in the respective field (art. 87 III).

For a long time, and more frequently in the last years, the establishment of corporations has been used as a form of privatisation. A classical phenomenon of this kind is the research organisation, in single institutes as well as in the German Research Community (Deutsche Forschungsgemeinschaft), an association of the universities and research institutions with the task to manage the promotion of research. However, one of the original reasons of this solution nowadays is no longer valid: Even if the Federation chooses a form of private law, its activity is, as we have seen (*supra*, a), limited to the powers mentioned in the constitution. But within these limits it may seem more efficient to reduce the direct State administration on regulation, on certain essential functions and on guaranteeing certain effects, while the management of the sector is left to private initiative, possibly in the beginning with the State as shareholder, but with the possibility and, perhaps, the aim of effective

privatisation. This is the situation of the German reform in the sectors of railways, post and telecommunication (art. 87e, 87f, 143a, 143b BL). This development reduces the federal administration, less (for local traffic systems) in favour of the Länder, but primarily in favour of private actors. Although a similar tendency may be observed on the levels of the Länder and the local authorities as well, it is the reduction of the federal presence on the local level which influences the federal system.

#### 4. *The influence of the Länder*

a) Stating the important role of the Länder, especially the delicate distribution of powers between them and the Federation in all the State functions, the necessity of a link between the two levels is obvious and an essential element in Germany as in every other federal system. Therefore the constitution not only provides for it, but declares explicitly inadmissible the abolition of the elements of federalism, especially of the principle of participation of the Länder in the federal legislative process (art. 79 III BL). But how to organise it? There is a very ancient tradition of cooperation between the member States in the old Holy Roman Empire of German Nation (before 1806) and the German Confederation (1815-1866) which influences the modern solutions, in an open and fundamental contrast to the principles of parliamentary bicameralism presented as a model for federal States since the constitution of the United States, the senate-model. Although solutions in this direction were largely discussed and supported in the German constitutional debates in 1848/49, 1918/19 and 1948/49, they never had any effective success, and it was always the principle of the Bundesrat that decided the issue. The member States, later the Länder, insisted on having their representation on the central level in the form of participation of members of their governments in the central decision making process, especially in federal legislation, but, according to art. 50 BL, in federal administration and, since 1992, in affairs of the European Union as well. According to this principle, Germany has a kind of bicameralism, but with a second chamber of a quite specific character.

b) Therefore the Bundesrat consists of members of the governments of the Länder nominated and recalled by them. It is the government of the Land which decides how to vote, and although the constitutional autonomy of the Länder and the fact that discussions of Bundesrat-problems are frequent in the parliaments of the Länder, there

is, according to a old and perhaps critical constitutional jurisprudence, no possibility to transfer the decision on the Land-level to the parliament or to the people. Every Land has at least three votes, the larger ones four, five or, beyond a population of seven million inhabitants, maximum six votes, so that inequalities of population are taken into consideration, but not entirely represented. For this reason, for the different dates of elections and for the different coalitions in the single Länder the composition of the Bundesrat does not entirely reflect the percentage of the political parties represented in the parliament; in several periods of the history of the Federal Republic as at present, the federal government does not have the majority in the Bundesrat. The votes of one Land may be cast only as a unit—a rule recently interpreted very strictly by the Federal Constitutional Court resulting in differences between the Bundesrat and a parliamentary body.

On the other hand the techniques of work of the Bundesrat are quite similar to parliamentary ones; there are phenomena like a president, committees, public debates and votes, but the method of work is more technical and businesslike than in the parliament which, according to the character of the German political system, works with a lot of routine as well. Yet the functions of the Bundesrat, although including a lot of administrative and European Union-oriented functions, are legislative for the major part. The Bundesrat is competent in the initial stadium of legislation having the right to introduce bills and to comment on bills submitted by the government; also the Bundesrat may demand that a joint committee of parliament and Bundesrat reexamines bills adopted by the parliament, and it may finally object to bills adopted by the parliament after this procedure. Normally such objections may be rejected by a decision of the parliament with qualified (absolute or, in case of objection by two thirds, two thirds) majority, so that the principle of parliamentary democracy is maintained. But in certain cases mentioned in the constitution, the consent of the Bundesrat is required for a bill in order to become law. These are the cases that concern the heavier impacts on the interests of the Länder. Besides modifications of the constitution and many—more than forty!—special rules, it is particularly the problem of federal laws containing regulation on the establishment of authorities or the administrative procedure of the Länder which require the consent of the Bundesrat (art. 84 I BL, see above, 3 d). This problem was not seen when the constitution was adopted, but in practise it has become essential: as more than half of all federal laws contain such regulation, necessary for coherent application, all these laws

require the consent of the Bundesrat. The constitutional jurisprudence has accentuated this requirement, and therefore the Bundesrat has augmented its importance in a decisive measure. The German legislative system has become nearly bicameral —although with a second chamber which is not a popular, but a governmental representation. For that reason the role of the Länder in federal politics is extremely important. In the same way there are the administrative aspects which are very influential. Finally the Länder-governments belonging to the parliamentary opposition have a strong influence when the majorities in parliament and Bundesrat are different.

### 5. *Unifying factors*

Through the system of the Bundesrat, a historically constant factor we have seen, which in spite of the separation of Federation and Länder, forces both sides to cooperate, even at the cost of the realisation of majority policies on the federal level. But this constitutional instrument, more important today than one could have thought in 1949, is only a part of the unifying factors which exist in the German federal system and which in a decisive way limit the realisation of independent constitutional organisations on the two levels.

a) The first reason lies in the *de facto-homogeneity*. Although the constitutional autonomy would allow the Länder to choose very different solutions, there are historical and practical reasons which limit the use of that liberty. The influence of the federal legislation, besides its legally binding ruling, recommends to the Länder-legislators the establishment of organisatory and procedural solutions which are quite similar, e.g. the necessity of delegated administration committed to the local authorities supposes an organisation of these authorities with a certain independence of the administrators from the local councils. The financial administration, created at the end of the first world war and remaining in force through the different constitutional frameworks, has been the model for the administration on federal commission (supra, 3 d). The migration after the second world war, especially the expulsion of Germans from the East, has had the result of a mixture of populations less conscious of local or regional traditions. The new borders of the Länder, in many cases created after 1945 and 1989, efface the legal traditions of the older Länder whose parts are often amalgamated in the new territorial limits.

b) These tendencies are underlined by *elements of unitary tradition*. It should be remembered that the 19<sup>th</sup> century national movement had a unitary tendency. Despite the victory of the federalist solution, the defenders of unitary legislation, administration and jurisprudence always had an important influence, growing in and after the first world war with the abolition of the traditional monarchies in the Länder. For this reason the Weimar constitution could begin with the formula: «The German people, unite in its races ...» and expand the federal powers largely used in the following years. Particularly the Nazi regime, by abolishing the federalist system and introducing a legislation by the government without parliamentary or federalistic controls, unified the central legislation; the concept of «*Gleichschaltung*» (bringing into line), used in that period, well expresses the tendency. It follows then, that the Federal Republic inherited a largely uniform legislation, although split in the last phase of the war and the first years after. East Germany was also an unitary State. For these reasons there is, in fact, a uniformity in many fields of legislation found in the power of the Länder, especially an approximation of the organisation of State and local authorities. This development influences the further solutions, e.g. in the field of economic activities of local authorities. Similar approximation may be stated in many fields formerly ruled by uniform legislation. Therefore it is an obvious trend towards coordinated legislation.

c) In this sense, above all, the ruling of the *administrative procedure* is important and interesting. While the laws on jurisdictional procedure are all federal ones—in civil and criminal procedure since 1877/79, in administrative court procedure since 1960—, administrative procedure certainly interests the federal administration, but it is, at the same time, an important field of legislation of the Länder. From the beginning in the nineteen-sixties, in fact, the preparation of the bills in this field has always taken place in the way of coordination of Federation and Länder. The result were, in 1976, almost identical laws enacted by the Federation and all the Länder whose application may be controlled by the Federal Administrative Court (although this, in other fields, does not control the application of the laws of the Länder). Therefore practically it makes no difference whether there is the law of the Federation or a Land which is applied, and there is an uniformity of the administrative procedure like that of the administrative court procedure.

d) A similar uniformity may be found in the regulation of the *public service*. Here too, there are old tendencies to unification and there was, with obvious traces of the period, an uniform codification of the

traditional law of public service in the nazi time (1937). After 1945, this law remained valid, except the typical nazi rules, and the Basic Law formally guaranteed the traditional principles of the public service (art. 33 IV, V), giving power to the Federation to enact a federal framework legislation (art. 75 no. 1, cf. supra, 3 b). After enacting such a law in 1957, this law has determined all the legislation of the field, e.g. preventing the Länder from approaching public service to labour law, and ruling on public service in such a way that guarantees similar solutions of all the important questions and a transfer without problems of public servants between Federation and Länder or between Länder. Only in the remuneration were there tendencies of competition with the aim to get the best public servants. This seemed intolerable with respect to a homogeneous public service, and therefore the Basic Law was modified in 1971 (art. 74a), to guarantee a uniform system of remuneration. The actual legislation leaves very few space to the employers in the public service and creates an almost total uniformity—as it would seem impossible in federal States like the United States or Switzerland, but which was largely accepted in the German public opinion and has been questioned only recently.

### 6. Instruments of coordination

These facts show us that the constitutional guaranteed separation of Federation and Länder is practically largely overruled, and that the de-facto-uniformity mitigates the problems that could result from the possibility to create different solutions. It may be of interest to mention some of the techniques helping to coordinate the members of the federal system.

a) Most important seems the voluntary *cooperation of the Länder administrations preparing uniform or harmonised legislation*. This factor has its roots in the centralist traditions, in the practical necessities of unification, especially in technically complicated fields, and in the common culture of the public service. Under these influences, the ministers and high functionaries of the Länder agree to work out a common solution acceptable for all and to prepare a model bill (*«Musterentwurf»*), with the aim that all the parliaments of the Länder may enact it. The law on administrative procedure was one example, but there are many others, e.g. in the fields of the law of the police, of building control, of economic activities of local authorities, of the mass media, of schools and universities; even in constitutional, especially in parliamentary law. In

some cases (like in the fields of radio and television) the model bills were completed by treaties between the Länder. The result is an administrative law and an administrative organisation quite similar in the different Länder formed through the governmental and administrative coordination of the legal orders, despite the fact that the influence of the parliaments of the single Länder decreases: the parliament, confronted with a model bill for all, will not easily oppose. Just in the field of civil rights, a fundamental task of parliamentary decision is thus weakened. But the cooperative tendency is nothing else but the continuation of that provided by the constitution by means of the Bundesrat: although this is a federal organ, the cooperation of the functionaries of the Länder in the committees continues in their conferences on the inter-Länder-level.

In a similar way the administrative cooperation in the Bundesrat regarding the execution of federal laws continues in the cooperation of the Länder administrations. Preparing general administrative rules (see supra, 3 d), the Länder harmonise their standpoints. Because of this reason the conflicts about the administrative practice are rare, and the importance of constitutional conflict resolution in this field is very low.

b) This cooperation may be seen in the tradition of a duty of *federal loyalty* founded under the 1871 constitution such as loyalty between the German princes. Certainly the constitutional framework has changed in the democratic State, but the constitutional jurisprudence always takes into account the old principle and demands mutual respect between Federation and Länder as well as between the Länder. Although such a principle can not substitute a concrete legal regulation, it helps in atypical situations and gives a basis for the duty to cooperate. This reason may explain why the practical cooperation is so effective.

c) The most actual and very controversial problem is the *financial equalisation*. The regulation of this field in the Xth chapter of the Basic Law is complicated and contains so many compromises that one may ask whether it can serve as the base of a juridical system allowing for concrete jurisprudential consequences. But the merit of the first judgement of the constitutional court in that field, pronounced in 1986, was just to define a system of the constitutional regulation. Bringing into a system the rules concerning (1) vertical distribution of taxes between Federation and Länder, (2) the horizontal distribution of the tax revenue between the Länder, (3) the horizontal equalisation between the financially stronger and the weaker Länder, (4) the supplementary federal grants for the weaker Länder and (5) federal subsidies for concrete tasks: the court gave the measure for the legislation in that field and reserved

for itself a power of control. In fact, the new regulation, enacted in 1987, was reviewed again and as a result produced a judgement in 1992, but this one, in principle, confirmed and concretised the first judgement. There was, nevertheless, a new factor: Considering the «extreme financial emergency» in two Länder, the Saar and Bremen, «the principle of the federal State is concerned as such. As a result, the other Länder of the federal community are obliged to give a weaker Land the necessary assistance with suitable measures according to a concept of harmony.» This conclusion definitively makes clear that the constitutional separation of the Länder in the federal State is bridged over by a constitutional principle of federal solidarity which may therefore be concretised through judicial review. However, the question which remains is underlined by the problems encountered after the German reunification. That was the problem determining the third judgement on the field in 1999. This time the court specified that the measures for financial equalisation, especially the supplementary federal grants, have to be justified, and asked for an additional legal definition of the measures, with the obvious aim to protect the financially stronger Länder and to avoid that the existing order of financial resources be upset. But the new legislation, executing the principles stated by this judgement, confirms the compromise and the principles of coordination and solidarity.

### *7. Final remarks*

What we have found in the first paragraphs of this paper is an extremely complicated constitutional system with separate constitutional spheres on the levels of the Federation and the different Länder, homogenised by the federal constitutional regulation only in some basic questions, but allowing very different organisations, policies and developments. The reasons for the functioning of such a system may be less obvious in the formal homogenisation ordered by the federal constitution, but more so in the de-facto-cooperation of the Länder on federal level and between themselves, and in certain historical, traditional legal and social facts which, until now, have guaranteed the consistence of the system.

But these integrating factors are not unalterable. In comparison with the German Empire of 1871, two most important factors are missing today: On one hand, the cooperation of the princes, which was an essential basis of the Bundesrat-model and of the federal loyalty of that time,

and on the other hand the Prussian hegemony, which influenced all the other member States and which, with the German Emperor, gave a symbol of German national unity.

Nevertheless, instead of these factors we have today an approximation of the Länder cultures, influenced by the traditions of the unitary State and the migration movements, especially after the second world war and until the most recent developments. It seems impossible today to speak of independent characters of the single German peoples, but the homogeneity, once represented by the princes, has been vulgarised or rather democratised, and thus invites to cooperate, in spite of separate political organisations. Instead of the Prussian hegemony, we find today a pluralism of Länder, but with basically more common feelings and interests and with a financial system which requires solidarity, but expresses it as well.

Therefore it is well justified to speak in Germany today about a pluralism of political cultures based on developments since 1945 and, for East Germany, since 1990 (with some older roots). But these cultures are close to each other and suppose a cooperation. In that way we reach a polycentrism, in concurrence with the political pluralism based on the party system, and giving this system a base on the Länder level. The party system is not an antagonism of paralysed factors, just as the federal system is not a stiff antagonism, but both are elements of a pluralistic democracy. To understand its functioning, it is not sufficient to study the constitutional institutions, but it is necessary to see them in their social framework. In that sense, an Institute for the Sociology of Law is just the right place of work for a constitutionalist.



# The Participation of Sub-National Units in the Foreign Policy of a Federation: The Swiss Case

By  
Luzius Mader

## *Introduction*

Foreign policy has long been —and in many states still is— thought to be an exclusive domain or a privilege of, first, the central state and, second, the executive branch of government. Of course, this conception of the assignment of powers and responsibilities with regard to the field of foreign policy is too simple to be accurate. It no longer reflects the actual constitutional or legal situation and practice. On the one hand, in many states, and in particular federal states, the sub-national units play a notable role not only in internal politics but also in the field of foreign policy. On the other hand, parliaments and —particularly in Switzerland, where important international treaties are submitted to a mandatory or optional referendum— the citizens are more and more involved in foreign policy.

These developments are due to a number of factors. Due to the ever growing internationalisation of politics, foreign policy is more and more becoming a part of domestic policy. There is a clear trend towards a certain parallelism of tasks and competencies: the political organs responsible for domestic decisions in a particular field are also responsible for foreign policy decisions concerning this field. The European Union clearly illustrates this development. In federal systems there is, furthermore, a trend towards a more co-operative, partnership-based approach rather than a conception of federalism focusing on the division of powers between the national and the sub-national levels of government. As a result of these two trends, the parliamentary powers have been extended and the powers of the sub-national units have been considerably strengthened in the last few years. This is particularly true for Switzer-

land, but Switzerland is by no means a special case with regard to these developments which can be observed in many other countries as well, especially in other federalist states in Europe such as Germany, Austria or Belgium<sup>1</sup>.

In this paper, I am going to have a closer look at the Swiss case and in particular at the role of the Swiss cantons in the field of foreign policy. I shall emphasise two different aspects of the cantons' role in the field of foreign policy namely, first, the foreign policy of the Swiss cantons in matters within their own competencies and, second, their participation in the foreign policy of the central level of government, i.e. the Confederation<sup>2</sup>.

For both aspects, the so-called «small» foreign policy of the cantons in their own fields of competence as well as their participation in the foreign policy of the federal government, we can notice in the last two decades—I would say since about 1985, i.e. since the time when the Swiss authorities started to prepare Switzerland's entry into the European Economic Area (EEA)—a clearly growing importance of the cantons in Swiss foreign policy.

There are, of course, several reasons which may explain this development. One of them certainly is the ever increasing internationalisation of politics, in particular within the context of the process of European integration. This process tends to lead to a shifting of powers from the cantons to the central level of government. The cantons try to react and are looking for compensations in order to maintain an important role as constituent elements of the Swiss Confederation. Another reason may be the fact that our general idea of federalism is changing. Federalism was for a long time considered to be a system essentially characterised by the allocation of powers or the assignment of responsibilities between the central level of government and the sub-national units. The alloca-

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<sup>1</sup> For a comparative overview concerning the federalist perspective see in particular Lejeune, Yves. 2003. Participation of Sub-national Units in the Foreign Policy of the Federation. In *Federalism in a Changing World – Learning from Each Other*, edited by R. Blindenbacher and A. Koller. Montreal: McGill-Queen's University Press, pp. 97 ff.; for the extension of the Parliament's role in Switzerland see Article 166 of the Federal Constitution (Cst.) and Article 47bis a of the Federal Statute concerning the Relations between the Councils (*Systematic Collection of Federal Legislation*, SR 171.11).

<sup>2</sup> For both aspects see in particular Pfisterer, Thomas. 2001. *Auslandbeziehungen der Kantone*. In *Verfassungsrecht der Schweiz / Droit constitutionnel suisse*, edited by D. Thürer, J.-F. Aubert and J. P. Müller. Zürich: Schulthess, pp. 525 ff.

tion of powers, especially of legislative powers, tended to be considered to be the principal distinctive element of a federal system. This traditional view of federalism is clearly too narrow. Federalism is much more than just a system of allocation of legislative powers between different levels of the state.

In Switzerland, the political discussion about a more comprehensive, contemporary view of federalism took place in particular during the process of constitutional reform that has led to the adoption of a new Federal Constitution (hereafter Cst.) in 1999. This contemporary view of federalism includes and emphasises, in particular, the idea of partnership and co-operation between the different levels of government. The development that can be noticed in the field of foreign policy is not at all limited to this domain. It can be observed also in purely domestic areas. It seems to me to be useful to situate the process towards a more active, dynamic foreign policy of the cantons in a broader context. I shall therefore begin with a short description of the main features of Swiss federalism today.

### *The main characteristics of Swiss federalism today*

Which are the main characteristics, the distinctive features of Swiss federalism today? The Federal Constitution of 1999 being supposed to reflect or express the current conceptions and practices in an accurate way, my description largely refers to the relevant provisions of the new Constitution. The main characteristics of Swiss federalism can be summarised in the following seven points<sup>3</sup>:

#### *2.1. The cantons as constituent elements*

The cantons —there are 26 of them— form one of the two constituent elements of the Swiss Confederation. Together with the people,

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<sup>3</sup> See e.g. Zimmerli, Ulrich. 2000. Bund —Kantone— Gemeinden. In *Die neue Bundesverfassung: Konsequenzen für Praxis und Wissenschaft*, edited by U. Zimmerli. Bern: Stämpfli Verlag. The same distinctive elements can of course be found in other federalist states. What distinguishes one federalist system from another are less the different distinctive elements as such than the way in which these elements are arranged or combined and their intensity and relative importance. Federalism is an open and gradual concept admitting a large variety of institutional arrangements.

they are the sovereign of the Swiss state (art. 1 Cst.). In other words, their existence does not derive from the existence of the Confederation; on the contrary, the existence of the Confederation is, at least in the perception of the cantons, the result of a decision of the cantons. The importance of the cantons considering themselves to be the founding fathers of the Swiss Confederation should not be underestimated. Even today, it is a major element for understanding the practical functioning of the political institutions in Switzerland.

Apart from two exceptions —6 cantons elect only one, not two, members to the Council of States (art. 150 paragraph 2 Cst.) and they have only half of a cantonal vote when matters are submitted to the vote of the People and the Cantons (mandatory referendum; art. 142 paragraph 4 Cst.)— all the cantons have equal rights and duties within the Swiss Confederation. The principle of the equality of all sub-national units is considered to be a basic, incontestable principle although the cantons are very different with regard to their size, the number of their inhabitants and their economic importance. Furthermore, there are important linguistic, religious and cultural differences. For this reason, «unity in diversity» is more than just one of the most often used descriptions to characterise Swiss federalism, it is also a political programme.

## 2.2. *The system of allocation of powers*

According to Article 3 Cst., the cantons «are sovereign insofar as their sovereignty is not limited by the Federal Constitution». And Article 42 Cst. states in a somewhat more contemporaneous language that «the Confederation shall accomplish the tasks which are attributed to it by the Constitution». In other words, the cantons have all the powers that are not transferred to the Confederation by the Federal Constitution. They have the general or residual power, whereas powers of the Confederation are limited to those enumerated in the Federal Constitution.

The decisive criterion for the allocation of powers is the principle of subsidiarity expressed in Article 42 Cst. in a rather vague way however. Indeed, according to Article 42 paragraph 2 Cst., the Confederation «shall assume the tasks which require uniform regulation». In spite of this principle, we have to admit that the enumeration of the powers of the Confederation has got longer and longer in the past few decades.

Attempts to slow down this process and even to retransfer some powers to the cantons were not very successful until now<sup>4</sup>.

Although the powers of the Confederation have been considerably extended in the past, the cantons have nevertheless preserved important powers in several fields, in particular in the field of inner security or police, education, culture, health, protection of nature, infrastructure (roads, water, construction, planning), assistance to needy persons, taxes etc. As we shall see, these are also the main fields in which they may conclude treaties with foreign countries.

### 2.3. *The autonomy of the cantons*

The cantons enjoy a far-reaching autonomy (art. 47 Cst.). Of course, they are not any more «sovereign», as Article 3 Cst. still says, but they are quite autonomous with regard to their tasks, their organisation and their financial means.

Within the framework of the Federal Constitution, the cantons are in principle free to define their tasks themselves (art. 43 Cst.). Within the framework of their powers, they can decide themselves which tasks they want to accomplish. As a result, public policies and the intensity of state intervention in some fields may vary from one canton to another. Such a situation is in complete conformity with the federalist idea. But, it has to be admitted also that the autonomy is not unlimited: some specific tasks are imposed upon the cantons by the Federal Constitution. For example, according to Article 8 paragraph 4 Cst. the cantons —as well as the Confederation— «shall provide for measures to eliminate disadvantages affecting disabled people». In other words: the Federal Constitution addresses a mandate also to the cantons. Furthermore, the cantons have also the general obligation to respect the fundamental rights and to contribute to their realisation (art. 35 para. 2 Cst.) and they shall strive to ensure the social goals anchored in the Federal Constitution (art. 41).

With regard to their organisation, the cantons are not completely free either. They must have democratic institutions and provide for the

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<sup>4</sup> The most recent and important attempt is a government proposal concerning a reform of the financial equalisation and of the tasks between the Confederation and the cantons actually discussed in Parliament; see *Bundesblatt (Official Journal)* 2002, pp. 2291 ff.; it remains to be seen whether this attempt will become a success.

separation of powers (art. 51 Cst). But they are not compelled by federal law to have, for example, institutions of direct democracy (with the exception of the popular vote on total revisions of the cantonal constitutions). On the other hand, they must have institutions enabling them to guarantee the implementation of federal law.

As far as the third aspect of the autonomy is concerned, the financial means, the cantons have considerable space of action, clearly more than the Confederation. There is no material harmonisation of taxes, for example; for the same amount of income you can pay in one canton five times the amount you have to pay in another without the Federal Supreme Court considering this situation as contrary to the principle of equality before the law (art. 8 Cst.). Especially in the field of direct taxes, the competencies of the Confederation are quite limited. The situation is different in the field of indirect taxes (value added tax and some special consumption taxes explicitly mentioned in the Federal Constitution).

#### 2.4. *Co-operative federalism*

Co-operation and partnership, even solidarity, are essential principles of Swiss federalism; they are expressly mentioned in the new Federal Constitution (art. 44 Cst.): «the Confederation and the cantons shall collaborate, and shall support each other in the fulfilment of their tasks». These principles will be further strengthened through a project aimed at reforming in particular the financial aspects of Swiss federalism<sup>5</sup>.

One of the consequences of the idea of co-operative federalism is that disputes between cantons or between cantons and the Confederation should be resolved through negotiation or mediation whenever possible; to bring such disputes before the Federal Supreme Court should in other words be the *ultima ratio*. On the other hand, it may be noted that co-operation, partnership and solidarity do not exclude or prohibit competition between the cantons (especially in the field of taxes and subsidies).

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<sup>5</sup> See the government proposal mentioned in Fn 3; according to this proposal, the Confederation could, under certain conditions, oblige cantons to co-operate among themselves.

## 2.5. *Participatory federalism*

The fifth essential element is the importance of the participation of the cantons in the decision making process at the federal level. Article 45 Cst. lays down the general principle that is further developed in other provisions of the Federal Constitution: for example, according to Article 147 (hearings and consultations) the cantons have to be consulted whenever the Confederation prepares important legislation, international treaties or other projects of substantial impact; according to Article 141 Cst, Federal Statutes and important international treaties must be submitted to the vote of the People at the request of 50'000 citizens or eight cantons<sup>6</sup>; according to Article 140 Cst. revisions of the Federal Constitution and the entry into organisations for collective security or into supranational communities need the consent of the majority of the cantons; and, last but not least, according to Article 55 Cst. which we shall see in more detail hereafter, the cantons «participate in the preparation of decisions of foreign policy which concern their powers or their essential interests».

Of course, the bicameral system with the second chamber, the Council of States, composed by two representatives for each canton (except the six cantons which, for historical reasons have only one representative) could also be mentioned in this context as an instrument of the cantons' participation in the decision making process at the federal level although, strictly speaking, the members of the Council of States do not represent their canton but its population and they are not bound by any instructions given to them by the cantonal authorities.

## 2.6. *Implementation of federal law by the cantons*

A further distinctive element is the fact that federal policies or federal law is implemented by the cantons and not by the Confederation itself (art. 46 Cst.). This is true for domestic law as well as for international

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<sup>6</sup> During the parliamentary debate concerning the new financial equalisation project, a proposal has been at least provisionally accepted to reduce this number to five in order to compensate in this way the absence of judicial review of Federal Statutes and to give the cantons a chance to defend their competencies by referring to the people if cantonal powers are usurped by the federal legislator.

law. Article 46 paragraph 2 Cst. even states that the Confederation should leave the cantons as large a space of action as possible. In other words, its legislation should not be too detailed in order to give the cantons more freedom in the way they implement federal law.

The allocation of powers in the Swiss federal system thus concerns essentially the legislative powers. Even in fields where the Confederation has legislative powers, the implementation is part of the cantonal tasks. For this reason, the federal administration is comparatively small.

### *2.7. Three levels of government*

When we discuss federalist systems we usually distinguish between the central level (federal government) and the sub-national level. This traditional way of looking at federalist systems ignores the third level of government, e.g. the municipal level. In Switzerland's new Federal Constitution, the municipalities, and in particular the cities and agglomerations are explicitly mentioned, expressing thus the fact that modern Swiss federalism is not just an affair of two partners but a «ménage à trois». Indeed, the new Federal Constitution recognises the significant role of the municipalities. Some of them are much more important, demographically and economically, than a number of cantons. The Federal Constitution guarantees the autonomy of the municipalities, but the content of this autonomy is almost exclusively determined by cantonal law.

Of course there are other characteristics of Swiss federalism that could be mentioned as well: for example the fact that federal law takes precedence over contrary cantonal law (art. 49 para. 1 Cst.) or the absence of judicial review with regard to Federal Statutes (Art. 191 Cst.) as a result of which there is no judicial sanction possible whenever federal laws infringe upon the field of cantonal powers. But my purpose was just to emphasise some elements that seem to me to be important for understanding the cantons' role in the field of foreign policy.

### *The foreign policy of the cantons*

#### *3.1. Foreign relations as an exclusive power of the Confederation*

According to Article 54 Cst. «foreign relations are a federal matter». Thus, the Federal Constitution holds that the relations with foreign

countries are, in principle, an exclusive field of competence of the Confederation. Foreign relations in the sense of this provision include the notion of «foreign policy» but are not limited to this aspect of international or external relations. The federal powers in the field of foreign relations include all fields of state activity; they are not restricted to the fields in which the Confederation has, according to the Federal Constitution, internal legislative (or other) powers<sup>7</sup>. In other words, there is no parallelism between internal and external powers. However, Article 54 para. 3 Cst. provides, that the Confederation must take into consideration the powers of the cantons and must protect their interest when it uses its powers in the field of foreign relations. In particular, these powers should not be used to override the internal allocation of powers.

### 3.2. *The so-called «small» foreign policy of the cantons*

The principle laid down in Article 54 Cst. is not absolute. Indeed, another constitutional provision, Article 56 paragraph 1 Cst., states that the cantons «may conclude treaties with foreign countries within the scope of their powers», which means that the federal power in the field of external relations is not strictly speaking exclusive<sup>8</sup>.

Very clearly, this provision, which existed in similar terms in the Federal Constitution of 1848/1874, expresses the fact that before the creation of the Swiss federal state, the cantons (or at least some of them) were sovereign, independent states. Many of them had concluded numerous treaties especially with their neighbouring states and they did not want to give up completely this treaty making competence at least in the fields which were part of their domestic powers. In this sense we had in fact a situation of «shared» or common sovereignty and it was not completely inadequate to continue the use of the term sovereignty of the cantons in Article 3 Cst.

Until the entry into force of the new Federal Constitution, the treaties concluded by the cantons needed to be approved by the federal govern-

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<sup>7</sup> See Ehrenzeller, Bernhard. 2002. Artikel 54 Absatz 1, In *Die Schweizerische Bundesverfassung – Kommentar*, edited by B. Ehrenzeller et al., Zürich, Schulthess, p. 666.

<sup>8</sup> For a short commentary of this provision see Pfisterer, Thomas. 2002. Artikel 56, *Die Schweizerische Bundesverfassung – Kommentar*, edited by B. Ehrenzeller et al., Zürich: Schulthess.

ment (and in case of dispute by the federal parliament). Today, this approval is not necessary any more but the cantons have to inform the Confederation before concluding a treaty (art. 56 para. 2 Cst.), giving in this way a possibility to raise objections if a treaty is contrary to the law or the interest of the Confederation or the laws of other cantons. If this is the case, the federal government may, according to Article 186 paragraph 3 Cst., submit the dispute to parliament which has to decide whether it approves the treaty or not (art. 172 para. 2 Cst.). This solution is also justified by the fact that—in the last resort—it is the Confederation which engages its international responsibility, if a treaty is not executed by a canton (in this sense, the Confederation is always «interested»).

According to Article 56 paragraph 3 Cst. the cantons may deal directly with lower ranking foreign authorities; in other cases, their relations with foreign countries shall be conducted by the Confederation acting on their behalf. This provision takes into account, in particular, the different institutional arrangements in the neighbouring countries. The cantons may easily develop direct contacts with the authorities of sub-national units of federalist states. Contacts with the authorities of centralised states are more complicated; they often require an involvement of the Confederation.

### 3.3. *Practical developments*

Without going into details or addressing the quite difficult question of the legal nature of at least some of the «treaties» concluded by the cantons, a fast glance at the practice in this field shows that the cantons have, in the past, concluded hundreds of treaties especially with neighbouring states and in particular with sub-national or decentralised units of the neighbouring states. In some cases treaties have been concluded with entities without common borders. In recent years, the newly created canton of Jura was particularly active in this field. This canton has for example concluded a treaty with the Province of Quebec and there exists also a sort of an agreement or rather a common declaration of intention with the Basque government.

The treaties concluded by the cantons have not always been submitted to the Confederation. In fact, one should rather say that, in most cases, they have not been submitted for approval. Maybe this explains at least partly why cases of disputes were very rare. In more recent times I

could mention perhaps two such cases: a treaty that was to be concluded between the canton du Jura and the Province of Quebec relating to co-operation in the field of culture and a treaty between the Canton of Vaud and the Palestine authorities concerning police training.

Finally, it may be said that the federal government is not at all trying to slow down or to restrain the activities of the cantons in the field of foreign policy. On the contrary, the Confederation explicitly welcomes these activities and, after the negative vote on the EEA-Treaty, it has even invited the cantons to continue their dynamic approach developed in the last two or three decades<sup>9</sup>.

*The participation of the cantons  
in the foreign policy of the Confederation*

Even more important than the so-called small foreign policy of the cantons is the second dimension of the cantons' role in foreign policy, namely their participation in the foreign policy of the Confederation. With regard to this dimension, the attitude of the federal authorities (especially administration and government) seems to be more reserved. At least in practice, a certain scepticism or reluctance is sometimes —or at least was until quite recently— perceptible. Generally, the intensification of the cantons' participation in this field is welcomed today and considered to be a very useful support for the foreign policy of the Confederation.

*4.1. Article 55 Cst.*

According to Article 55 paragraph 1 Cst., the cantons «shall participate in the preparation of decisions of foreign policy which concern their powers or their essential interests». Paragraph 2 of the same provisions rules that the Confederation «shall inform the cantons timely and fully, and consult them». In a way, these two provisions detail and enlarge what is said, in general terms, in Article 45 Cst concerning participation in federal decision-making and Article 147 Cst. concerning hearings and

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<sup>9</sup> See the report of the Swiss government from March 1994 about cross border co-operation of the Swiss cantons and participation in foreign policy: *Bundesblatt (Official Journal)* 1994 vol. II pp. 620 ff.

consultations<sup>10</sup> and they give the cantons more or less the same rights that the Parliamentary Committee on Foreign Policy got about 10 years earlier. Indeed, Article 47<sup>bis</sup> a of the Federal Statute concerning the Relations between the Councils gave this committee the right to be informed timely and fully and to be consulted on the essential guidelines or instructions for international negotiations<sup>11</sup>.

Paragraph 3 of Article 55 Cst. specifies that «the position of the cantons shall have particular weight when their powers are concerned. In these cases, the cantons shall participate in international negotiations as appropriate». Compared with the situation twenty years ago, this provision expresses without any doubt a major change in the cantons' role in foreign policy. But this change is not the result of the new constitutional provision. In reality, the new Federal Constitution took into account important political and institutional changes that had occurred since the beginning of the 1990s, in the context of the debate on European integration, in particular in the context of Switzerland's planned entry into the EEA. After the negative vote of the People and the cantons concerning the EEA, an intensive debate was engaged in order to improve the internal political support of the Swiss foreign policy. This debate, in which the cantonal governments claimed a major role, followed two largely parallel tracks: on the one hand the preparation of the new constitutional provision in the framework of the constitutional reform process and on the other hand the elaboration of a new Federal Statute on the participation of the cantons in the foreign policy of the Confederation.

#### 4.2. *The Federal Statute of 22 December 1999*

In December 1998 the Swiss Parliament adopted the new Federal Constitution. One year later, it passed the Federal Statute of 22 December 1999 on the Participation of the Cantons in the Foreign Policy of the Confederation<sup>12</sup>. Although this Federal Statute was adopted after the new

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<sup>10</sup> See in particular Pfisterer, Thomas. 2002. Artikel 55. In *Die schweizerische Bundesverfassung – Kommentar*, edited by B. Ehrenzeller et al., Zürich: Schulthess.

<sup>11</sup> See *Systematic Collection of Federal Legislation (SR)* 171.11; this Federal Statute will be replaced by the new Parliament Act enacted 13 December 2002 and entering into force in December 2003.

<sup>12</sup> See *Systematic Collection of Federal Legislation SR* 138.1.

Federal Constitution, it isn't an act which simply implements Article 55 Cst. It would have been adopted without the new Federal Constitution.

The law states the basic principles with regard to the cantons' participation in the foreign policy of the Confederation. Article 1 paragraph 2 specifies that essential interests of the cantons are concerned when important tasks to be performed by the cantons are concerned. This includes also situations where the cantons have no or only limited legislative powers but are responsible for the implementation of federal law. Paragraph 3 of the same article expresses a major fear of the Confederation: the participation of the cantons must not hinder the Confederation's ability to act in the field of foreign policy; on the contrary, according to Article 2 one of its aims must be to support the foreign policy of the Confederation. Furthermore, Article 7 emphasises that the cantons have to guarantee the timely adaptation of their legislation whenever they are responsible for the implementation of the international law.

To a large extent, the content of the law is nearly identical and scarcely much more detailed than the content of Article 55 Cst. Indeed, the law had become largely unnecessary after the adoption of the new constitutional provision. But, of course, it was politically inopportune to simply stop the legislative process and to renounce the adoption of the law as this would have been a negative signal for the cantons.

#### 4.3. *New institutions of co-operation*

In order to make sure that they are practically able to participate actively in the federal decision-making process, especially in the field of foreign policy but also in institutional matters or matters covering several policy fields, the cantons set up, in 1993, a Conference of the cantonal governments. In this conference, which meets about four times a year, each canton is represented by one member of the cantonal government. The main function of the conference is to facilitate the horizontal co-ordination of the cantons' activities. Positions approved by at least 18 of the 26 cantons are considered to be the common position of the cantonal governments.

The discussions and decisions of the conference are prepared by an executive committee formed by nine members of cantonal governments and by a permanent secretariat (about six persons).

In order to strengthen or to improve also the vertical co-operation between the cantons and the Confederation, representatives of the Con-

ference of the cantonal governments meet regularly (usually twice a year) with a delegation of the federal government (usually three members of the Federal Council) to exchange information and opinions about the matters discussed before in the Conference of cantonal governments and in order to develop common positions on matters concerning both the Confederation and the cantons. These meetings are called the «Federalist Dialogue». They are prepared by an interdepartmental working group (one representative from each one of the seven ministries) supposed to co-ordinate the contacts of the different ministries and to facilitate the development of a consolidated federal position with regard to questions of general interest that have to be discussed with the cantonal representatives.

In practice, the co-operation between federal and cantonal authorities has become very intense in the last few years, especially because of the negotiations with the EU and the implementation of the treaties concluded with the European Community: the cantons have representatives in the delegations negotiating in fields concerning their powers or interests, they have a representative in Brussels, they have an «agent de liaison» working in the federal administration and having practically full access to all relevant information. Thus, in a way, we could say that at least with regard to European integration, foreign policy has in practice nearly become a common task of the Confederation and the cantons. There is no doubt, however, that the lead in this field continues to be taken by the Confederation.

### *General appraisal of the cantons' involvement in foreign policy*

What should we think about the cantons' increasing involvement in foreign policy? I consider the developments that have occurred in the last years in this field to be quite positive. They give a new sense and a new dynamic to federalism.

As far as the so-called «small» foreign policy of the cantons is concerned, the growing activities and initiatives of the cantons, in particular the intensification of cross border contacts with neighbouring regions in other states seem to me to be very good illustrations of the process of «globalization»; they favour interregional co-operation beyond national boundaries and facilitate or make possible solutions which are closer to the every day life of the people.

As far as the participation of the cantons in federal decision-making in the field of foreign policy is concerned, the political weight which

the cantons have in this context seems to me to be an adequate compensation for important transfers of powers to the national and also to the international or supranational level. If we want federalism to remain an essential principle of the organisation of our political system, this shifting of powers has to be compensated in some way. In my eyes, a more active part of the cantons in the federal decision-making process, in domestic affairs as well as in foreign policy, is such a compensation.

There is another point I would like to mention in this context: the implementation of legislation —be it domestic or international legislation— is mainly a task of the cantons: Article 46 Cst. holds explicitly, that the cantons shall implement federal law (and international law that is binding for Switzerland is considered to be part of federal law). It seems to me to be necessary that authorities which are responsible for the implementation of decisions, are also involved in their preparation. Otherwise the risk exists that wrong decisions are taken or that decisions are taken which are difficult to implement.

Finally, to add a last positive aspect, there is no doubt that participation contributes to build or to strengthen the political support for and the legitimacy of foreign policy decisions. This is one of the aims of the relevant Federal Statute. If political or legislative decisions are more and more taken in the form of international treaties, it is mandatory that these treaties are, as far as possible, prepared and decided upon in the same way as domestic legislation. In this sense, I am in favour of parallelism of internal competencies with regard to treaty-making and legislation. Otherwise internationalisation leads to a reduction not only of the cantons powers, but also of the political rights of the citizens.

On the other hand, I am of course well aware that the participation of the cantons in the federal decision-making process (especially, but not only, in the field of foreign policy) may also present some negative aspects: international negotiations do not become easier or simpler if the number of political actors increases; information and consultation need time, especially because the cantons must have the possibility to co-ordinate themselves before they express their opinion; more vertical co-operation between the cantons and the Confederation inevitably calls for more horizontal concertation among the cantons on the one hand but also among the different federal ministries on the other hand.

Furthermore, co-operation and participation may also lead to a dilution of responsibilities: the Confederation has to consult the cantons; their opinions or positions must be taken into account and can have a decisive influence; but in the end, the cantons are not responsible for the

result. This can become a practical and a political problem. However, formal procedures of participation tend in my eyes at least to reduce the risk of diluted responsibilities whereas informal mechanisms can aggravate it. The Swiss parliament's recent refusal to approve the Air Transport Treaty between Switzerland and Germany signed by the Swiss government seems to me to be an instructive illustration in this sense; an illustration which, by the way, shows that the analysis should not be limited to formal participation and co-operation but must include also informal influences of the cantons in the decision-making process.

The institutional developments that have occurred in Switzerland in the last two decades with regard to foreign policy are considerable. To some extent, foreign policy has been normalised; it is no longer a field apart where the cantons, the parliament and the citizens should not interfere. This is an important step because learning processes are possible only if participation is not only a right but a living practice.

## El difícil Federalismo

Por  
José Manuel Castells

### *La historia como premisa*

Puede predicarse de la historia constitucional española del siglo XX, una persistente constante compuesta inicialmente por unos acendrados principios federalistas, para una desembocadura final en una vertiente, meramente autonomista; o si se quiere, la iniciática postulación o previsión de unos parámetros federalizantes para concluir en la modestia de los planteamientos meramente estatutistas, fácil de considerarse como de tono menor frente a la amplitud federalista.

El siglo precedente había alumbrado el evidente fracaso de la I República federal, destrozada entre el fuego cruzado del cantonalismo y el carlismo. No obstante, en el desierto doctrinal de la decimonónica izquierda, es perceptible la teorización de un autor de valía innegable, el catalán Pi i Margall, que se decanta de forma nítida por el federalismo y que posee en esta materia una obra clave y de gran altura: *Las Nacionalidades* (1877); alegato en favor de la federalización española y expresión de un gran respeto, e incluso admiración, por las instituciones forales vascas, así como por sus realizaciones administrativas<sup>1</sup>.

Llegamos con el decurso del tiempo a ese momento, profundamente esperanzador, que se virtualizó en las Cortes Constituyentes republicanas del otoño de 1931. La reforma social, religiosa y militar

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<sup>1</sup> En momentos en que los juicios sobre los vascos no son demasiado propicios, recordaré lo que opinaba esta autor (pág. 227) sobre los mismos: «Los vascos se han distinguido siempre por un grande amor a sus propias leyes, una ciega devoción a sus caudillos y un fiero espíritu de independencia». Denotable también la alusión en igual dirección de la pág. 322 de la misma obra.

que se impulsó con decisión bajo la docta dirección de Manuel Azaña, tuvo su correlato en el denominado «Estado integral», que reconocía la posibilidad de Estatutos de autonomía en el interior de la naciente República. No obstante, bajo el peso del «problema de Cataluña», cualquier veleidad federalista fue en este momento marginada en orden a la articulación del Estado republicano con sus territorios, adoptándose en consecuencia el reconocimiento, con la forma de Estatutos autonómicos, respecto de aquellas regiones que así lo exigieran. La mayoría absoluta del Parlamento sólo pensaba en Cataluña, impulsora del nuevo régimen a través de sus partidos políticos, y en satisfacer sus reivindicaciones.

Finalmente, tres regiones plebiscitaron con éxito sus proyectos de Estatutos, y dos de ellas (Cataluña en 1932 y Euskadi en octubre de 1936) lo obtuvieron, aunque su vigencia fuera realmente sincopada y en situación de excepcionalidad, como en el supuesto vasco significaba su vigencia en plena guerra civil (Castells 1976).

Este proceso se repitió en el nuevo proceso constituyente que se inicia con la desaparición del régimen franquista. Un presunto ideario federalista, profesado por uno de los principales partidos, el PSOE y con un prestigio popular reactivo frente al centralismo del régimen periclitado, se diluye en el vacío total al ser sacrificado en el altar del consenso que no alcanzaba precisamente cotas federales. Unas pocas voces testimoniales se reclamaron federalistas en las Cortes, con una rotunda negativa de la mayoría más cualificada, que se sumó a la descentralización política de menor vuelo.

Triunfó así el Estado Compuesto formado por aquellos territorios que decidieron conformarse en Comunidades autónomas, siguiéndose con fidelidad el modelo italiano de la Constitución de 1948. Aunque esta vez, y como novedad, planeó básicamente sobre la Constitución territorial el «problema vasco», en su pluriforme dimensión; la disposición adicional 1.<sup>a</sup> del texto constitucional supuso una solución no suficientemente pactada, que admitiendo la diferencialidad, a nadie satisfizo en última instancia, sobre todo a los nacionalistas vascos.

Quede claro por lo tanto, que el federalismo, como la forma republicana de gobierno o la ruptura con las instituciones del pasado inmediato, no contaron prácticamente en los planteamientos de los constituyentes. Otra realidad político-territorial se dibujó y se puso en práctica de inmediato, si bien la Constitución no la bautizó de ningún modo con un nombre determinado.

*El estado autonómico y su vertiente antifederalista**2.1. La prohibición formal de la propia Constitución*

No han faltado autores de peso, que han defendido la existencia de una cierta asimilación entre el Estado autonómico alumbrado por la Constitución de 1978 y el propio Estado federal, según aparece conformado en otras realidades políticas. Así, Francesc de Carreras (1996 pág. 26) señala que «nadie pone en duda que, peculiaridades aparte, nuestro Estado forma parte de la gran familia de los Estados federales». En igual dirección Eliseo Aja (1999) afirmaba que este Estado autonómico podía considerarse como un Estado federal<sup>2</sup>. Incluso se llega a mencionar la realidad de un «federalismo anónimo» inscrito en la Constitución española (Bartolomé Clavero 2000 pág. 30), si bien ese mismo constitucionalismo español «solapa el federalismo porque le repugna». Y sin embargo, existen también voces autorizadas que han defendido que el Estado autonómico español en su versión actual no es, ni de lejos, un Estado federal<sup>3</sup>; basándose para esta línea argumentativa por la rotunda declaración del artículo 145.1 de la propia Constitución: «En ningún caso se admitirá la federación de Comunidades autónomas», manifestación que en su explayación formal y prohibitiva trataba de despejar el potencial «peligro» de unos países catalanes que englobaran a más territorios que la estricta Cataluña, puesto que para otras Comunidades se admitía su conexión o coalición (véase la disposición transitoria cuarta de la misma Constitución).

No obstante, serán los principios constitucionales y su aplicación en la práctica política posterior, los que permiten señalar una evidente diferenciación entre ambas formas de organización superior del Estado: la estrictamente autonómica y la consecuentemente federal.

*2.2. El reverso federalista en la realidad*

Sin entrar, por razones obvias, en un análisis de principios derivados del federalismo, por otra parte suficientemente heterogéneo para no

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<sup>2</sup> Lo que no suponía un obstáculo para el mismo autor, cara a reconocer en monografía posterior, los déficits en instrumentos que facilitarían la participación de todos los poderes afectados en la resolución de los problemas comunes (2000 págs. 38-39).

<sup>3</sup> Por todos indicativamente esta posición, las ponencias de Euric Fossas y Ferran Requejo en la obra colectiva *Asimetría federal y Estado plurinacional* (1999).

admitir pautas absolutamente unitarias, puede ser oportuno el aludir a una reforma bien reciente de un país prototípicamente federal: el Estado suizo y su reforma constitucional de 1999<sup>4</sup>. En esta «revisión» se señala que dichas medidas se centran en una «serie de aspectos»: que los cantones constituyen el elemento de base del Estado federal, que precisamente nace de su unión y que se compone prácticamente por ellos; no en balde el federalismo suizo «busca garantizar, por encima de la separación y limitación de poderes, la pluralidad lingüística y religiosa». Se establece de tal modo, un sistema garantista de las realidades territoriales en su máxima dimensión.

Queda así clara la idea, consubstancial a otros federalismos como el germánico o el belga (a partir de 1993): los Estados miembros de la federación son los elementos decisivos en la formulación de toda política federal unitaria a nivel doméstico, así como de forma terminante también, sucede lo mismo en la participación del Estado correspondiente federal en órganos y políticas de la Unión Europea<sup>5</sup>. O por describirlo con suficiente expresividad: las partes componen el todo y ese todo es una expresión esencial de las partes, en un sistema de mutua lealtad entre unos y otros.

Muy diferente es el sistema español: el Estado autonómico, con sus acreditados 23 años de experiencia, nos muestra un proceso que partiendo del «moderado centralismo» propio de la doctrina inicial del Tribunal Constitucional nos lleva en la actualidad a una concreta posición actual que defiende la «finalización» del mencionado proceso autonómico pendiente en todo caso, de una redistribución de competencias desde la vertiente de las Comunidades autónomas hacia las entes locales, entendida esta vez la operación en vísperas electorales (véase las numerosas declaraciones de dirigentes del Partido Popular en esta dirección de un nuevo «pacto local»).

En el intervalo hasta ese punto final, ha tenido lugar la sólida apropiación patrimonialista de los órganos constitucionales por parte de los dos partidos políticos mayoritarios, y la no menos vehemente utilización de las políticas del Estado, en tanto monopolio del partido gubernamental que las ejerce en régimen de exclusiva. El espacio no es compartido por cualquier otro *outsider*; salvo determinados mínimos y ele-

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<sup>4</sup> Un juicio crítico sobre esta revisión total en Jordi García i Manzano (2001).

<sup>5</sup> Al respecto la obra colectiva dirigida por García de Enterría (2002) con las ponencias al respecto en esta cuestión.

mentales consensos. La práctica diaria en estos dos planos, es suficientemente reveladora para que se proporcionen ejemplos al respecto.

Se ha revelado de tal manera un peligro que también se atisbó en la Italia de su inicio autonómico: la posible fagocitación de los entes regionales por los barones de los partidos políticos estatales, elevando el punto de mira: o la supeditación regional a los intereses sectoriales de aquellos partidos<sup>6</sup>. De tal modo, el centro geográfico se hace también político, y aquel ente que domina el eje central, es el protagonista absoluto de las políticas de gobierno existentes globalmente en el Estado. En los intersticios de este sólido poder, se admiten tenues y controladas penetraciones periféricas, por parte de los periféricos dóciles naturalmente. Insisto que no se trata de una elucubración, sino más bien de una constatación diaria de unas prácticas constantes y repetidas.

La contradicción de estas posturas con principios federalistas, tal como se revelan en ilustres supuestos comparados, no puede ser más palmaria; la oposición entre el actual sistema vigente en el reino de España y cualquier Estado federal, no puede ser más rotunda y terminante.

### 2.3. *La validez parcial del Estado autonómico*

Manifestación la precedente que no es óbice para la mención de aspectos notablemente positivos del sistema español, que sin llegar en sí mismos a alcanzar parámetros federales, fuerzan a calificar positivamente el decurso sobrevenido en la cuestión de las autonomías políticas. En este espacio, debe de aludirse a una importante descentralización competencial, homologable en ocasiones a la existente en Estados federales; un indudable amplio reconocimiento del hecho diferencial, especialmente el vasco y catalán<sup>7</sup>; finalmente, se ha producido con normalidad la generalización de las autonomías a todo el territorio español, consolidándose como básicos entes de dirección política en sus propios ámbitos territoriales.

Juicio genérico que resalta la cara amable del Estado autonómico, un tren de largo recorrido que ha avanzado, si bien sincopadamente

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<sup>6</sup> En esta dirección, J. Mor (1974) destacaba que «o las regiones devienen protagonistas de la vida política nacional o pueden ser fagocitadas, quedando como instrumentos de manipulación en las manos de los políticos nacionales»

<sup>7</sup> La obra que ha tocado en mayor profundidad y en su pluriforme realidad esta cuestión es la titulada *Estado autonómico y hecho diferencial de Vasconia* (2000).

como tributo a las correspondientes mayorías existentes cada momento en las Cortes Generales. Si esas mayorías no eran cualificadas y requerían pactos con la «periferia» dicho tren aumentaba perceptiblemente en velocidad; cuando tenía lugar una mayoría absoluta, el arbitrio central era total y el transporte acomodaba su velocidad a las conveniencias del centro, en ocasiones muy caprichosas, incluso arbitrarias.

Instrumentalización de la organización territorial en su conjunto, por veleidades político-partidistas que se ha hecho más notable en los tiempos que rodean al nuevo siglo, pero que tiene ilustres antecedentes en décadas precedentes. Pero estamos en un nuevo siglo y en una realidad ciertamente convulsa, como nos revela la palpitante actualidad.

*Las dificultades esenciales para una presunta instauración del federalismo en el reino de España*

Además de la mencionada «instrumentalización partidista» son evidentes otras causas originantes de obstáculos, que en el actual sistema constitucional y político español suponen auténticas barreras que impiden cualquier avance hacia una determinada fórmula de federalización del Estado.

Federalismo como organización superior del Estado, que está indudablemente de moda<sup>8</sup>, puesto que dicha construcción la profesan los países punteros del globo (Estados Unidos, Alemania, Canadá, Suiza...). Doctrina que ha acreditado además un consistente éxito en la gestión de los servicios públicos, que ha demostrado la existencia de una profunda lealtad entre todas las partes implicadas y en todas direcciones; y además, una correlativa y notable disminución de tensiones en su interior<sup>9</sup>.

Volviendo a España, una abierta sistematización de esas razones del «no avance» hacia el federalismo puede ser la siguiente, en lista meramente indicativa pero suficientemente expresiva de las contingencias obstaculizadoras.

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<sup>8</sup> Al respecto la diversa obra del Profesor Ferran Requejo, especialmente la publicada en 1999. Recientemente Eduardo López Aranguren: *Relaciones intergubernamentales en los Estados Autónomo y federal*, Oñati, 2002.

<sup>9</sup> Una última exposición sobre estas apreciaciones en el marco del federalismo, en Eduardo López Aranguren (2002).

### 3.1. *Un poder político centralizador y centralista*

Parece difícil de negar que el poder político español está retornando, de forma ostensible, a unos orígenes de centro-periferia, tal como se perfilaron en los dos pasados siglos, especialmente en las sucesivas épocas autoritarias. La afirmación de cierto «intelectual», «cuando el centro va bien, España va bien... cuando la periferia va bien, España va mal», es reveladora de esta concepción consistente en que la acumulación de poder político, económico, financiero y mediático en manos exclusivas y excluyentes de las instancias centrales, presupone un correlato apropiado a una acertada dirección política de gobierno y administración. Posición ciertamente discutible.

Quiere indicarse que después de ensayarse tres líneas políticas diferentes, en los gobiernos de la nación, como fueron y son las de UCD, PSOE y PP, parece haberse llegado a la conclusión finalmente, que es exigible una máxima capacidad decisoria a disposición de las instancias centrales, y para llegar a la misma se requiere unos enormes dispositivos de concentración mediática, de apoyo financiero y de sumisión de los distintos poderes al centro prepotente.

No es pues ésta una buena situación y hora para una profunda redistribución territorial del poder político, en tanto exigencia de base de todo federalismo que se precie. Por el contrario, se alumbran tiempos de concentración y monopolización de todas las aristas de todos los poderes en todo el territorio.

### 3.2. *Las inercias propias de la «Gran Administración» central*

Aunque puede resultar extraño a mentes racionales, la Administración General del Estado no ha dejado de crecer de forma cuantitativa desde 1975; y ello, a pesar de las fuertes transferencias de personal desde esa Administración, hacia las emergentes Comunidades Autónomas, o en menor medida, hacia las Administraciones locales. La propia ley de Organización y funcionamiento de la Administración (ley 6/1997, de 14 de abril), tras reconocer en su exposición de motivos que el carácter de la Administración única lo representa la administración autonómica, al menos en el terreno igualmente autonómico, tras hacer desaparecer nominalmente la figura del Gobernador civil, sin embargo mantiene en la práctica intocada la auténtica estructura de la Administración central, incluida su vertiente periférica a nivel de las Comunidades autónomas.

Es obvio que mientras dicha macro-administración permanezca en sus moldes precedentes —los propios por demás de un precedente sistema absolutamente centralista y centralizador—, se estará muy lejos de cualquier nivel federal, que en sí mismo perfila, y el ejemplo alemán es paradigmático en este aspecto, una pirámide exactamente inversa a la española en cuanto al número y calidad de las diferentes Administraciones públicas.

### *3.3. El monopolio del interés general por las instancias centrales*

Monopolio central revalidado con reiteración por el Tribunal Constitucional. Lejos queda el lúcido análisis de Kelsen cuando mencionaba los tres grados de este tipo de interés, propio del federalismo: el existente en los Estados miembros, el interés propio del Estado central o federal, y el que es propiedad del Estado global, interés este último que es el único y exclusivo poseedor del auténtico interés general, frente a los sectoriales de los otros dos tipos de interés que responden a pautas burocrático sectoriales, si bien legítimas.

En el sistema español el interés general lo detenta con dicha exclusividad, el poder central; los demás son intereses menores, limitados territorialmente y supeditados en todo momento a un interés general central. Remedando al monarca absoluto, el interés general soy yo, benemérita instancia central, quien lo disfruta en propiedad exclusiva y sin nivel perceptible.

### *3.4. La sacralización normativa propia del conservadurismo*

Aja (2000 pág. 42) ha resaltado con todo acierto la desconfianza o pánico a las reformas constitucionales, propias de determinadas ideologías, aunque estas reformas sean más que pertinentes, oportunas, incluso necesarias. Se desemboca de tal modo en el carácter sagrado e intangible de determinadas normas intocables tal como era la propiedad privada para los revolucionarios. Sacralización de normas que repercuten negativamente para el propio ordenamiento, elevado a un altar que no le corresponde y que llega a ocasionar incluso su deterioro funcional.

Se aportará de inmediato el supuesto del Senado español, como muestra explicatoria a esta «sacralización» de tintes tan negativos y ello por razones no solamente reaccionarias.

### 3.5. *La inevitable alusión a la voluntad política*

Si lo dicho precedentemente nos proporciona unas pistas, el núcleo de la cuestión se sitúa en el habitual tópico a la mención de la voluntad política concorde con el cambio federal, en tanto pieza esencial para dicha transformación. Pues bien, esta voluntad política parece decantarse por la aceptación acrítica del actual sistema autonómico, aunque se admita, como lejana posibilidad, la reforma de la Constitución como un objetivo a largo plazo<sup>10</sup>, hoy en día punto menos que rechazable y ciertamente inoportuno.

Si esta voluntad política no existe en el interior o en los aledaños del poder, el federalismo seguirá siendo un argumento estratégico de valor secundario, propio de programas políticos testimoniales, si bien se reconoce su buena intención y punto.

#### *El senado como paradigma de una cámara de representación territorial propio del federalismo*

Pocas dudas ofrece la afirmación que erige al Senado como órgano fundamental en una concepción federalista del Estado, aunque el entramado del reparto de poder propio de esta fórmula, no se acabe o agote sus posibilidades en un Senado participativo; si bien debe insistirse en las virtualidades derivadas del Senado en la organización federal. Es por esta razón, que por su valor ejemplar, dedique este epígrafe al Senado Constitucional español en su deficiente conformación actual.

### 4.1. *El Senado en la actualidad su indefinición e inutilidad*

Las presentes características del Senado se han resaltado suficientemente, haciéndolas derivar de las propias insuficiencias de la Constitución de 1978. El desconocimiento del devenir del propio proceso autonómico y de la generalización o no de las Comunidades autónomas, dio pie a la formalización de un Senado de base electoral fundamentalmen-

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<sup>10</sup> El propio presidente Aznar (2000 pág. 113) admitió esa posibilidad, aunque la condicionó al referirse de inmediato al «qué, el cómo y el cuándo se reforma; el porqué y el para qué...».

te provincial y de funcionamiento como un simple ente gregario del Congreso de los Diputados. De este modo, surgió el actual Senado del que se ha escrito, con conocimiento de causa (Sánchez Amor, 1994 pág. 95), que se conforma como un banco de pruebas para parlamentarios noveles (que luego si tienen éxito, irán al Congreso) y como un cementerio de elefantes para notables en desahucio. Pobre bagaje para tanta institución.

Durante el trienio 1993-1996 la constatación del carácter baladí del Senado se generaliza, y en consecuencia, se despierta un amplio movimiento reformista que alcanza a todos los sectores. Incluso el Partido Popular en la oposición a la sazón, se decanta por esta reforma: al establecer «las Bases para un acuerdo nacional de culminación del desarrollo autonómico», presentadas por su propio presidente, se contiene en su punto 9.º la siguiente propuesta: «a la luz de la experiencia que resulta del funcionamiento de la Comisión de Autonomías del Senado, preparar la reforma Constitucional indispensable para instituir una auténtica Cámara de representación territorial, que dé perfil definitivo al Estado de las Autonomías».

Unanimidad restructuradora respecto del Senado que se traduce también en un similar respaldo doctrinal. Son numerosos los seminarios y publicaciones sobre esta cuestión, que avanzan en profundidad; así, indicativamente y con las publicaciones subsiguientes aparecidas a la luz pública, las propiciadas por el Centro de Estudios Constitucionales, la Real Academia de Ciencias Morales y Políticas, la Asociación española de letrados parlamentarios, el Instituto Vasco de Administración Pública, el Instituto Catalán de Estudios autonómicos...<sup>11</sup>.

Un tímido avance en este momento supuso la creación, mediante reforma del Reglamento del Senado, de una Comisión General de Comunidades Autónomas y la aprobación por el Pleno del Senado, el 28 de septiembre de 1994 de una moción que exigía «la reforma del Senado para integrar más adecuadamente la Cámara territorial en el desarrollo del Estado de las autonomías»; finalmente la participación de los Presidentes de las Comunidades Autónomas, que parecían de esta manera revalidar la esperanza de vivificar el decaído Senado, en estado de aguda

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<sup>11</sup> Respectivamente, los títulos de estas publicaciones era la siguiente: *La Reforma del Senado* (1994); *La Reforma del Senado* (1996); *El Senado, Cámara de Representación Territorial* (1996); «*Revista Vasca de Administración Pública*» n.º 35 (II) (1993); *Ante el futuro del Senado* (1996).

postración que se sumaba en todo caso a la generalizada voluntad reformadora.

Sin embargo, las manifiestas dificultades para realizar la reforma impulsieron finalmente su ley. Entre estas diversas causas, Leguina (1996 pág. 142), alude a motivaciones claramente de oportunidad, puesto que el nivel reformista requería para su realización un clima general de normalidad, un amplísimo acuerdo interpartidista y una participación activa de los partidos nacionalistas periféricos; triple circunstancia que estaba lejos de tener lugar al enfocarse el impulso de reforma. A lo que debía de adicionarse la resistencia de los partidos nacionalistas a truncar dinámicas bilaterales a favor de un multilateralismo integrador propio de un nuevo Senado (Trujillo 1994 pág. 278) o las renuencias al respecto de los dos grandes partidos políticos estatales ante el previsible aumento del peso político de sus barones regionales (Sánchez Amor 1994 pág. 153).

De ahí que incluso en el propio trienio revisionista, se formuló un claro fatalismo que negaba cualquier posibilidad de reforma senatorial. Así Pérez Royo (1996 pág. 404) se decantaba por aceptar que la solución homogénea se imponía como una solución prácticamente inevitable para el Senado, consecuencia de una reforma imposible, lo cual suponía el asentamiento del Senado de la ley de reforma política de 1977.

A partir de 1996 el «impasse» es la situación normal del Senado Constitucional. Todo proyecto de reforma se aplaza para tiempos mejores y un interrogante se plantea con toda crudeza: ¿a quién interesa un Senado activo o uno meramente en hibernación? Respuesta fácil desde la perspectiva de poder que se afianza de forma clara y rotunda.

En fechas bien recientes y con ocasión de los informes con los que concluyó la Comisión parlamentaria Catalana de profundización en el autogobierno (marzo del 2002), aparece la institución de un «Senado reformado», como acorde y premisa de los nuevos tiempos, sin que esta cuestión aparezca enunciada como un tema central, aunque sí se perfila en tanto obvio y natural. Muestra de ese posibilismo, que si reivindicativo no se expresa con ningún tono conminatorio, puede aludirse a la propuesta del parlamento catalán del 9 de mayo de este mismo año, que ha pedido la designación de los magistrados del Tribunal Constitucional por parte de las Comunidades autónomas y a propuesta del Senado. No parece que semejante propuesta haya merecido un mínimo de atención en los pertinentes órganos decisorios, modos y ciegos para cualquier veleidat revisionista.

Nos hallamos por lo tanto, en un momento político en que el Senado se conforma en una institución híbrida, ni carne ni pescado; ni repre-

sentación de las Comunidades autónomas ni tampoco de las entes locales; ni titular de funciones de supervisión autonómica, ni foro de encuentro regional. En síntesis, un órgano constitucional que se mantiene en pie por la más pura de las inercias del pasado, sin que exista legitimación plausible para su subsistencia en sus actuales módulos.

#### 4.2. *El Senado en un sistema federal asimétrico*

Si bien en la lógica del federalismo se encuentra un Senado representativo, portavoz y participativo de las entidades territoriales de base, el gran reto —no tan fácilmente afrontado por el teórico federalismo— se centra en la adecuada asimilación del diferencialismo en su interior, en cuanto expresión de la diversidad cultural y lingüística. Federalismo y homogeneización se ha llegado a defender que marchan inextricablemente unidos y se proporcionan ejemplos comparados en esta línea.

Hecho diferencial que de forma sintética puede describirse en torno a los siguientes parámetros<sup>12</sup>: **a)** El dato de la historia, vivificada por la disposición adicional 1.<sup>a</sup> de la Constitución de 1978; **b)** Un subsistema propio y peculiar de partidos políticos y de sindicatos de clase; **c)** El evidente hecho cultural-lingüístico propio; **d)** El elemento geográfico insular; **e)** El derecho civil foral; **f)** El complejo normativo revalidante, tal como se configura con la Constitución y los Estatutos de autonomías y demás leyes del bloque de la Constitucionalidad.

Conjunto específico que además aparece asentado en la bilateralidad relacional de los poderes territoriales de base con las instancias centrales, frente a los planteamientos de un multilateralismo global que encuadra al resto de Comunidades Autónomas en sus relaciones con el poder central.

La consecuencia en el caso diferencial del País Vasco consistirá en un mosaico competencial específico (ertzaintza, educación, etc.), un régimen económico peculiar (concierto o convenio económico) y una organización territorial igualmente especial. De modo similar, aunque un idéntico, en el supuesto de Cataluña.

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<sup>12</sup> Sobre esta cuestión, Eliseo Aja: *El Estado Autonómico, Federalismo y Hechos diferenciales*, Madrid, 1999. Sobre el supuesto vasco, mi trabajo «El hecho diferencial vasco» en el número 47 (II) de la «*Revista Vasca de Administración Pública*».

Firme planteamiento de base que debía traducirse en un sistema asimétrico en el marco estatal, con la mayor importancia y consistencia en su reflejo en el Senado<sup>13</sup>. Desde esta perspectiva «un Senado reformado» en expresión catalana, debe, de forma ineludible, atenerse a las siguientes exigencias coherentes con los presupuestos de partida y con la perspectiva finalista perseguida<sup>14</sup>.

A) Senado que asuma el modelo pluricultural con normalidad, partiendo de la diversidad lingüística y de su reconocimiento en el funcionamiento habitual del Senado. No puede olvidarse que un 40 por cien de la población española vive y convive en un régimen de cooficialidad lingüística. No obstante, y podría aportar alguna experiencia personal desde este plano, las suspicacias a aceptar la cooficialidad lingüística en el mismo Senado —con abstracción de la anecdótica intervención de determinados presidentes autonómicos— son demás públicos y notorios, y han imposibilitado, hasta el momento, su adecuada plasmación. Y sin embargo, como señala Vernet<sup>15</sup>, el Senado constituye la institución central que debería expresar la forma más clara el carácter multilingüe del Estado español, en pura y estricta coherencia.

Al menos hasta el presente, la experiencia de este reconocimiento de un sistema de cooficialidad es excesivamente tierno e inconsistente.

B) En cuanto a la estructura del Senado, ésta debe conformarse sobre la base de grupos territoriales representativos de las Comunidades autónomas. Es cierto que estos grupos han existido en periodos anteriores, aunque la experiencia ha sido decepcionante no tanto por la actuación de dichos grupos, como por la absoluta prevalencia de la solidaridad partidista sobre los vínculos territoriales, existentes aquella en los grandes partidos políticos estatales (Da Silva 1994, pág. 33).

De todos modos, y una vez más aludiendo a la coherencia, no puede propugnarse un «Senado reformado» que no permita al menos la agrupación de senadores de una determinada Comunidad autónoma, bien permanentemente o bien, en temas que afectan al hecho diferencial pro-

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<sup>13</sup> Sobre este Senado, mi ponencia «*El Senado y el reconocimiento del hecho diferencial*» en la obra colectiva *Ante el futuro del Senado* (1998).

<sup>14</sup> Al respecto, Alejandro Saiz (1995).

<sup>15</sup> «La era de la globalización de la economía es también la era de la localización de la política. Lo que a los gobiernos locales y regionales les falta en poder y recursos lo suplen con flexibilidad e interconexión. Ellos son los únicos que pueden estar a la altura del dinamismo de las redes globales de riqueza e información».

pio, cara a adoptar decisiones conjuntas, sin mengua de la existencia en el interior de estas agrupaciones del hecho partidista.

Cuestión conexas es la propia composición del Senado y su método de elección, partiendo una vez más de su carácter representativo de las Comunidades autónomas. Existe una diversidad de fórmulas al respecto (el sistema alemán de designación por los gobiernos autonómicos, la elección por sufragio universal directo, la designación por los parlamentos autonómicos, o un sistema mixto de varios de los anteriores), métodos que siempre deben desembocar en su base autonómica, de elección o designación.

C) En el mismo plano, al abordar las funciones de ese «Senado reformado», la impronta del reconocimiento de la diferencialidad se presenta como una exigencia ineludible. Se plantea así la posibilidad, plenamente reconocida por ejemplo en el sistema belga, de un derecho de veto por parte de un grupo territorial en un concreto procedimiento legislativo; o la configuración de un sistema de minorías de bloqueo de determinados proyectos legales (Leguina 1996 pág. 159), que signifique en todo caso, la mera posibilidad de un veto suspensivo o de reconsideración de determinados proyectos estatales, para los que se requeriría, en última instancia, mayorías cualificadas cara a su aprobación definitiva. Sin que la posibilidad por estos grupos de un veto definitivo sea descartable en principio.

En coherencia, debía también propugnarse la legitimación para recurrir por el grupo territorial afectado y ante el Tribunal Constitucional, contra aquellas leyes que entraran en presunta contradicción con el componente del régimen diferencial comunitario. En igual sentido, el constituirse el Senado en cámara de primera lectura en leyes de intereses y contenidos territoriales, y de activa y necesaria participación en las leyes básicas, orgánicas y de desarrollo del artículo 150 de la Constitución, además como una de sus funciones primordiales.

Con igual razón, el Senado novedosamente conformado, debía ser el órgano adecuado en orden a facilitar la intervención comunitaria en las diferentes propuestas de nombramiento por parte de las Comunidades autónomas, sobre todo dotadas de hecho diferencial, de miembros de los órganos constitucionales, así como en las políticas globales de las instancias centrales, siguiéndose pautas de respeto mínimo para la existencia igualmente mínima de las Comunidades autónomas.

Igualmente, parece necesario el arbitrar fórmulas de coordinación, incluso de formalización de políticas comunes entre Comunidades autónomas limítrofes, sirviéndose para ello del Senado; y desde esta institu-

ción, facilitar la necesaria apertura a la normal participación de las Comunidades autónomas, en mayor medida las de diferencialidad constitucional, en los órganos y políticas de la Unión europea, así como de otros organismos de nivel internacional (Unesco, etc.); sobre todo en aquellas materias que afecten a competencias singulares de esas Comunidades, siguiéndose así los trazos consolidados de países tales como la República federal alemana, Bélgica y Austria. Algo se esboza en el sistema español —aunque sea a nivel de simple amago—, con esas Comisiones bilaterales para asuntos europeos, en relación a Cataluña y Euskadi y el poder central.

El interrogante sobre la posibilidad real de formalizarse este «Senado reformado» es cierto e incontestable. La duda de su implantación a corto plazo no menos real y consistente. Y sin embargo, pocos pueden negar la coherencia, la racionalidad, incluso la sensatez, de su aparición a medio plazo, entre otras razones para responder a los requerimientos propios del real Estado autonómico español. Lo que nos vuelve a la sempiterna mención a la voluntad política o a la existencia de nuevas mayorías parlamentarias, más abiertas y flexibles que las actuales.

*Perspectivas para la instauración  
de un federalismo apropiado al nuevo siglo*

Sin llegar a perfilar la estación de llegada del tren del Estado autonómico, reconociendo que la modernidad pasa por la conjugación de la globalización económica y la localización de la política (Manuel Castells, 1999, pág. 410)<sup>16</sup>, parece sin embargo, imprescindible plantearse de una vez, con rigor y seriedad, la articulación federal del estado español, en cuanto paso adelante en la dirección de una más racional conformación del mismo y del reconocimiento más ajustado de los entes identitarios existentes en su interior<sup>17</sup>.

Federalismo impulsado en la dirección seguida por los Estados más avanzados política y económicamente y en los parámetros, por ejemplo,

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<sup>16</sup> Sobre estas consecuencias, los distintos informes que tuvieron lugar en la Comisión parlamentaria catalana de profundización del autogobierno (marzo 2000).

<sup>17</sup> Al respecto y como una posición sintomática reciente, la conferencia de Joaquín Almunia (Fundación Ortega y Gasset, del 11 de febrero del 2000) titulada «*Un impulso federal al Estado Autonómico*».

de la revisión general de la Constitución federal suiza de 1999, en referencia a unas máximas garantías de la pluralidad histórica, religiosa y lingüística de la antigua confederación helvética.

El canadiense Gaguon, citado por López Aranguren (2002 pág. 126-127), reflexionaba sobre las aplicaciones o usos políticos del federalismo, y los sintetizaba nuclearmente en las siguientes: 1). Mejor gestión de los conflictos, puesto que servía para aliviar las tensiones de una manera más apropiada. 2). Mejor protección de las minorías en cuanto que comporta un mayor respeto a la diversidad existente en su interior. 3). Equilibrio ajustado entre la unidad nacional y la soberanía regional, tanto más denotable en relación al actual Estado de las autonomías español, desnivelado profundamente a favor de los poderes centrales. 4). Profundización en la representación democrática, por establecer un sistema de representación más complejo y sofisticado que el propio de los Estados unitarios, y sin embargo, de una mayor resonancia democrática.

Partiendo de que hoy en día la relación entre naciones es básicamente una relación de interdependencia (López Aranguren 2002 pág. 128), de la existencia de un Estado plurinacional español con las consiguientes consecuencias directas<sup>18</sup>, de fórmulas de cosoberanía entre todas las instituciones territoriales, de respeto y aceptación de los hechos diferenciales, la solución sobre todo este compuesto, un federalismo asimétrico sigue siendo un hito positivo, pleno de esperanza y cargado de futuro.

Presión ya desarrollada por determinados territorios en pro de esta deseada federalización. Como ha destacado Manuel Castells (1998, Volumen 2 pág. 70), «lentamente, pero de forma segura, Cataluña junto con el País Vasco, están forzando a España a convertirse, a su pesar, en un Estado federal muy descentralizado». Hasta que esa lenta marcha surgida desde determinados territorios dotados de una especial sensibilidad por el autogobierno, cuajen en otras áreas y lleguen a implicar en su proceso al propio Estado de las autonomías, estaremos en un tiempo de espera.

No puede dejarse al margen por último, como señaló el llorado Tomás y Valiente (1995, pág. 516) que «la estructura misma del Estado de las autonomías está caracterizado... por ser un Estado complejo al que

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<sup>18</sup> Sobre estas consecuencias, los distintos informes que tuvieron lugar en la comisión parlamentaria catalana de profundización de autogobierno (marzo 2000).

es consustancial el equilibrio entre unidad y diversidad, entre homogeneidad y heterogeneidad, entre igualdad y pluralismo». Si así se reconoce globalmente, el camino hacia el federalismo estará expedito, o al menos y no es poco, abierto.

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Federalismo, nacionalismo y autodeterminación  
en el País Vasco

Por  
Javier Villanueva

*Tras la pista del federalismo vasco*

La historia del federalismo vasco, desde que despunta como corriente específica a mediados del siglo XIX hasta ahora, es en muy buena medida la crónica del fracaso repetido de una corriente que no logró superar nunca el estigma del *caos cantonalista* atribuido a la Primera República española (1873-1874).

Desde los años ochenta del siglo XIX, el término «federal» tiende a desaparecer del nombre mismo de los partidos políticos federalistas y su pista se difumina. Desde entonces, lo federal se convierte o bien en una identidad escondida, que está subordinada a otras que aparecen más en primer plano y que por ello se queda en una identidad secundaria o de segundo grado, o bien en un rasgo que está muy presente en ciertos líderes, sobre todo del mundo republicano y socialista, pero que nunca llega a cuajar como una identidad específica y fuerte. Dicho esto, cabe añadir, no obstante, que el balance es más matizado si se mira la historia del federalismo vasco desde otra perspectiva: por su capacidad de contaminar a otras corrientes ideológicas e influir en ellas o «prestarles» alguna parte de su ideario, esto es, desde la historia de las ideas.

De entrada, el fuerismo es un «sustrato común» (Coro Rubio 1998) a todas las ideologías presentes en el País Vasco en los años sesenta del siglo XIX: liberales, republicanos, conservadores, carlistas y tradicionalistas, así como, a su vez, la huella de las ideas federalistas es patente en todas las corrientes del fuerismo vasco en esa época. Considero fueris-

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<sup>1</sup> «Fuerismo es la tendencia o aspiración política que se propone reconquistar los fueros de que ha sido despojado el país basko-navarro y retener, mientras tanto, los que

tas, siguiendo a Campión<sup>1</sup>, a todos los que se asignan esa identidad y dicen estar a favor de la restauración de los Fueros vasco-navarros. Y, por lo mismo, considero federalistas a quienes se inspiran en modelos o ideas federales. Pero ha de tenerse en cuenta, sobre todo, que la influencia de las ideas federalistas también alcanza al nacionalismo-vasco ya en el siglo XX, a través principalmente de tres vías. En primer lugar a través de la herencia fuerista asumida por aquél, cosa que es ya un lugar común en la historiografía vasca<sup>2</sup>. En segundo lugar, por el contacto con las corrientes pro-autonomistas del mundo liberal y republicano del País Vasco en el primer tercio del siglo XX. Por último, por la influencia del federalismo europeo en los líderes exiliados del PNV, entre los años cuarenta y el comienzo de los setenta del pasado siglo XX.

### 1.1. Cuatro generaciones

La *primera generación* actúa y escribe en los años sesenta y setenta del siglo XIX, en un tiempo en el que se suceden importantes acontecimientos. En el conjunto de España: la revolución de 1868, la segunda guerra carlista (1872-1876), la primera República (1873-1874), la vuelta de la Monarquía y el comienzo del régimen de la restauración. En el territorio vasco-navarro: la derrota del carlismo tras una sangrienta guerra civil, la ocupación militar del territorio vasco en el último tramo de dicha guerra, la desaparición traumática en 1876 de lo que quedaba de las instituciones y prácticas forales en Álava, Vizcaya y Guipúzcoa, el «estado de sitio» posterior en todo ese territorio que se prolonga hasta el verano de 1879.

En ese tiempo compiten entre sí tres clases de fuerismo: 1) el liberal moderado de los Egaña y Mateo Moraza, cuyo lema es *Fueros y Constitución*, 2) el tradicionalista y antiliberal de los Artiñano, Ortiz de Zárate, Manterola, Navarro Villoslada, etc., con el lema *Dios y Fueros*, que acaba siendo el hegemónico<sup>3</sup>, 3) el federalista y republicano que

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*aún conserva*». En «Fuerismo, regionalismo y federalismo» (sin fecha). Obras Completas. Tomo XV: *Campión periodista*, pág. 138.

<sup>2</sup> Tras la senda abierta por SOLOZÁBAL (1975), ELORZA (1978), CORCUERA (1979), ARANZADI (1981) y JUARISTI (1987) entre otros.

<sup>3</sup> Vicente GARMENDIA (1999): *Jaungoicoa eta foruac. El carlismo vasco-navarro frente a la democracia española (1868-1872)*. Bilbao: Universidad del País Vasco.

intenta una síntesis de modernidad y tradición, imposible para los aires de la época. Estos últimos —entre los que destacan: los hermanos Benito y Joaquín Jamar en Guipúzcoa aunque son de origen navarro, Fermín Herrán en Álava y Serafín Olave en Navarra— son correligionarios o discípulos de Pi i Margall; dicho en otros términos, un exmilitar, dos intelectuales y tres hombres de negocios. El también navarro Arturo Campión es uno de sus miembros más jóvenes, pero la abandona tras el fracaso de la república federal cuando aún no ha cumplido los veinte años.

Las ideas-fuerza de esta generación son las de Francisco Pi i Margall, el efímero presidente de la Primera República española. Entre ellas destaca la voluntad de conjugar el doble principio de autonomía y pacto, el núcleo de su concepción federativa. La *autonomía* es libre albedrío y presupone un punto de partida pro-autodeterminativo<sup>4</sup>. El *pacto* incluye el impulso unitario, la formación de un estado federal, para la obtención de un beneficio mutuo. La combinación de ambas cosas da como resultado su fórmula: «*o pacto o fuerza, fuera del pacto no se puede ser federal*»<sup>5</sup>.

La equiparación de fuerismo y federalismo, en la que insisten los hermanos Jamar<sup>6</sup> y también Serafín Olave<sup>7</sup>, es un rasgo destacado del republicanismo vasco de esa época, desde que una asamblea de representantes de Navarra y Vascongadas, celebrada en junio de 1869 en Eibar, acordó el Pacto de las Provincias Vascongadas y Navarra, entre cuyos contenidos destacaban la «conservación de los Fueros» y la «federación con la madre patria»<sup>8</sup>. Pero quizás su legado más relevante es la interpretación del Fuero como una constitución progresista, laica y garantista, «de un pueblo que no reconoce amos», que J. Jamar siste-

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<sup>4</sup> «Los pueblos deben ser dueños de sí mismos, incluso para asimilarse y fundirse con otro pueblo». Pi i Margall (1876): *Las nacionalidades*. Madrid: Cuadernos para el diálogo, 1972, págs. 149 y 154.

<sup>5</sup> *Las nacionalidades*, págs. 78-80

<sup>6</sup> «*La organización foral de las Provincias Vascongadas es la república federal*». En Juan María Sánchez Prieto (1993): *El imaginario vasco. Representaciones de una conciencia histórica, nacional y política en el escenario europeo 1833-1876*. Barcelona: Ediciones Internacionales Universitarias, págs. 266-269.

<sup>7</sup> «*Fuerismo y federalismo son sinónimos*» dice en un escrito fechado en 1878. En Miguel José Izu (2001): *Navarra como problema. Nación y nacionalismo en Navarra*. Madrid: Biblioteca Nueva, pág. 158.

<sup>8</sup> Antoni JUTLAR (1975): *Pi i Margall y el federalismo español*. Madrid: Taurus, tomo 1.º, pág. 433.

matiza y resume en el folleto *Lo que es el Fuero y lo que se deriva del Fuero* publicado en 1868. Esta interpretación, reiterada una y otra vez por su hermano Benito desde las páginas del diario *La Voz de Guipúzcoa* (Fusi 1979), estará vigente en la izquierda autonomista hasta los años treinta del siglo XX.

La *segunda generación* actúa en los años ochenta y noventa del siglo XIX, tras la desaparición traumática de las instituciones forales en Álava, Guipúzcoa y Vizcaya, y tras haber salvado del naufragio una autonomía fiscal, mediante la figura del concierto económico logrado en 1878, que permitirá sostener la nueva administración vasca<sup>9</sup>. De esta generación me fijo, en especial, en la Asociación Euskara de Navarra, de la que son miembros Campión, Olóriz e Iturralde.

El federalismo de esta segunda generación se diferencia del de la generación anterior en que invierte los términos de su adscripción al federalismo. Salvo algunos pocos federalistas confesos de la generación anterior como Fermín Herrán, o los hermanos Joaquín y Benito Jamar, los de esta generación son primordialmente fueristas y a consecuencia de ello son también federalistas. Quien lo tiene más claro en este sentido es Arturo Campión, quizás por su formación de jurista, para quien los Fueros vasco-navarros contienen todos los ingredientes sustanciales de los sistemas compuestos federativos o confederativos: una constitución interior, órganos propios exclusivamente poseídos, unos pactos de soberanía e incorporación con un poder exterior<sup>10</sup>.

El primer tercio del siglo XX es el tiempo de *la tercera y la cuarta generación*. Ya ha pasado un cuarto de siglo desde la pérdida de las instituciones forales y es un tiempo marcado por la transformación del País Vasco en una sociedad industrializada. En la esfera política es el tiempo de nuevas iniciativas que pretenden ampliar la autonomía de la administración vasca; y, también, de nuevos protagonistas, como el socialismo y el nacionalismo.

De estas generaciones conviene fijarse especialmente en personajes como los guipuzcoanos Francisco Gascue y Francisco Goitia, herederos de la primera generación federalista, y los bilbainos Horacio Echevarrieta y Ramón Madariaga, representativos de una izquierda republica-

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<sup>9</sup> El *concierto* reconoce la autonomía fiscal de Álava, Vizcaya y Guipúzcoa (reconocida ya a Navarra en la figura similar del *convenio* económico) y mantiene la especificidad administrativa del País Vasco.

<sup>10</sup> Ídem, págs. 215-218.

na pro-fuerista y pro-autonomista que desde 1912 adopta el lema *República y Fueros*, o en algunos liberales como José Orueta. La mayoría de ellos son empresarios dinámicos (L. Castells 1987). Desde el congreso de 1918 que proclama su adhesión al federalismo, también forma parte de esta corriente el Partido Socialista, si bien Indalecio Prieto, y, sobre todo la tendencia que pueden representar los líderes del «socialismo eibarrés», como Toribio Echeverría y José de Madinabeitia, ya habían manifestado anteriormente su afinidad ideológica con el republicanismo vasco de inspiración fuerista y federalista<sup>11</sup>. La restauración foral y la federación ibérica son las dos ideas centrales de esta tendencia socialista en cuanto a la organización territorial del estado y la inserción en el mismo de la singularidad vasca.

El federalismo de estas dos últimas generaciones es de segundo grado. En su caso, la identidad principal es la autonomía, entendida como actualización y adaptación a la realidad vasca y española tanto de los fueros como de los principios federales en los que se inspira. Pero a diferencia de la primera generación, cuyos principios federalistas quedan a veces aprisionados por un doctrinarismo que se nos antoja visto desde ahora rebosante de ingenuidad, y a diferencia de la dedicación casi exclusiva de la segunda generación a sus aportaciones lingüístico-culturales e ideológico-historicistas, algunos personajes de la tercera y cuarta generación se preocupan algo más por aclarar y concretar el significado de la restauración foral en «el tiempo presente».

Entre los federalistas de la cuarta generación debe mencionarse finalmente a la extrema izquierda vasca de los años treinta del siglo XX: comunistas, poumistas y anarquistas. Pero en todos ellos sin excepción el federalismo es muy tenue y se queda en un mero adjetivo, si bien comunistas y poumistas proclaman una y otra vez que reconocen y respetarán la autodeterminación del pueblo vasco, «hasta su constitución en estado independiente, si ésa fuera la voluntad de la mayoría»<sup>12</sup>.

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<sup>11</sup> Jesús M. EGUIGUREN (1984): *El PSOE en el País Vasco. 1886-1936*. Haranburu Editor, págs. 152-167.

<sup>12</sup> La cita es de un artículo de José Luis Arenilles, escrito en 1936. Para los poumistas, ver el libro de los hermanos José Luis y José María ARENILLES *Sobre la cuestión nacional en Euskadi*, editado por Fontamara en 1981. Para los comunistas, Antonio Elorza (1977): «Comunismo y cuestión nacional en Cataluña y Euskadi (1930-1936). Un análisis comparativo». *Saioak, revista de estudios vascos*, número 1.

## 1.2. *Un federalismo a la medida del nacionalismo vasco*

Sabino Arana (1865-1903), el fundador del nacionalismo vasco, pertenece a la segunda generación. Casi toda su obra escrita y su intervención política se concentra en apenas una década, mientras que Campi3n (1854-1936) es coet3neo de las tres primeras generaciones.

Para empezar, Sabino Arana cambia de nombre a los Fueros para resaltar que la cosa, aunque siga siendo la misma, debe ser contemplada con otra mirada. Para Arana son las «leyes viejas», las leyes antiguas de los pa3ses vascos; unas leyes propias, de pueblos libres, aut3ntico testimonio de su capacidad de autolegislaci3n y de su libertad originaria. De manera que el lema *Jaun Goikua eta Lege zarrak* (*Dios y Leyes viejas*) con el que sustituye al cl3sico lema fuerista y carlo-integrista *Jaun Goikua eta Foruak* (*Dios y Fueros*) contiene los elementos centrales de la identidad vasca del pasado y del futuro: el catolicismo y la recuperaci3n de las viejas leyes. Esto 3ltimo equivale, seg3n Sabino Arana, a recuperar la verdadera independencia que tuvieron los pa3ses vascos hasta la p3rdida de los fueros, de modo que el lazo confederativo o federativo con la Corona de Espa3a, hasta entonces un elemento consustancial del sistema foral para todas las corrientes fueristas, queda borrado de la historia<sup>13</sup>. A partir de aqu3, quedar3 consagrado el dogma nacionalista de que Euskadi no ha estado nunca unida a Espa3a, ni voluntaria ni involuntariamente, hasta la ley del 25 de octubre de 1839 que dispone la conformidad del Fuero con el sistema liberal constitucional.

El segundo cambio, por tanto, es la equiparaci3n de fuerismo e independencia, condensada en su f3rmula: *fuerismo es separatismo*. A contracorriente de la tradici3n vasca hasta entonces un3nime<sup>14</sup>, Sabino Arana se inventa un pasado de independencia de Espa3a que justifique el futuro deseado (tambi3n independiente de Espa3a). La utilizaci3n resuelta por su parte del argumento y el sentimiento anti-Espa3a y anti-espa3ol es la argamasa con la que cimienta toda su construcci3n nacionalista.

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<sup>13</sup> Los cr3ticos de la «invenci3n» de la historia vasca por Sabino ARANA, como SOLOZ3BAL (1975), ELORZA (1978), CORCUERA (1979), ARANZADI (1981), JUARISTI (1987) o DE LA GRANJA (1995), abundan en estas ideas.

<sup>14</sup> Con la 3nica excepci3n del vasco-franc3s Txaho, autor del libro *Viaje a Navarra durante la insurrecci3n de los vascos*, en tiempos de la primera guerra carlista, cuyo antiespa3olismo est3 bajo sospecha de encubrir un inter3s pol3tico y diplom3tico descaradamente pro-franc3s seg3n Juaristi (1987).

Por lo demás, Sabino Arana traslada los acentos federalistas hacia adentro de los países vascos en un doble movimiento marcado por la dualidad pasado-presente. En primer lugar, de acuerdo con su concepción del pasado, cada uno de los siete territorios vascos (Navarra; las tres provincias vascongadas: Vizcaya, Guipúzcoa y Álava; más los tres de la parte vasco-francesa: Laburdi, Baja Navarra y Zuberoa) ha seguido un proceso de formación confederativo cuyo modelo más acabado es el de Vizcaya. Por otra parte, y en lo que hace al futuro, postula la confederación de todos ellos mediante un tratado especial. Según Javier Corcuera (1979, pág. 371), hay un silencio y un nulo desarrollo por parte de Arana en todo lo relativo a cómo habrían de ser la futura constitución común o confederada y la constitución interna de cada uno de los estados vascos confederados.

Durante el primer tercio del siglo XX el grueso de sus seguidores repetirá sin más estas afirmaciones genéricas de Arana, que se convierten por tanto en un tópico omnipresente de la literatura nacionalista; si bien algunos de los principales publicistas no se limitaron a repetir la versión *aranista* de la historia vasca sino que la ilustraron, complementaron o desarrollaron, sin cuestionarla, conscientes de que apenas había tenido tiempo para penetrar y profundizar más en la mayor parte de los asuntos que abordó<sup>15</sup>. Hubo, también, quienes se atrevieron a revisar algunas tesis de Arana, como la confederación inter-vasca, en nombre de la unidad nacional vasca<sup>16</sup>. E incluso cabe mencionar a quienes cuestionaron dicha tesis confederalista desde la más estricta ortodoxia, como el sacerdote José de Ariztimuño (*Aitzol*)<sup>17</sup>.

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<sup>15</sup> Lo hizo por toda la primera generación nacionalista Luis Eleizalde cuando escribió en la revista *Euzkadi*, en 1921, que S. Arana «murió sin haber podido terminar una sola de las obras que emprendió») En *Luis de Eleizalde. Un vasco polifacético*, de Esteban Antxustegi. Bilbao: Fundación Sabino Arana, 1998.

<sup>16</sup> José Luis DE LA GRANJA (1995): *El nacionalismo vasco: un siglo de historia*. De la Granja menciona entre los heterodoxos a Francisco Ulacia y Eduardo Landeta, ambos provenientes del fuerismo liberal intransigente, así como a Jesús de Sarriá, el director de la prestigiosa revista *Hermes* entre 1917 y 1922. Textos significativos de estos u otros «revisionistas» en De Pablo, Santiago; de la Granja, José Luis y Mees, Ludger eds. (1998): *Documentos para la historia del nacionalismo vasco. De los Fueros a nuestros días*. Barcelona: Ariel practicum.

<sup>17</sup> Ariztimuño, además de cuestionar la tradicional separación de los vascos en siete territorios distintos y de criticar el proyecto de la izquierda nacionalista, ANV, por «centralista y unitarista», anima a revisar la propuesta confederativa de Arana y postula una solución «más equilibrada y ponderada» que la separatista o la unitarista. José de Arizti-

A lo largo del primer tercio del siglo XX es obligado tener en cuenta, de otra parte, la batalla ideológica y política que se libra en torno a la participación o no del nacionalismo vasco en la política española, un asunto que afecta de lleno a cualquier planteamiento federativo del País Vasco en el estado español.

La ortodoxia doctrinal afirma el objetivo de la independencia de la nación vasca, Euskadi, señala a España y lo español como enemigo principal de Euskadi y lo vasco, y, en consecuencia, exige romper con España y lo español; el nacionalismo no ha tener ningún compromiso con España. Dicho de otro modo: a) el nacionalismo vasco no ha de comprometerse en ningún pacto estatal, sea la autonomía sea la federación o sea la confederación, b) no ha de participar en la política española, c) no ha de aliarse con fuerzas españolas. Una lógica, estrictamente nacionalista de diferenciar y separar cada nación y cada nacionalismo. Los hermanos Sabino y Luis Arana encabezan la ortodoxia.

Enfrente de esa ortodoxia doctrinal hubo siempre un criterio revisionista. Que se distingue de los ortodoxos por su pragmatismo, esto es, por admitir objetivos graduales intermedios como la autonomía y el mayor nivel posible de autogobierno en el estado español. La justificación de esa opción se atiene a la lógica de que cuanto más se avance por el autonomismo se estará en mejores disposiciones para vasquizarlo todo (*Kizkitza* en 1917)<sup>18</sup>, por el «deber taxativo de hacer cuanto esté en nuestras manos para salvar nuestra lengua y nuestro pueblo» (*Kizkitza* en 1932)<sup>19</sup>, como «primer paso hacia el ejercicio de todas las funciones que ejercía el país en la época foral» (Leizaola 1932)<sup>20</sup>. Esa lógica es la que les lleva a apartarse del criterio de los ortodoxos, por considerarlo negativo para Euzkadi, y a interesarse en la política española y en las alianzas con las fuerzas políticas españolas. En la nómina de los «revisionistas» en estas materias están los líderes más conocidos del PNV durante la primera mitad del siglo XX: Engracio Aranzadi (*Kizkitza*), Luis Eleizalde, J. A. Aguirre, Manuel Irujo y F. J. Landaburu, así como los hete-

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muño, Aitzol (1935): *La democracia en Euskadi*, págs. 210-214. Aitzol murió en 1936, a los 39 años, fusilado por las tropas franquistas. Fue uno de los principales impulsores y animadores del renacimiento lingüístico-cultural en euskera desde la asociación *Euskalzaleak* y desde la revista *Yakintza*.

<sup>18</sup> En Antonio ELORZA (1978): *Ideologías del nacionalismo vasco. 1876-1937. De los «euskaros a Jagi-Jagi*. L. Haranburu-Editor, pág. 360.

<sup>19</sup> Citado en *Ideologías...*, pág. 432.

<sup>20</sup> Ídem, pág. 430.

rodoxos Ulacia, Landeta y Sarriá o la nueva corriente nacionalista laica y de izquierda que forma Acción Nacionalista Vasca a partir de 1930.

Esta polémica, aquí presentada en sus posiciones más extremas, pero que produjo de hecho muchos más matices e incluso complejas combinaciones de ambas en las mismas personas, minuciosamente detalladas en el libro *El péndulo patriótico*, es un campo destacado de la pugna histórica entre las dos almas del PNV, y, más en general, del nacionalismo vasco.

Desde 1917, en que se inicia un movimiento autonomista liderado por las diputaciones de Vizcaya, Guipúzcoa y Álava, las concepciones básicas del fuerismo (más o menos federalista) se ven sometidas a la prueba de su validez política y jurídico-constitucional. ¿Cuál es el título del derecho al autogobierno? ¿El argumento foral-historicista? ¿El criterio nacional y el principio de nacionalidades confirmado por la lingüística, la etnología y la antropología? ¿La voluntad popular y la regla democrática? ¿La identidad de los vascos es una, aunque con diversas variedades dialectales e institucionales o debe prevalecer su diversidad de manifestaciones como en la historia? ¿Cuál es el significado en nuestros días de la restauración foral y en qué puede consistir en concreto? ¿Cuál es la diferencia entre la autonomía y la reintegración foral? ¿Se plantea o no algún vínculo constitucional entre las instituciones vascas y el estado español y cual es su carácter: autonómico, federativo o confederativo? ¿Cuál es el modelo de constitución interna del País Vasco y por tanto de relación entre sus unidades históricas: unitario, federal o confederal? ¿Cuál es la lógica de la lista de competencias cuya soberanía se reclama?

Cabe decir, sin entrar al detalle, que la respuesta a estas interrogantes tiene dos momentos y dos protagonistas distintos. El primer momento, anterior a la constitución republicana de 1931, tiene como protagonista a la Sociedad de Estudios Vascos, Eusko Ikaskuntza, en cuya comisión de autonomía se viene gestando desde años atrás el texto-base conocido como el Estatuto de Estella. Este proyecto estatutario tiene la impronta de la *mayoría foral*<sup>21</sup> que lo elaboró (Idoia Estornés Zubiza-

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<sup>21</sup> Compuesta por carlistas, nacionalistas, republicano-federalistas y fueristas liberales. Pero esa mayoría pro-fuerista era compatible con una durísima contienda en la esfera política, donde los nacionalistas compiten en esa época con los carlistas por la hegemonía en los ámbitos agrarios guipuzcoanos y ambos se la disputan con liberales y republicanos en las zonas urbanas.

retta 1990). En lo que hace a la constitución interna del territorio vasco tiene un sesgo confederalista. Es de inspiración más bien federalista en cuanto al vínculo que establece con la república española. Y es también federalista en la distribución de poderes. Tras el fracaso de ese intento, habrá un segundo momento, con protagonismo de las instituciones y fuerzas republicanas, en el cual se encaja el estatuto de autonomía vasco dentro de la lógica y las normas de la constitución republicana y de su modelo de estado integral.

### 1.3. *Desviación del federalismo hacia Europa*

En los años cuarenta del pasado siglo, tras la guerra civil, con el nacionalismo vasco derrotado y sus líderes en la cárcel o en el exilio, hay un repunte inesperado de los asuntos federalistas en el PNV fruto del encadenamiento de varios acontecimientos.

El primero, el proyecto de una comunidad ibérica de naciones en el que participa Manuel de Irujo, permite descubrir cómo concibe el federalismo uno de los líderes del nacionalismo vasco con mayor contacto con la política española.

Irujo concibe la comunidad ibérica como una «unión de unidades» o «comunidad de tipo federal» entre Cataluña, Portugal, Galicia, España y el País Vasco, pero que más bien es de tipo confederativo pues cada parte habría de disponer de atributos estatales tradicionales, como fuerzas armadas propias, bandera, moneda y representación exterior<sup>22</sup>. Su planteamiento responde a lo que se entiende hoy por *federalismo multinacional*, ya que habría de reconocer y proclamar expresamente el rango de naciones soberanas, «igual que Portugal y España», de Cataluña, Galicia y Euzkadi<sup>23</sup>. Irujo subraya el carácter voluntario de esa unión federativa, cuyo fundamento es autodeterminativo<sup>24</sup>.

El segundo acontecimiento más bien es una especulación relacionada con la expectativa (producida por el vehemente deseo de los exiliados más que por indicios racionales) de que la victoria de los aliados en la guerra mundial acarree la caída del franquismo y un cambio de régimen. Esa expectativa animó la discusión sobre cómo habría de ser

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<sup>22</sup> *La Comunidad ibérica...*, págs. 80-85 y 102-104.

<sup>23</sup> *La Comunidad ibérica...*, págs. 89 y 104.

<sup>24</sup> *La Comunidad ibérica...*, págs. 35, 116, 119 y 121.

el nuevo régimen democrático español y puso sobre la mesa la discusión sobre la validez de la reciente experiencia republicana. En esos debates, el nacionalismo vasco no se limitó a exigir una restauración de la autonomía vasca sino que reclamó asimismo un mayor reconocimiento del rango nacional del País Vasco, concretado en el reconocimiento de la capacidad de consultar al pueblo vasco acerca de su futuro político, mediante un plebiscito, y de convertir en fuente única de derecho esa decisión popular<sup>25</sup>. Con esta condición, el nacionalismo vasco volvía a su tradicional exigencia de un acomodo más bien de tipo confederal.

El tercer acontecimiento, nada más terminarse la guerra mundial, fue el enganche del nacionalismo vasco con el movimiento federalista europeo en los debates e iniciativas para impulsar la unidad europea. Su edad de oro son los años que van de esa fecha inicial hasta que se adoptó la decisión de constituir una Europa de los estados, opción aceptada con tristeza por el PNV, pues dilataba sus expectativas. No era «la Europa de los pueblos que los vascos llevaban en la mente y en el corazón», pero aún así «era preferible esa Europa a ninguna»<sup>26</sup>.

El testimonio de los principales representantes del nacionalismo vasco en esos debates, Manuel Irujo y Francisco Javier Landaburu, no da mucho de sí, más allá de confirmar su cómoda conexión personal con esa corriente. Los temas «federalistas» no abundan en sus artículos en la prensa nacionalista, lo que ya es un dato, y cuando los abordan expresamente raras veces se escapan de la generalización. Pero, pese a ello, se advierte en ambos la lucidez de vislumbrar la aparición de un nuevo horizonte político y de anticipar sus consecuencias. El desarrollo político de una Europa federal de los pueblos es la nueva perspectiva del nacionalismo vasco<sup>27</sup>, cuyas implicaciones desveló Irujo con toda claridad: *No queremos poner aduanas en el Ebro, aspiramos a quitar las de los Pirineos, aspiramos a que las facultades reservadas en el estatuto vasco al estado central español pasen a ser ejercidas —en parte al menos— por el estado central europeo*<sup>28</sup>. Dicho de otra forma, el nacio-

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<sup>25</sup> DE PABLO, Santiago; MEES, Ludgar; RODRÍGUEZ RANZ, José Antonio (2001). *El péndulo patriótico. Historia del Partido Nacionalista Vasco*. Barcelona: Crítica. Tomo II, págs. 172, 251, 257, 289.

<sup>26</sup> Manuel DE IRUJO (1972). *Escritos en Alderdi*. Editado por el Partido Nacionalista Vasco, Bilbao, 1980. Tomo II (1961-1974), pág. 247.

<sup>27</sup> Francisco Javier LANDABURU (1953). *Escritos en Alderdi* (1949-1962). Editado por el Partido Nacionalista Vasco, 1980, pág. 67.

<sup>28</sup> Manuel DE IRUJO (1962). *Escritos en Alderdi*, tomo 2.º (1961-1974), pág. 49.

nalismo vasco oficializa el desvío hacia Europa de su nuevo horizonte utópico, la federación europea.

En la transición del franquismo a la democracia, todos los participantes en el consenso político, incluido el PNV, descartaron las fórmulas expresamente federales; mientras que el PNV descartó asimismo, a su vez, la exigencia de la autodeterminación. En el debate parlamentario de la nueva constitución democrática la incorporación a la misma del derecho de autodeterminación fue propuesta únicamente por el partido de la izquierda nacionalista vasca Euskadiko Ezkerra<sup>29</sup>. Aparte de esta enmienda de EE, en la que se mencionaba la opción federal como de una de las posibilidades que habría de dirimir el ejercicio del derecho de autodeterminación, la defensa de fórmulas federales o confederales se quedó una vez más en los márgenes de la vida política: en la izquierda de la izquierda. Mientras que el PNV optó por plantear la exigencia de un reconocimiento simbólico del rango nacional de Euskadi a través de la fórmula de la unión con la Corona. Pese a su evidente carácter de fórmula anacrónica e historicista, era funcional para poner sobre la mesa la exigencia de alguna señal de asimetría y de admitir, por parte del estado, su realidad plurinacional.

A modo de resumen, los principales hitos de este recorrido por la historia vasca, tras la pista del federalismo, se pueden concentrar en estas ideas.

Primera. El federalismo, debido a su esencia de pacto y autonomía y a la doble lealtad que entraña, conecta de un modo natural con la tradición histórica de los países vascos que, exageraciones retóricas aparte, se pensaba en esos mismos términos. En la medida que da continuidad a la tradición histórica vasca, el federalismo engancha de una manera fácil con el fuerismo, y especialmente con el llamado *fuerismo progresista*.

Segunda. Sabino Arana rompe con la tradición histórica vasca cuando formula la idea nacional desde un pensamiento excluyente de lo español, cuando afirma que Euskadi es la patria de los vascos así como su única nación («los vascos no somos españoles ni franceses») o cuando señala que España y lo español son la antítesis de Euskadi y lo vasco o que «fuerismo es separatismo». Con el antiespañolismo de Arana, se

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<sup>29</sup> Dicha enmienda obtuvo el voto favorable al final de todos los representantes del nacionalismo vasco: los diputados y senadores del PNV, Letamendía y los senadores Banderés y Goio Monreal.

niega toda posibilidad de pacto federal con España y el federalismo se reserva a la organización interna del País Vasco bajo una fórmula confederativa.

Tercera. El autonomismo vasco que surge a comienzos del siglo veinte es el heredero natural del federalismo y el fuerismo del siglo XIX, a los que da continuidad histórica. En lo fundamental, el autonomismo es una actualización y adaptación a las circunstancias del siglo XX de ambas corrientes.

Cuarta. Pese a que el antespañolismo aranista es una herencia presente en todas las ramas posteriores del nacionalismo vasco, en éste hay una permanente ambigüedad en la actitud hacia España y lo español, que también está presente en la obra escrita de Sabino Arana y en su práctica política de diputado. Una muestra de dicha ambigüedad es el protagonismo del nacionalismo vasco en la reivindicación autonomista que ha estado en el centro de la vida política vasca desde 1917 a 1979.

Quinta. Desde que emerge la unidad europea, el nacionalismo vasco es consciente del profundo cambio que implica en cuanto a los viejos conceptos estatales decimonónicos de soberanía nacional e independencia; y, en consecuencia, orienta y reserva su federalismo hacia Europa. Su nueva perspectiva es la de una Europa de los pueblos en la que Euskadi sea una estrella de primer grado, sin pasar por España, en igualdad de condiciones con todos los demás miembros de la misma.

Sexta. En la actualidad, el nacionalismo vasco combina esta perspectiva europea con su tradicional ambigüedad hacia España, al menos por parte del PNV, su principal partido, que le permite conectar con interpretaciones como la Herrero de Miñón sobre la utilización de la Disposición Adicional 1.<sup>a</sup> de la Constitución o con formulaciones de tipo confederal como la declaración de Barcelona-Vitoria-Santiago de 1998, aparte de mantenerse al frente del gobierno autónomo vasco desde 1980.

### *Valor y viabilidad del federalismo multinacional*

Se trata de examinar el valor y la viabilidad de las fórmulas federativas para encarrilar lo que suele considerarse *el último de los grandes problemas del siglo XIX*, una vez ya resueltos o encauzados básicamente el problema agrario, el religioso, el social y el militar. Me refiero al *encaje* de las nacionalidades y nacionalismos periféricos (de Cataluña, Galicia y País Vasco) en la España constitucional.

Para abordarlo adecuadamente me parece obligado distinguir tres aspectos del mismo, que considero sustanciales.

Primero. Es menester explorar qué tipo de acuerdos federales pueden acomodar satisfactoriamente las aspiraciones de los nacionalismos periféricos. Lo específico en este caso es la existencia de diversas naciones o identidades nacionales en un mismo territorio; o por decirlo de otra forma, la constitución o integración de una sociedad plurinacional. El federalismo para acomodar en un estado común diversas naciones o identidades nacionales, ha recibido diferentes nombres: *multinacional* (Máiz 2000), *plurinacional* (Requejo y Fossas 1999), *asimétrico* (Kymlicka 1995), de *diversidad profunda* (Taylor 1992a)... Aunque parece un invento reciente, es la misma clase de federalismo en que pensaba Rovira i Virgili, hace un siglo<sup>30</sup>; o el que propugnaban Irujo o Pi i Sunyer, cuando discutían el proyecto de una comunidad ibérica de naciones.

Resumo sumariamente las condiciones básicas de un federalismo multinacional. 1.<sup>a</sup>) Requiere, ante todo, el reconocimiento (Taylor 1992b) de la plurinacionalidad, que no es asunto de competencias sino de otro orden: el *status* dentro del estado, su rango nacional, sus símbolos reconocidos... y todo ello desde la percepción de las propias minorías (Kymlicka 1996). 2.<sup>o</sup>) La regulación de la plurinacionalidad se ha de atener estrictamente al principio de igualdad y exige, por tanto, un tratamiento simétrico (Requejo 1999). 3.<sup>a</sup>) Los acuerdos federales para acomodar la plurinacionalidad se han de extender a un triple ámbito: simbólico-lingüístico, institucional y competencial (Requejo 1998). 4.<sup>a</sup>) Todo ello debe quedar atado mediante garantías constitucionales, un rasgo fundamental de cualquier clase de federalismo según toda la doctrina.

Segundo. Por la misma razón, aunque en otro sentido y a otra escala, se trata de plantear un federalismo ajustado a unas realidades nacionales periféricas que también se definen por una diversidad profunda de identidades nacionales, cosa muy relevante en Euskadi y en Cataluña. Lo específico en este caso es que la *diversidad profunda* que dice Taylor también alcanza a los sujetos «primarios» de la plurinacionalidad.

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<sup>30</sup> ROVIRA I VIRGILI llamó *federación nacional* a «aquella en que los estados que la constituyen son unidades nacionales, son naciones». Jaume Sobrequés i Callicó (1988), «Federalismo y nacionalismo en el pensamiento de Rovira i Virgili». En *Federalismo y estado de las autonomías*. Barcelona: Planeta, pág. 34.

También en este caso, el federalismo multinacional es una fórmula idónea en principio para aquellas situaciones que señala Norman (1996, pág. 57): «cuando los grupos están muy entremezclados, no se les puede dividir territorialmente y sería más costosa y traumática e insatisfactoria la separación». En casos como el vasco o el catalán, en efecto, la federación multinacional puede adecuarse mejor a la identidad dual de buena parte de la sociedad<sup>31</sup>; tiene la ventaja añadida de mantener un ámbito existente desde hace siglos de estrechas relaciones (culturales, económicas y sociales) y de solidaridad en lugar de romperlo, ámbito hacia el que siente una especial vinculación afectiva una buena parte de la población; y puede ahorrar, por tanto, los riesgos, traumas, temores e incertidumbres de la desmembración.

Tercero. Hay que ver qué clase de acuerdos y de prácticas federales hacen falta para aunar e integrar en un proyecto común un cuadro de conjunto que ofrece una complejidad específica dada la suma de asimetrías y peculiaridades del estado español.

Hay que aunar e integrar un país radicalmente asimétrico, dada la confluencia de estos hechos peculiares. 1) La existencia de naciones distintas a la predominante, con lo que supone de distintas identidades, culturas y lealtades nacionales, y, por tanto, de una realidad plurinacional que cuestiona radicalmente la afirmación de un único pueblo español y una única soberanía nacional. 2) El hecho de que en estas naciones periféricas hay al mismo tiempo un sector de la población no identificado con la identidad nacional propia de los nacionalismos periféricos, lo que se traduce en un gran lío de identidades: exclusivas y no compartidas, duales o divididas, complejas o múltiples. 3) Los ocho hechos diferenciales (Aja 1999) reconocidos por la Constitución (lengua, organización interna: los cabildos insulares y los territorios históricos vascos, derecho civil foral) que nadie cuestiona. 4) Un total de 17 comunidades autónomas reconocidas, entre las cuales hay una diferencia sustancial entre las que se sienten *naciones distintas* y aquellas otras que se sienten *regiones de España*, independientemente de que algunas de ellas puedan esgrimir en su haber una personalidad histórica milenaria.

La puesta en marcha de un federalismo multinacional en un conglomerado de esta guisa no puede hacerse de cualquier forma.

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<sup>31</sup> En las series del euskobarómetro entre 1987 y 2001 sobre la identidad subjetiva, la identidad dual «tan español como vasco» es la más preferida, con un porcentaje medio del 33'3%. La siguiente es la opción de «sólo vasco» con un 28% de media. Fuente: página web del Euskobarómetro.

Ante todo requiere algún tipo de identidad compartida (Kymlicka 1995, pág. 257), un proyecto común, un vínculo afectivo; que no tiene por qué ser definido de la misma forma en las diferentes naciones de la federación (Norman 1996), pero que debe ser un motivo lo suficientemente fuerte y claro, inicialmente, como para impulsar una empresa colectiva correosa: la transformación del estado en una federación multinacional y, luego, para darle un tiempo razonable de prueba. El convencimiento sobre su necesidad y conveniencia, porque se piense que reporta ventajas claras o bienes valiosos a unos y otros (Stepan 2000), puede ser uno de los ingredientes de esa identidad compartida.

De otra parte, requiere reciprocidad, lealtad mutua, lealtad a los respectivos compromisos adquiridos: de la federación con las partes y de las partes con la federación (Solozabal 1979). Esta reciprocidad parece el terreno más propicio para generar la lealtad mutua que exige por definición un federalismo multinacional y para elaborar la cultura pública federal compartida que necesita asimismo.

Finalmente, requiere una distribución adecuada de poderes. La distinción de Requejo (1998) sobre la necesidad de tres tipos de acuerdos diferentes: el tratamiento simétrico de la plurinacionalidad desde la igualdad para todas, acuerdos asimétricos y confederales, acuerdos simétricos competenciales, parece en principio una sugerencia adecuada para las peculiaridades del estado español.

De manera que este último campo de exigencias sobre qué acuerdos federales son aptos para un ámbito plurinacional, se desenvuelve en un terreno eminentemente práctico, de eficacia y eficiencia, no menos importante. Pertenece, por así decirlo, al campo de la política práctica, que es un arte sobre todo. Mientras que los otros dos aspectos son de un género distinto y definen la sustancia misma de la cosa: la complejidad de España, por su plurinacionalidad, y la complejidad de algunas naciones periféricas a causa de la diversidad profunda de identidades nacionales que hay en ellas.

Pese a su diferente naturaleza estos tres aspectos forman un todo lógico e inseparable, de manera que no cabe quedarse con uno cualquiera de ellos y abstenerse de los demás. La lealtad a la federación es correlativa e inseparable del reconocimiento y respeto de ésta a la plurinacionalidad. Y otro tanto puede decirse de la satisfacción de los nacionalismos periféricos, que es correlativa e inseparable de que satisfagan a aquella parte de su población apegada a una identidad nacional vasco-española.

Así concebido, el federalismo multinacional presenta a su favor un juicio de valor y en su contra una previsión cuajada de sombras acerca de sus posibilidades.

Su mayor valor es que permite conjugar mejor que ninguna otra fórmula el doble aspecto que define la cuestión vasca: la aspiración nacionalista de reconocimiento de la dimensión nacional del País Vasco de un lado, y, de otro, el reconocimiento y respeto de la diversidad profunda de la sociedad vasca. En la medida en que conjuga ambos aspectos, posibilita un reparto más equilibrado de las incomodidades sociales de todo tipo que entraña la plurinacionalidad. Este valor no es efectivo, empero, si no es fruto de un acuerdo que satisfaga a ambas partes.

Entre las ventajas de la federación se encuentra asimismo el valor, ya comentado antes, de mantener un ámbito histórico, el marco común estatal, en el cual se han entretreído unas relaciones de todo tipo especialmente intensas. La permanencia de ese ámbito tan diverso, siempre y cuando se haya eliminado en el mismo toda sombra de imposición, enriquece en todos los sentidos a sus habitantes, aparte de satisfacer el sentimiento de pertenencia de cuantos se identifican con él.

Pero, dicho esto, es obligado tener en cuenta que la discusión sobre el valor del federalismo multinacional está ya condicionada en buena medida a la evolución futura de la Unión Europea. Ya hoy día, de hecho, algunos argumentos ampliamente manejados antaño para legitimar o deslegitimar a los estados, como la búsqueda de seguridad o el atractivo de un mayor poder económico, se están desplazando hacia la UE, en su actual realidad, y ésta los ofrece con mayor amplitud (Kymlicka 1996).

En cuanto a la viabilidad del federalismo multinacional, es ya casi un lugar común la prevención acerca de que no asegura el éxito de la empresa ni garantiza «de un modo definitivo» la satisfacción de los nacionalistas periféricos. Ha de asumirse que el más racional y generoso de los proyectos federativos puede no satisfacer a quienes tienen un sentimiento de identidad exclusiva y quieren mantenerla a toda costa.

Una de las claves principales de su viabilidad la expuso Rovira i Virgili<sup>32</sup>, hace casi un siglo, cuando insistió en que el federalismo (multinacional) está en manos de los «otros»: las fuerzas españolistas. Tal dependencia de las fuerzas mayoritarias del sistema político español es una sombra sobre la federación multinacional. Otro tanto puede decirse de la dificultad de construir una identidad común, dado que exige un impulso, una solidaridad, un convencimiento... (Kymlicka 1995, págs.

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<sup>32</sup> Jaume SOBREQUÉS I CALLICÓ (1988). En *Federalismo y estado de las autonomías*, pág. 40.

259 y ss.) que no se ve hoy día en las élites políticas. Previamente ha de construirse el sujeto y los motivos que animen ese impulso.

Solozabal comentó hace tiempo, citando a T. M. Frank, que la viabilidad de una federación multinacional requiere tres condiciones especiales: convencimiento de la federación, líderes carismáticos y acontecimientos que la impulsen<sup>33</sup>. Es evidente que las tres brillan por su ausencia en el conjunto del ámbito político español, incluido el vasco. Así las cosas, se antoja pertinente el pesimismo de Fossas (1999) sobre la viabilidad del federalismo multinacional (en el ámbito del estado español), dados los tics y temores que despierta en los nacionalismos realmente existentes o la ausencia de una sociedad civil federal o de una cultura federal en las élites políticas<sup>34</sup>. Pero tal vez no sea tan sombrío el panorama en las élites culturales y económicas.

### *Nacionalismo vasco y federalismo*

¿Es compatible el nacionalismo vasco con el federalismo? Doctrinalmente, creo que no hay una incompatibilidad de fondo con las fórmulas de tipo confederativo, mientras que sí la hay, y muy radical, con todas las demás fórmulas federativas. A mi juicio, esa incompatibilidad se concentra en tres puntos de fricción principales: a) la definición de España, b) la definición de nación vasca y la valoración del pluralismo de la sociedad vasco-navarra, c) la concepción de la autodeterminación. Los dos primeros afectan directamente al sujeto o sujetos de la federación. El último, a la entraña misma del federalismo multinacional.

#### *3.1. La definición de España*

Hoy día el nacionalismo vasco<sup>35</sup> no acepta el concepto primario de nación española y de pueblo español, concepto que está en la Constitu-

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<sup>33</sup> Juan José SOLOZÁBAL (1979): «Nacionalismo y federalismo en sociedades con divisiones étnicas: los casos de Canadá y Suiza». Recopilado en la obra del mismo autor, *Las bases constitucionales del estado autonómico*. Madrid: Mc Graw Hill, 1998.

<sup>34</sup> Enric FOSSAS (1999): «Simetría y plurinacionalidad en el estado autonómico». En *Asimetría federal y estado plurinacional*. Editorial Trotta, pág. 292.

<sup>35</sup> Uso esta expresión cuando entiendo que todas sus distintas ramas y familias coinciden en algo.

ción y que, muy probablemente, es compartido con más o menos entusiasmo por la mayoría de la población del estado español. Tampoco acepta siquiera el concepto de «España, nación de naciones», ni aun en la más ambigua de sus acepciones (en el sentido de una nación política que alberga a varias naciones culturales). Al nacionalismo vasco no le van las distinciones sutiles sobre el sentido *primario* o *secundario* del término naciones del que suele hablar, entre otros, Requejo (1999), sino que se atiene a la vieja distinción entre naciones y estados, que asigna a aquellas la pertenencia intrínseca al orden natural de las cosas (en último término guiado por la providencia divina) mientras que los estados son construcciones meramente artificiales y arbitrarias. De modo que todas las corrientes del nacionalismo vasco coinciden en la idea de que España no es una nación (una comunidad natural), sino tan solo un estado (y una comunidad artificial). Todas ellas coinciden asimismo, en la idea de que Euskal Herria (o Cataluña y Galicia) sí lo son, por el contrario, en la medida en que tienen todos los atributos de las comunidades naturales.

No obstante, esa definición negativa de España (que no es una nación) está en flagrante contraposición con la que reconoce y acepta que España sea una nación, definición que está presente además en Sabino Arana (De la Granja 2001)<sup>36</sup>. Me refiero a la idea que ha venido sosteniendo el nacionalismo vasco a lo largo del siglo pasado de que España es *la cuarta nación* de la península ibérica (sin Portugal), esto es, la resultante de la operación de quitar a aquella los territorios de las nacionalidades vasca, catalana y gallega. Esta concepción aparece nítidamente en los escritos de Manuel de Irujo (1945) sobre la comunidad ibérica de naciones<sup>37</sup>.

En mi opinión, ambas definiciones son francamente insatisfactorias. Se sustentan en definiciones de época, decimonónicas, cuyas insuficiencias (una concepción objetivista, la arbitraria asignación de un carácter *natural* a las naciones y de un carácter *artificial* a los estados, un exceso de primordialismo) ha enunciado con acierto y desde diferentes

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<sup>36</sup> José Luis DE LA GRANJA (2001): «La idea de España en el nacionalismo vasco». En Antonio Morales Moya, coordinador. (2001): *Nacionalismos e imagen de España*. Sociedad Estatal España Nuevo Milenio, pág., 39.

<sup>37</sup> Este concepto de *cuarta nación* también está muy extendido en las corrientes de izquierda más abiertas al reconocimiento de los problemas nacionales en el estado español. A modo de ejemplo, su presencia en la obra del filósofo Manuel Sacristán, quien se refería frecuentemente a ella como «la pequeña España».

perspectivas la revisión crítica de los nacionalismos llevada a cabo en las últimas décadas. La idea de la «cuarta nación» no se ajusta a la realidad, pues también está presente en gran medida en las otras tres. Y otro tanto puede decirse de la negación de la nación española.

Requejo (1999) ha señalado que en España no existe ni una sola ni 17 naciones y que España no es solo un estado sino que tiene también un componente nacional. Pero añado, por mi parte, que es menester tirar algo más de ese último hilo si se quiere llegar a una definición cabal de España. Creo que la definición de España debe abarcar por lo menos tres aspectos fundamentales: a) es un ámbito territorial en el que se han desarrollado lazos comunes de muy diversos tipo (familiares, lingüísticos, culturales, económico-sociales, políticos, de costumbres y tradiciones, etc.) que han operado en el largo tiempo; b) es una comunidad política, producto de esa experiencia histórica común de larga duración y de un fenómeno de integración de tipo nacional; c) es un sentido de pertenencia nacional, un sentimiento afectivo de identificación nacional probablemente mayoritaria fuera de Cataluña, el País Vasco y Galicia, pero que también está muy presente aunque con menor intensidad en el interior de estas otras naciones. De manera que en ese triple sentido, España y lo español son un elemento consustancial de la propia definición de las nacionalidades históricas<sup>38</sup>.

Se antoja un imposible que pueda cuajar un federalismo multinacional en el estado español si el nacionalismo vasco no revisa y corrige su definición de España. Pero lo mismo podríamos decir, cambiando el sujeto de la frase, acerca de la definición predominante de España que tienen la mayoría de los españoles. También adolece de las mismas insuficiencias teóricas y de similares desajustes respecto a la realidad.

### 3.2. *La definición de la pluralidad*

La sociedad vasca, además de estar marcada por la diversidad habitual en toda sociedad moderna abierta y compleja (una diversidad social, política e ideológica, de religión y de moral, de cultura, de hábitos y costumbres, etc.), lo está también y en un grado muy notable por otra clase de diversidad que afecta a sus cimientos nacionales, esto es a la lengua,

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<sup>38</sup> Por la misma razón se debería añadir, en rigor, que Francia y lo francés son otro componente sustancial de la nación vasca en su totalidad.

cultura, procedencia, identidad colectiva y sentimientos nacionales. Pero lo más singular del caso vasco, y también del catalán, a este respecto, es que esa clase de pluralidad se da en un grado muy superior a la media conocida en países occidentales similares al nuestro, como Escocia, Quebec o Flandes o Valonia.

La particularidad del pluralismo vasco se manifiesta en estos tres hechos: 1) que es ya una sociedad mayoritariamente mestiza, 2) que está escindida como ya se ha dicho en cuestiones básicas de su identidad colectiva, y 3) que alberga un alineamiento político-electoral muy condicionado en el fondo, si bien de forma compleja, por los dos hechos anteriores. Todos los países modernos tienen el pluralismo 1 y son mestizos en mayor o menor grado. La mayoría de los estados del mundo, que son plurinacionales de hecho, tienen un pluralismo 2 más o menos acusado. Mientras que en los estados verdaderamente nacionales como Portugal y en naciones como Quebec, Escocia, Flandes, Valonia y Galicia, etc. el pluralismo 1 es muy reducido; en todos esos casos, la homogeneidad de la población (de origen, lengua materna, tradición cultural, etc.) es bastante elevada, con porcentajes de la misma entre el 75% y el 90%.

En la Comunidad Autónoma Vasca, los pluralismos 1 y 2 son muy relevantes y a consecuencia de ello hay un acentuado pluralismo 3 asimismo<sup>39</sup>. Pero tal vez lo más peculiar de su pluralismo no son las diferencias existentes que atañen a la identidad colectiva y a los sentimientos y lealtades nacionales. Creo que su rasgo más singular reside en que, en dichas diferencias y a través de ellas, se manifiesta una quiebra social en asuntos básicos para la cohesión de la comunidad política que pretende ser. Lo más peculiar es, por tanto, el hecho de que, a resultas de su pluralismo, se dé un patente conflicto interior en cuestiones básicas para la convivencia comunitaria.

La definición de la nación vasca en la doctrina central nacionalista<sup>40</sup> tiene una sustancia *etnicista* que le incapacita para satisfacer las

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<sup>39</sup> El pluralismo 3, medido a través de los datos político-electorales, se distribuye de forma heterogénea en el conjunto del territorio vasco. En la CAPV, su población se puede considerar dividida y polarizada en dos campos bastante similares, aunque ligeramente inclinada a favor de la identificación con el nacionalismo vasco. Mientras que en Navarra y en Iparralde (parte vasco-francesa) la diversidad es mucho más asimétrica en un sentido desfavorable a dicha identificación.

<sup>40</sup> Dicha doctrina central se puede resumir, a mi juicio, en estos postulados: A) El País Vasco, Euskadi, es una nación diferente a la española y a la francesa; su existencia se remonta a tiempos inmemoriales. B) El territorio vasco comprende las siete regiones his-

expresiones del pluralismo de la sociedad vasca que no sintonizan con los postulados del nacionalismo vasco. En esto, también ocurre que la incompatibilidad doctrinal entre ambos términos se plantea muy radicalmente mientras que, históricamente, en la práctica política, esa radicalidad se diluye en continuas negociaciones y en muy diversos apaños o acomodos.

La doctrina central nacionalista piensa la nación vasca en los términos unívocos mazzinianos: un territorio, una lengua, un pueblo, una única idea nacional. Dicha de otra forma, no está pensada para asumir la diversidad profunda que caracteriza hoy día a la sociedad vasca<sup>41</sup>. Precisando aún más, la piensa así a largo plazo, esto es, como resultado del éxito de su oferta política, tras un largo proceso de integración y como fruto de su capacidad de asimilación al ideario abertzale. El conjunto del nacionalismo vasco rara vez se sale de tal modelo, si bien es patente asimismo una preocupación por suavizar o camuflar sus aristas más antipáticas.

El problema estriba en que esa aspiración asimiladora, aun cuando se piense en términos de voluntariedad y de respeto de los procedimientos democráticos del estado de derecho y de los derechos individuales, ya denota en sí misma un juicio negativo de la diversidad y pluralidad actual. A tenor de su doctrina, el nacionalismo vasco no puede dejar de considerar la diversidad profunda existente como «una realidad molesta», como «algo a superar o a hacer desaparecer». Lo cual no sólo plantea un conflicto profundo de valores con quienes la consideran una riqueza del conjunto de la sociedad, que se debe mantener aunque sea una permanente fuente de conflictos. Ante todo y sobre todo es una grave desconsideración de quienes tienen un sentimiento nacional distinto al del nacionalismo-vasco.

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tóricas: Vizcaya, Guipúzcoa, Álava, las dos Navarras, Lapurdi y Zuberoa, cuya reunificación (*Zazpiak bat!*: Siete en uno) en una única comunidad política es un objetivo irrenunciable. C) El euskera es la lengua del País Vasco y el signo singular de su identidad nacional y de su cultura; la euskaldunización del territorio vasco es una condición necesaria para que vuelva a ser la tierra del euskera: Euskal Herria. D) El País Vasco está sometido desde hace siglos a dos estados que impulsan su españolización y afrancesamiento. E) Lograr la soberanía es una aspiración política fundamental; sin ella no puede realizarse plenamente la nación vasca. F) La realización de la nación vasca es una empresa colectiva que requiere la identificación y la lealtad de todos los vascos.

<sup>41</sup> Este juicio es extensible a cualquier nacionalismo decimonónico, lo mismo da, a estos efectos, que sea un nacionalismo-estatal o que sea un nacionalismo «de un pueblo sin estado». La experiencia de todo el siglo XX, especialmente en Europa, ha sido concluyente a ese respecto.

Ya hace tiempo que el conflicto vasco no puede entenderse si se ignora este nuevo aspecto del mismo: la demanda de reconocimiento y respeto por parte de quienes se sienten menoscabados por el nacionalismo vasco en su identidad personal y colectiva en el territorio en el que éste es la fuerza hegemónica. Cosa que por cierto conecta con un cambio de paradigma en todo el mundo occidental en lo que hace al tratamiento de las identidades diferentes (Kymlicka 1996). Antes se aceptaba la perspectiva de la pérdida de la nacionalidad a cambio de otras ventajas, como ya dijo Marx en su día a propósito de la sociedad provenzal. Entonces no había otra opción sino la elección entre la asimilación o hacer las maletas y el éxodo. Ahora se trata de hacer compatibles en una misma sociedad una pluralidad de bienes distintos (I. Berlín), incluidos los diferentes bienes nacionales, aunque sean conflictivos entre sí. Así lo exige una visión de la justicia y de *la vida buena* indudablemente más civilizada y satisfactoria.

Creo que la convicción «reversionista» a este respecto, por parte de los líderes del nacionalismo vasco, es una condición necesaria para que pueda cuajar en todo su mundo un sentimiento favorable al federalismo multinacional. Pues tal vez la mayor ventaja de este sistema, como ya he dicho antes, es su mayor capacidad de adecuación a ese rasgo singular de la sociedad vasca que es su diversidad profunda.

### 3.3. *La autodeterminación o el derecho de salida*

Desde hace ya un tiempo, el derecho a la autodeterminación es la idea más poderosa que tiene en sus manos el nacionalismo vasco.

Lo es así por su versatilidad. Esto es, por su capacidad de expresar a la vez: a) la meta final de su carrera, el mito de la plena libertad, porque un pueblo autodeterminado es un pueblo con soberanía plena; b) la meta próxima en la que lo ha invertido todo su capital en la última década: «pacificar y normalizar» la vida vasca, ya que cree que ETA abandonarían las armas si se le reconociera ese derecho; c) la manera o el método para llegar a cualquier meta: mediante el ejercicio de la libertad de decisión democrática en el ámbito vasco; d) el motor para movilizar las fuerzas necesarias. En la vida política vasca no hay ninguna otra idea capaz de ofrecer prestaciones tan poderosas como estas «emes» asociadas a la autodeterminación: mito, meta, método y motor movilizador.

Lo es también por su utilidad práctica para la acción ideológica y política del nacionalismo vasco. Blandida como *amenaza*, es un instru-

mento de presión en sus manos para intentar obtener otras mejoras de muy diverso tipo en sus conflictivas relaciones con el poder central español. En momentos muy determinados, puede tener un alto valor político asimismo, bien sea como *método* de afirmación y legitimación o bien como *procedimiento* de ratificación.

Pero en cualquier caso conviene adelantar que para el nacionalismo vasco la autodeterminación no equivale a un referéndum sobre la permanencia o no en España<sup>42</sup>. Según el canon de la ortodoxia nacionalista, la autodeterminación sólo tiene sentido para confirmar el triunfo de las propias posiciones. De modo que si ha acudirse a alguna consulta, será para ganarla, no para ver cuántos están a favor de una cosa y cuántos a favor de otra. Más que una consulta para dirimir una controversia entre ir por una dirección o por otra, como a veces se piensa ingenuamente, sería un refrendo que mostrase su mayoría. Si por un error de cálculo se perdiera ese referéndum, tampoco pasaría nada trascendente; no sería más que un revés momentáneo, un mero atraso de su proyecto hasta que madurase la siguiente ocasión para poder demostrar la mayoría.

De ahí que el sentido actual de la autodeterminación para el nacionalismo vasco, más allá de su utilidad o función política, haya que situarlo en su *valor simbólico*. Lo que le coloca en un terreno mucho más poderoso que el de la política: el campo de los anhelos, deseos, sentimientos, horizontes... de un amplio movimiento social, el nacionalismo vasco, y de su complejo imaginario ideológico-político de afirmación de una nacionalidad-*isla*, de un *pueblo en marcha* por su supervivencia, de una nación *heterodeterminada* por España y Francia, etc.

Pero este valor preferentemente simbólico implica también, por lo mismo, una mayor versatilidad, indeterminación y ambigüedad que otras fórmulas políticas. Lo cual le da al mismo tiempo una gran capacidad de adaptación y de flexibilidad en cualquiera de las direcciones, tanto en las más proclives a revisar y renovar el contrato estatal del País Vasco, como en las que manifiestan una intrínseca desconfianza en toda fórmula que no sea la separación de España y Francia.

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<sup>42</sup> La generación de la postguerra (los J. A. Aguirre, Manuel Irujo, etc.) planteó la autodeterminación como referéndum sobre la vinculación o no del País Vasco con España, en consonancia con la doctrina de la ONU en ese tiempo bajo una influencia acusada de lo que podríamos llamar la versión «leninista de la autodeterminación, tras la cual están los votos mayoritarios de la alianza entre el bloque pro-soviético y el bloque tercermundista».

Desde el nacionalismo-vasco, el reconocimiento de la autodeterminación es la condición mínima para legitimar cualquier sistema político, y, por tanto, para legitimar también un sistema federal multinacional. Esa condición se resume, de entrada, en dos cosas. Una, que se reconozca la viabilidad legal de todos los proyectos políticos democráticamente legitimados —aun los independentistas— y se les deje en igualdad de oportunidades; todos han de ser posibles si cuentan con mayorías suficientes. La otra, que esté regulado todo lo relativo a la forma en que pueda ejercerse el derecho de secesión, desde cómo y quién puede tomar la iniciativa de ese ejercicio o quién hace la pregunta o qué mayorías se exige para sancionarla hasta cómo y quién ha de consumir la separación si logra cumplir todos los requisitos.

¿Se le puede exigir al nacionalismo vasco que renuncie al postulado que más y mejor le define hoy día: a la posibilidad de que una amplia mayoría de la población vasca pueda refrendar un proyecto político que avale su inserción directa en Europa sin pasar por España? Creo que no hay ningún argumento político-moral que pueda justificar tal exigencia. Aunque sí se le debe exigir naturalmente que todo el proceso autodeterminativo esté regulado mediante procedimientos democráticos previamente acordados o que haya plenas garantías de la preservación de todos los derechos de las minorías disconformes con el proyecto mayoritario o que la consumación de la separación sea tratada y negociada de modo bilateral, ya que la ruptura del contrato estatal existente afecta a las dos partes como ya señaló en su día Pi i Margall<sup>43</sup>.

Todo lo relativo a la autodeterminación se ve de manera radicalmente distinta, empero, si se contempla desde la diversidad profunda de la sociedad vasca. Si se mira desde esa perspectiva, lo verdaderamente relevante es la existencia de «otra parte» de la población vasca, la otra mitad de la sociedad, que niega que haya una imposición exterior antidemocrática o que el pueblo vasco esté *heterodeterminado* por otros.

Es más, en esta «otra parte» de la población vasca no se entiende qué se reivindica con la autodeterminación o el *ámbito vasco de decisión*. O bien se considera que «ya lo tenemos» en el estatuto de autonomía y que ya lo ejercemos continuamente y en muchas cosas verdaderamente importantes: educación, sanidad, hacienda, policía, parlamento

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<sup>43</sup> Los pactos federales, como cualquier contrato, tienen su base en la voluntad de dos partes, según Pi i Margall, y «no se disuelven ni se rescinden por la de uno de los contratantes» sino que requieren el mutuo disentimiento. *Las nacionalidades*, pág. 261.

y gobierno vasco... O bien se entiende que no es una demanda de la mayoría, el caso de Navarra, donde, además de ejercerlo también en cosas similares, está reconocido incluso para poder decidir su integración en unas instituciones comunes a las de la CAPV. O bien predomina en ella un sentimiento de pertenencia a España y se está de acuerdo en compartir con otros pueblos y otras gentes —a las que se siente vinculada por múltiples lazos de todo tipo— ese ámbito común más amplio de convivencia y de solidaridad y de decisión que es España.

A tenor de este hecho la conclusión es clara y terminante: la autodeterminación no es un valor compartido por la sociedad vasca. Para unos es un bien y para otros no lo es. Más aún, en esa «otra parte» la autodeterminación propugnada por el nacionalismo vasco se ve como amenaza y genera un mundo de miedos y temores incontrolados.

Aquí tiene el nacionalismo vasco un problema ineludible. Que hasta ahora no ha sido capaz de digerir, seguramente porque choca de raíz con el núcleo más íntimo de la doctrina central nacionalista. Ésta, desde su concepto de nación vasca unívoca y uniforme, no puede admitir tamaña disidencia. De ahí que tienda a negarla o que la interprete como una alienación, esto es, como una mera contaminación de parte de la población vasca por un agente exterior, el españolismo, como un fenómeno pasajero que se puede rectificar a base de un proceso de «concienciación nacional correcta». Pero esta forma de abordar el problema, aparte de apoyarse en un concepto tan endeble como la *alienación nacional*, es además muy insatisfactoria, en tanto en que implica que una de las partes aspira a imponer su punto de vista sobre la autodeterminación a la otra parte. Parece más adecuado al signo de los tiempos otro paradigma, a saber, que lo que es un *bien de una parte* sólo puede ser un *bien común* si la otra parte lo acepta como un bien también suyo, libremente, por su propio interés y convicción, a través de un diálogo y de una negociación en la que muy probablemente haya un intercambio cruzado de bienes, que son particulares o de parte, amén de conflictivos entre sí. A través de un *do ut des*, un te doy para que me des, dicho de otra forma.

De otro lado, este problema *interno* a la sociedad vasca derivado de su diversidad profunda no se puede ni se debe confundir con el aspecto *externo* de la autodeterminación: el relativo a la disconformidad con la estancia y permanencia del País Vasco en el seno del estado. Pero es obvio que se condicionan poderosamente entre sí. Hasta el punto de que es difícil pensar siquiera la posibilidad misma de desencadenar un proceso de autodeterminación *externa* si antes, y previamente, no hemos

arreglado los vascos de alguna forma mínimamente satisfactoria esa división interna que afecta a cosas básicas para toda comunidad política, como qué país queremos, cual es su territorio, y su identidad colectiva, qué relaciones establecen entre sí sus diversos territorios, qué relación deseamos mantener con los estados español y francés, etc.

Una federación multinacional no debería cerrar el paso a los proyectos políticos más «soberanistas» o independentistas; no debería negarles la mínima viabilidad legal que ha de tener todo proyecto político legitimado democrática y mayoritariamente en las urnas. Una acción federal-estatal que impidiera un proceso autodeterminativo vasco sostenido por una mayoría de la población, no sólo iría en contra de la regla democrática si de verdad hubiere un proceso autodeterminativo vasco que contase con el apoyo de una mayoría, sino que pondría en peligro la calidad de la propia democracia española y la sometería a ésta a una muy grave degeneración.

Una federación multinacional que pretenda satisfacer al nacionalismo vasco debe admitir, por consiguiente, la incertidumbre de un futuro abierto a la posibilidad de una separación. Si ésta posibilidad no se reconociera no habría manera de paliar el temor a quedarse sin garantías, atados y supeditados a una mayoría electoral «ajena», por parte de los nacionalismos que se saben minoritarios en la federación.

Ahora restaría por saber si la federación multinacional puede encajar esa falta de certezas sobre su futuro, dada la consustancial ambigüedad de un *partenaire* que está en ella porque no tiene el apoyo necesario para «salirse». Este problema, así planteado, de forma pura y dura, parece irresoluble, permanentemente abocado a la desconianza recíproca, al desencuentro, a la inestabilidad, al conflicto insoportable...

No obstante, cabe pensar que en la práctica se muestre de forma más matizada y compleja, aunque sólo sea porque cada parte se vea forzada a reconocer sus propias limitaciones, que son abundantes y muy profundas. Es decir, que unos sean más conscientes de que la identidad española no puede ser *includente* de quienes se sienten de una nación distinta y no aceptan una identidad dual; y que otros sean más conscientes de que la identidad vasca no puede ser *excludente* de los ciudadanos y ciudadanas vascas que no se sienten ni quieren sentirse únicamente vascos sino que se sienten a la vez vasco-españoles. Si llega ese momento y hay unos líderes carismáticos por ambas partes que así lo reconocen y que saben transmitirlo a la sociedad, al menos se podrá discutir las ventajas que reportaría a todas las partes una federación multinacional.

En cualquier caso, parece evidente que la posibilidad misma de la federación multinacional en el ámbito del actual estado español es inseparable de una reconversión de los nacionalismos, del central-español y de los periféricos.

Por parte del nacionalismo vasco requiere: la decisión de ponerse a cimentar un suelo común para toda la población habida cuenta la diversidad profunda de la sociedad vasca, una vuelta al reconocimiento del hecho español así como a la perspectiva (fuerista) del pacto y a la voluntad de compartir un proyecto común, la opción de fijar un umbral de satisfacción «razonable» de sus demandas... Si se empeña, por el contrario, en deslegitimar cualquier salida por su carácter de «española», independientemente de su alcance y contenidos, la federación multinacional no tendrá nada que hacer. Y no es un consuelo, tener la razonable presunción de que el nacionalismo-vasco, en ese caso, tampoco podrá nada más que cultivar el propio huerto que ahora administra.

Desde la otra parte, el esfuerzo revisionista tal vez haya de ser aún mayor, ya que debe corregir unas inercias antiguas y poderosamente incrustadas en la sociedad. No ha de olvidarse que el españolismo castizo se ha caracterizado hasta la fecha por su rigidez y por su incapacidad de integrar otras identidades y otros sentimientos distintos de pertenencia. Pero como no es éste el momento de entrar en ello, me limito a señalar ahora que, entre sus muchas materias de rectificación, se encuentra la de desdramatizar la secesión y el «soberanismo» ante el profundo cambio que en esas cuestiones supone ya el estado actual del proceso de integración europea. Todo lo que se haga por rebajar y desactivar el dramatismo que acompaña a ambas propuestas será oportuno y necesario. E incluso hasta podría adelantar el final de ETA.

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# Federalismo territorial, soberanía cultural e integración europea

Por  
Luis Sanzo González

## *Introducción: la crisis de los Estados plurinacionales en Europa*

Uno de los principales rasgos de la construcción estatal en Europa ha sido la consolidación de estructuras políticas fundamentadas en los principios de unidad y homogeneidad nacional.

La aplicación del principio de las nacionalidades, interpretado en términos de coincidencia entre etnia o cultura y territorio, orienta las propuestas del Presidente Wilson que culminan en el Tratado de Versalles. La reconstrucción de Europa tras la Primera Guerra Mundial se inspira así en la idea de unidad entre territorio, nación —en el sentido étnico y cultural— y Estado.

El genocidio del pueblo judío y las acciones de transferencia de población que acompañan el final de la Segunda Guerra Mundial<sup>1</sup> profundizan en la parte occidental de Europa en este dramático proceso de unificación entre territorio y nación, dejando sin embargo todavía numerosos conflictos nacionales pendientes en la Europa del Este. La disolución a finales del siglo XX de algunos Estados ex-comunistas —como la URSS, la RFS de Yugoslavia o Checoslovaquia— abre un nuevo cauce

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<sup>1</sup> El caso más llamativo, aunque no único, es la deportación hacia Alemania de personas de origen alemán residentes en países fronterizos, circunstancia que convierte la Alemania de posguerra en un auténtico país de refugiados. El máximo exponente de este exilio masivo, generalizado e indiscriminado, es la pérdida de ciudadanía y la expulsión forzosa de entre 2 y 3 millones de habitantes de la región de los Sudetes de la antigua Checoslovaquia. A diferencia de la política occidental actual en la ex-Yugoslavia, es importante recordar que esta política de deportación fue aprobada y liderada por las grandes potencias vencedoras (artículo XIII del acuerdo de Potsdam, 2 de agosto de 1945).

a la tendencia secular europea a la creación de estructuras estatales de base nacional, reflejando de paso los límites de la solución wilsoniana. En este sentido, muchos de los Estados afectados por los recientes procesos de disolución<sup>2</sup> tienen su origen en el periodo inmediatamente posterior al final de la Primera Guerra Mundial.

La consolidación de los nuevos Estados nacionales se asocia habitualmente, por otra parte, a políticas de homogeneización cultural, en especial en materia lingüística, acordes con un modelo relativamente rígido de nacionalismo estatal. La progresiva universalización del sistema educativo contribuye poderosamente a la transmisión de la ideología estatal nacionalista, en el que el principio de unidad nacional resulta fundamental.

Aunque el modelo de Estado-nación no ha sido enteramente consolidado<sup>3</sup>, puede afirmarse que la principal y triste herencia que, en esta materia, deja el siglo XX es la constatación del fracaso histórico de los modelos políticos pluriculturales y plurinacionales en Europa. Los problemas de limpieza étnica que han acompañado la desintegración de Yugoslavia<sup>4</sup> no son sino la última expresión del trágico destino de estos «bienintencionados» modelos políticos. De hecho, podemos preguntarnos si Suiza no acabará convirtiéndose en el último bastión del federalismo pluricultural en Europa.

La progresiva conformación, iniciada con la aprobación de la Carta de Naciones Unidas, del nuevo concepto de autodeterminación territorial —el pueblo étnico deja paso al pueblo territorial en la nueva concep-

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<sup>2</sup> La creación de Yugoslavia —bajo la forma de «Reino Unido de los Serbios, Croatas y Eslovenos»— y la de Checoslovaquia es resultado de los acuerdos de Versalles.

<sup>3</sup> Entre las cuestiones pendientes debe destacarse, en particular, el de las minorías húngaras que quedaron situadas fuera de las nuevas fronteras de Hungría una vez disuelto el Imperio Austro-Húngaro. Esta realidad ha dado lugar a una controvertida política de apoyo a los húngaros residentes en países fronterizos por parte del Estado magiar (Acta LXII, de 2001, relativa a los húngaros residentes en países vecinos). A la cuestión húngara habría que añadir, de no aparecer algún foco nuevo de conflicto, el problema de la población romaní en Europa del Este y la marginación de las minorías rusas en países como Estonia y Letonia.

<sup>4</sup> Según el informe *Global Appeal 2002* del Alto Comisionado de las Naciones Unidas para los Refugiados, en enero de 2002 la población desplazada o retornada en la ex-Yugoslavia ascendía a alrededor de 1.050.000 personas, un 80,5% de la misma originaria de Bosnia (principalmente musulmanes y serbios). A ella se unían más de 800.000 refugiados, ubicados en un 76,5% de los casos en Serbia (procedentes mayoritariamente de Croacia y Kosovo).

ción— choca aparentemente de forma radical con esta tendencia a la unificación entre Estado y nación. Este planteamiento no obstante no es sino una racionalización a posteriori, de carácter liberal-ciudadano, del proceso previo de consolidación del Estado-nación en el mundo occidental, basado en una óptica esencialmente étnica y nacionalista<sup>5</sup>. En este sentido, su función más directa consiste en sancionar el control de los Estados-nación consolidados históricamente sobre su territorio metropolitano, limitando la ONU el derecho de autodeterminación, en su dimensión de secesión/independencia, a las colonias extra-territoriales.

La nueva aproximación tiene, no obstante, una virtud esencial y es que, a través de ella, el derecho internacional pone en lo fundamental punto final al conflicto de las naciones por el territorio, garantizando la integridad territorial de los Estados no coloniales y defendiendo un concepto de unidad nacional de base territorial y ciudadana. Su principal defecto, en cambio, es que las minorías nacionales quedan asimiladas en derechos y deberes, de acuerdo con el principio de igualdad ciudadana, a la mayoría nacional dominante<sup>6</sup>. Una de las principales características del nuevo modelo internacional se asocia precisamente a la eliminación de cualquier dimensión colectiva en el tratamiento de los derechos de las minorías nacionales<sup>7</sup>.

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<sup>5</sup> De hecho, el modelo no se impone en aquellos casos en los que las potencias occidentales consideran necesario hacer prevalecer el criterio étnico. Así ocurre con la imposición por la ONU de la partición de Palestina para posibilitar la creación de un nuevo Estado judío. Más recientemente, Kofi Annan ha planteado igualmente la posible partición del territorio del Sahara Occidental para resolver el conflicto entre el Frente Polisario y Marruecos.

Esta posición contrasta con la inflexibilidad «territorialista» mantenida por la antigua Comunidad Europea en el proceso de desintegración de la RFS de Yugoslavia. Siguiendo las opiniones de la Comisión Badinter, la comunidad internacional impuso en este caso el principio de integridad territorial de cada República federada yugoslava, al margen del deseo de los distintos pueblos residentes en el territorio, dando así origen a los sucesivos conflictos de Croacia, Bosnia, Kosovo y Macedonia.

<sup>6</sup> Este es el origen del discurso que, en nombre de la igualdad de todos los ciudadanos, legitima la implantación de un único discurso cultural y lingüístico, bajo el pretexto de que su acceso compartido por todos es premisa fundamental de una participación igualitaria en la vida política, económica y social.

<sup>7</sup> Conviene recalcar el tratamiento estrictamente individualista de los derechos de las minorías previsto en el artículo 27 del Pacto Internacional de Derechos Civiles y Políticos de 1966: «*En los Estados en que existan minorías étnicas, religiosas o lingüísticas, no se negará a las personas que pertenezcan a dichas minorías el derecho que les corresponde, en común con los demás miembros de su grupo, a tener su propia vida cultural, a*

Sin embargo, eliminado el peligro que para el Estado representaban algunas minorías, este planteamiento, en un contexto de suficiente unificación política y cultural, ha sido el que ha permitido avanzar en un planteamiento nacionalista más liberal, conformándose cada vez más el nacionalismo moderno en términos de nacionalismo ciudadano, abierto a toda la población, sin distinciones de origen, lengua, raza o religión<sup>8</sup>.

A la hora de abordar la situación española, resulta necesario tener en cuenta las consideraciones anteriores y tomar conciencia de que nos encontramos ante uno de los últimos ejemplos vivos, a pesar de sus limitaciones, de una estructura política pluricultural y plurinacional, en el sentido más profundo del término<sup>9</sup>.

El problema que se plantea en esta comunicación es el del futuro de esta experiencia. Este futuro puede pasar por un relanzamiento de los fenómenos de unificación cultural y nacional; puede pasar también por un proceso de desintegración similar al de otras estructuras estatales plurinacionales. La comunicación pretende incidir sin embargo, desde la problemática específica de Euskadi, en las condiciones en las que podría

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*profesar y practicar su propia religión y a emplear su propio idioma*». Aunque del artículo se desprende la existencia de minorías, éstas no tienen como tales derechos propios, quedando éstos exclusivamente atribuidos a las personas individuales que componen estas minorías.

<sup>8</sup> Esta liberalización del nacionalismo se ha traducido en la aprobación por el Consejo de Europa, el 1 de febrero de 1995, del «Convenio-Marco para la Protección de las Minorías Nacionales» (Tratado n.º 157). Hay que precisar, no obstante, que muchos países de la Unión Europea que han ratificado el Tratado aplican de forma muy restrictiva el concepto de minoría nacional. Así, en algunos casos se aplica en exclusiva a algunas minorías claramente especificadas (por ejemplo en Dinamarca o en Suecia) o a nacionales pertenecientes a minorías concretas (las definidas en la norma del *Volksgruppenengesetz* en Austria o, en el caso de Alemania, en la propia Declaración de ratificación).

El concepto restringido de minoría, aplicado en exclusiva a ciudadanos del país, ha llevado a otros Estados, por ejemplo Luxemburgo, a señalar que en su territorio no existe ninguna minoría nacional, no considerándose como tales a las minorías compuestas por no nacionales (como la colonia portuguesa residente en ese país). Esta aproximación tiene importancia para entender el sentido del concepto de «ciudadanía europea» realmente existente. Así, si en toda la Unión Europea un ciudadano de un Estado miembro puede verse reconocido derechos políticos limitados (por ejemplo, el derecho a elegir a sus representantes municipales), carecerá sin embargo de aquellos otros que le pudieran corresponder, en el contexto del «Convenio-Marco», como miembro de una minoría nacional.

<sup>9</sup> Esta caracterización plurinacional podría, no obstante, ser negada desde una lectura constitucional rígida que no tuviera en cuenta el conjunto del bloque de constitucionalidad y se limitara a la literalidad de artículos como el número 2 de la Constitución.

consolidarse una tercera vía, mediante la consolidación de un auténtico modelo de Estado pluricultural y plurinacional, alternativo al modelo tradicional de Estado nacional.

*Las bases para una convivencia plurinacional en España*

*Una respuesta correcta pero insuficiente: federalismo territorial y mestizaje cultural*

En la tradición política de la izquierda española y vasca, la que ha mostrado mayor preocupación por la tercera vía señalada, los problemas que plantean las realidades plurinacionales tienden a solucionarse recurriendo a dos planteamientos complementarios: federalismo territorial y mestizaje. Mediante el federalismo se trataría de organizar, por vía de pacto, la convivencia política entre realidades territoriales diferenciadas, con conciencia y dinámica política propia; el mestizaje constituiría la solución a la creciente convivencia entre poblaciones de origen cultural diferenciado, producto inevitable de las migraciones. De esta forma, la pluralidad de intereses e identidades quedaría razonablemente organizada.

Existen, sin duda, argumentos variados para sostener que este modelo es garantía de éxito. El modelo autonómico español que, en especial en el caso vasco, tiene muchos rasgos del federal, asociado a una regulación pactada de las contradicciones culturales internas, claramente plasmada en el pacto educativo, ha tenido efectivamente resultados positivos. Y lo ha tenido por una razón fundamental. Aún habiendo pervivido la violencia de ETA y el conflicto de identidades nacionales, nadie podría razonablemente negar que a finales del Siglo XX todavía respondía Euskadi al esquema de una sociedad internamente integrada, sin grandes conflictos sociales como los que todavía abundan en Irlanda del Norte o como los que caracterizaron a Bélgica antes de proceder por la vía de hecho a la separación «cultural».

Pero este modelo tiene sus límites. Su éxito depende de la voluntad de convivencia y de la aceptación de las premisas de la misma. El federalismo territorial sólo resulta una solución si el pacto en el que se basa es sólido y aceptado. Éste es el problema con el que de antemano, sin haberse siquiera desarrollado plenamente, choca en el caso vasco la propuesta federalista. El federalismo, al igual que el actual sistema autonómico, se enfrenta en este sentido con la demanda de autodeterminación

compartida por los diferentes partidos nacionalistas. Para el nacionalismo, incluso en su vertiente más moderada, el pacto en el que se basa todo federalismo, es todavía una cuestión pendiente para el pueblo vasco, tal y como se encargarían de recordar, desde esta perspectiva, las disposiciones adicionales de la Constitución y del Estatuto de Gernika. Y no hay federalismo sin pacto.

Pero, si el pacto es necesario, también lo es que éste responda a la admisión previa del carácter soberano de las partes participantes en la discusión política que le precede, partes que por tanto serían igualmente soberanas para poder optar por cualquier otra solución. De esta forma, si se pretende ser coherente con el planteamiento de pacto federal, es preciso respetar en última instancia, si no el ámbito vasco de decisión, porque pacto implica negociación a varias bandas y ausencia de imposición unilateral, sí cualquier resultado derivado del pacto, adaptando el marco jurídico a sus contenidos. Ésta es precisamente la lógica discursiva de la Corte Suprema de Canadá que permite concluir que del pacto federal constitucional puede incluso concluirse la aceptación por todas las partes afectadas de la secesión de una parte del territorio<sup>10</sup>.

En realidad, en territorios pluriculturales, cuando esta idea profunda de pacto y de aceptación de sus consecuencias ha estado ausente, el federalismo territorial no ha sido capaz de prevenir los conflictos entre colectivos nacionales o la ruptura estatal. En estos casos, el federalismo territorial no sólo no se plantea como solución sino que se convierte incluso en el centro del problema como demuestran la actual experiencia de Quebec o la disolución de la antigua República Federal Socialista de Yugoslavia.

En las circunstancias señaladas, el modelo federal se presenta como radicalmente opuesto a las demandas nacionalistas, en especial en el caso

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<sup>10</sup> Supreme Court of Canada. In the matter of section 53 of the Supreme Court Act, R.S.C., 1985, C. S-26; and in the matter of a reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in order in Council P.C. 1996-1497, September 30, 1996. Opinión emitida el 20 de Agosto de 1998.

La teoría de los derechos históricos, tal y como se defiende desde el nacionalismo, llega a las mismas conclusiones, legitimando cualquier modelo de relación pactada con el Estado. En efecto, aunque los derechos históricos no son en su esencia compatibles con la secesión, sí habría tal solución por vía de pacto, como ha teorizado Miguel Herrero y Rodríguez de Miñón en *Derechos Históricos y Constitución*. Grupo Santillana de Ediciones, S.A., Madrid 1998.

de una Federación compuesta por territorios que no se asocian en todos los casos a nacionalidades diferenciadas. Como evidencia el conflicto político planteado en Quebec, cuando una unidad política quiere destacar su propia existencia frente a la mayoría del resto de la Federación, en tales casos la realidad federal puede convertirse en un obstáculo en la búsqueda de una solución. No es la multilateralidad con otras partes de la federación lo que de hecho se pretende sino, más bien, la bilateralidad entre la parte federada que busca un reconocimiento específico de su realidad — con las correspondientes implicaciones en términos de ampliación competencial y autonomía de actuación internacional— y el Estado <sup>11</sup>.

Éste, y no otro, es precisamente el modelo de relación que desea el nacionalismo vasco con España, entendida como nación dominante. Desde el planteamiento nacionalista de las cuatro nacionalidades — vasca, gallega, catalana y española— no es fácil plantear, en efecto, una salida federal ajustada a la historia española que teorizaron federalistas como Pi i Margall <sup>12</sup>. Esta salida no sería probablemente, para los diferentes nacionalismos, sino otra versión más del «café para todos». A lo sumo, el federalismo tendría en tal caso sentido como la estación término previa a la independencia <sup>13</sup>.

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<sup>11</sup> Las limitaciones que impone la concepción federal canadiense a Quebec quedan resumidas en la argumentación de uno de los principales políticos e ideólogos del nacionalismo quebequés, Daniel Turp: «Le corps politique fédéral, tel qu'il est actuellement comporte des empêchements structurels (la notion d'égalité des provinces, par exemple) qui rendent impossible la réalisation des demandes passées et présentes de Québec en vue d'obtenir des pouvoirs accrus dans les limites du système fédéral». (Daniel Turp. En la serie *Is constitutional renewal thinkable for Canada ?* Weatherhead Centre for International Affairs. Harvard University, October 1999).

Sin embargo, como admite Turp, el federalismo como tal no constituye el auténtico problema sino la aplicación específica que realiza Canadá del principio federal, garantizando en la práctica un derecho de veto provincial a cualquier reforma constitucional. En realidad, la idea federal no significa nada per se, hay que analizar cada modelo particular de federalismo y, sobre todo, las posibilidades constitucionales que ofrece para ajustar el modelo a las demandas planteadas por cada una de las partes de la Federación.

<sup>12</sup> Francisco Pi y MARGALL. *Las nacionalidades*. Librería Bergua, Madrid, sin fecha (¿1936?).

<sup>13</sup> Este sería precisamente el planteamiento del único nacionalismo que se muestra políticamente abierto a un pacto federal, el de ERC. Como señalaba recientemente su líder, Carod-Rovira, en referencia a una posible salida federal en España, «*si una presencia plural en el Gobierno del Estado para hacer de verdad un cambio de régimen implica la presencia de partidos de las distintas izquierdas nacionales del Estado, nosotros no rechazamos esta posibilidad. Pero no hablamos de tener cargos en Madrid, sino de pluralizar*

Planteado de esta manera, el federalismo sería desde luego útil para el objetivo independentista. En este sentido, no hay duda de que el sistema federal favorece la consolidación de la tendencia a la autonomización nacional, tal y como ha sido estudiado en el caso de la URSS o Yugoslavia. De una parte, porque garantiza que las lógicas nacionales predominen en el debate interno de las partes federadas, fundamentándose la reproducción del poder político en la apelación al grupo étnico dominante; de otra, porque facilita el reconocimiento internacional<sup>14</sup>. En este sentido, no hay que olvidar que el modelo federal, en el caso de estructuras previamente unitarias, aparece sobre todo como la culminación lógica del reconocimiento interno de la existencia de una estructura política territorial autónoma y de su soberanía original. Si una parte de un Estado tiene necesidad de reconocimiento y participación internacional, este paso podría por tanto resultar fundamental.

Pero este planteamiento carece de sentido en el caso español. La experiencia yugoslava, por ejemplo, constituye una clara manifestación de la falta de lógica de un modelo federal entendido como «equilibrio de poderes», realidad previa a la independencia o solución de compromiso impuesta por la consideración de realidades geopolíticas superiores, como sucede actualmente en el caso belga por la dificultad que plantea, de cara a la independencia, la multiculturalidad de la región de Bruselas y su condición de capital de la Unión Europea.

Es discutible además que, planteado en este sentido, el federalismo aporte demasiado respecto a la realidad actual del sistema autonómico, en especial en territorios con alto nivel de competencias y con una existencia histórica reconocida, como sucede en el caso vasco. De hecho, las Comunidades Autónomas tienen una existencia propia y son agentes polí-

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*el Estado español en una fase que para otros sería definitiva y para nosotros sólo de transición». El País. 14/4/2002. Entrevista a Josep Lluís Carod Rovira - Secretario General de Esquerra Republicana de Catalunya.*

<sup>14</sup> Aunque la base del acceso a la independencia no está en la existencia o no de una realidad federal previa, la doctrina ha distinguido entre Federación y región o comunidad autónoma a la hora del reconocimiento de una nueva estatalidad. Es significativo, en este contexto, el diferente tratamiento dado por la comunidad internacional a las ex-repúblicas soviéticas y yugoslavas respecto a sus regiones autónomas (Chechenia, Kosovo). Apelando al principio de «uti possidetis», la Comisión Badinter negó a estas últimas la posibilidad de la independencia, incluso en un proceso de disolución del Estado previo.

ticos reconocidos en la Constitución Española, legitimados para iniciar un proceso de reforma constitucional<sup>15</sup>. Ciertamente es que existe una diferencia respecto al modelo de reconocimiento internacional que supone la Federación pero precisamente ahí radica el dilema: si el reconocimiento de la soberanía de las partes es un paso para garantizar su deseo de acuerdo, el modelo federal irá adelante porque culminaría la unidad española, constituyendo la Federación el resultado de la autodeterminación de sus partes; de lo contrario, no sería sino el paso previo a la autodeterminación entendida en tanto que independencia, paso que carecería de utilidad para el resto de entidades federadas y para el propio Estado. La discusión, por tanto, no se centra realmente en resolver la cuestión del modelo de Estado sino en determinar si existe o no voluntad de consolidar un Estado común. Ésta y no otra es la cuestión esencial a resolver.

En definitiva, el federalismo tiene sentido como modelo de organización deseado por las partes pero no como una fórmula que no sea sino el paso previo a la independencia, en cuyo caso realmente poco será lo que pueda aportar respecto al actual modelo autonómico. El esfuerzo federal, entendido en términos de ajuste organizativo de las distintas estructuras políticas constitucionales o incluso en términos de aplicación de la idea de subsidiariedad, en la línea de la Administración única promovida desde Galicia o Cataluña, merece ser desarrollado si existe una voluntad general en todas las partes de construir un modelo de esas características, pero no tendría fundamento racional, desde una perspectiva general, si este planteamiento únicamente encontrara razón de ser como un nuevo escalón en un proceso de creación de una nueva y diferenciada estructura estatal.

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<sup>15</sup> Es precisamente en la legitimidad democrática de Quebec para iniciar una reforma constitucional en la que encuentra, en realidad, fundamento la Corte Suprema de Canadá para defender la posibilidad de la secesión negociada. El Fiscal General de Canadá lo recuerda de esta manera: «...il est primordial de se rappeler que la Cour a précisé que le principe démocratique qui légitimerait l'option souverainiste est un principe inhérent à la Constitution du Canada. L'obligation de négocier est un devoir constitutionnel, qui découle, d'une part, du principe constitutionnel de la démocratie et, d'autre part, du droit et de la responsabilité des représentants élus démocratiquement d'entamer des modifications constitutionnelles...» (Warren J. Newman. *Le Renvoi relatif à la Sécession du Québec, la primauté du droit et la position du Procureur général du Canada*. Canada Watch. September-October 1999, Volume 7, Number 4-59).

En lo relativo a España, la capacidad de las Comunidades Autónomas para tomar la iniciativa en un proceso de reforma constitucional, a través de sus Asambleas, está claramente recogida en la Constitución española (artículos 166 y 87.2).

De considerarse la propuesta federalista una alternativa real por el conjunto de las nacionalidades de España, se plantearía la vía para su desarrollo. En tal caso, más que proceder a una revisión del modelo de distribución competencial entre Estado y Comunidades Autónomas, sería probablemente más útil utilizar las potencialidades que ofrece la Constitución como vía para la definición del modelo específico de relación con el Estado deseado por las partes, fundamentado en la negociación entre cada una de ellas y el Estado<sup>16</sup>. Este planteamiento, que para su desarrollo no requeriría en realidad ningún tipo de reforma constitucional, permitiría abrir las puertas a un sistema de federalismo asimétrico —basado en un régimen autonómico general, complementado por acuerdos bilaterales específicos entre el Estado y las Comunidades Autónomas que optaran por esta fórmula—, que es realmente el que pudiera llegar a tener en España algún tipo de funcionalidad. En las demás autonomías, el avance federalizante podría desarrollarse de acuerdo con el modelo general, facilitándose en su caso la eliminación de la prohibición constitucional de federación entre Comunidades Autónomas e incluso la posible extensión del modelo de negociación con el Estado planteado con anterioridad.

De esta forma, podría llegarse a un modelo federal peculiar que, de una parte se basaría en pactos bilaterales entre el Estado y los territorios «nacionalmente» diferenciados —que, a su vez, internamente, pudieran llegar a tener una organización interna federal, por ejemplo en el caso de Euskadi y Navarra— y, de otra, en un desarrollo del régimen autonómico general que, por sus propias características, pudiera ajustarse igualmente a las demandas y necesidades del resto de Comunidades Autónomas, entre ellas la de una posible federación entre algunas de éstas. Las Comunidades Autónomas o las Federaciones resultantes constituirían la base para la reestructuración de los órganos generales de la Federación (Senado, organización de la justicia, etc.). Evidentemente,

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<sup>16</sup> La propuesta de desarrollo de los derechos históricos, planteada por Herrero de Miñón se define en la dirección mencionada, aunque existen otras vías, tales como la que he planteado en el libro *El Pueblo Vasco y la Autodeterminación*. Aplicada a una propuesta federalizante, esta vía implicaría una propuesta de reforma de la relación entre Euskadi/Navarra y el Estado iniciada desde los Parlamentos Autonómicos y que, aprobada por las Cortes Españolas, sería ratificada por el pueblo territorial vasco. En la práctica, la Constitución permite ir más allá del modelo autonómico general, teniendo en cuenta la posibilidad del Estado de delegar a las Comunidades Autónomas competencias propias (artículo 150.2).

algunos ajustes constitucionales —como los relativos al Senado o la supresión de la limitación de federación entre Comunidades Autónomas— requerirían una reforma constitucional específica, aunque de carácter limitado.

La consolidación de una alternativa federal en España se enfrenta sin embargo a un problema añadido que no ha sido abordado por el federalismo clásico español. En sus orígenes, la propuesta federalista se desarrolla en un momento en el que todavía territorio y población tienden a confundirse. El federalismo surge, en efecto, en un periodo histórico en el que aún no se han producido, al menos a escala de todas las naciones, los grandes movimientos migratorios de finales del XIX y del siglo XX. De ahí que todavía pueda asociarse, sin grandes distorsiones, territorio y nación. ¿Qué sucede, partiendo del planteamiento federal tradicional, cuando en el territorio de la Federación conviven distintos pueblos o naciones, colectivos con identidades nacionales diferentes, que además han dejado de estar homogéneamente distribuidos en el territorio?

La solución que se ha dado en España a este problema resulta ciertamente paradójica puesto que ha consistido en una fusión del nacionalismo español de la Constitución (el modelo cultural unitario de la Constitución Española, fundamentado en la idea del españolismo cultural común<sup>17</sup>) con la aceptación de la autonomización cultural en las Comunidades Autónomas de base nacional diferenciada, cuya principal manifestación se encuentra en los procesos de normalización lingüística aplicados en Cataluña y Galicia que, en la práctica, tienden a reducir el castellano a una lengua minorizada en el ámbito público.

El hecho de que el Gobierno del Estado y el de las dos Comunidades Autónomas mencionadas estén sustentados o apoyados por el mismo partido puede resultar paradójico pero, en realidad, no lo es. En este sentido, la principal diferencia entre el planteamiento de los movimientos nacionalistas y del Gobierno español no radica tanto en la no aceptación del principio de la unidad entre cultura, pueblo y territorio, aplicado a las cuatro nacionalidades teóricas —gallega, vasca, catalana y española—, como en la radical negación de que esa realidad pueda poner en peligro la unidad del Estado y, en sentido amplio, la «españolidad» del

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<sup>17</sup> Constituyen elementos esenciales de esta aproximación esencialista la idea de España como «patria común e indivisible de todos los españoles» (artículo 2 de la Constitución) y el tratamiento del castellano o español como lengua oficial del Estado, con obligación para todos los españoles de conocerla (artículo 3).

propio Estado central. No debe por tanto sorprender comprobar que los movimientos sociales o políticos más marginalizados de Galicia y Cataluña sean movimientos calificados como «españolistas», en un sentido sobre todo lingüístico<sup>18</sup>, en un contexto de práctica teóricamente «españolizante» por parte del Estado.

La respuesta que se plantea a esta cuestión desde el moderno federalismo español o vasco no es muy diferente, aceptándose como punto de partida la unidad entre cultura, pueblo y territorio. En este caso, sin embargo, la idea de mestizaje tiene mayor importancia, planteándose las realidades nacionales como resultado de un mestizaje cultural del que participan todas las culturas, minoritarias o no.

El principio del mestizaje es sin duda el que mejor se corresponde al concepto moderno de «pueblo territorial», consolidado en la normativa internacional. Tiene la gran ventaja de no prejuzgar ninguna solución cultural para un pueblo determinado en un territorio determinado, garantizando además a todos una identidad personal propia, aunque con frecuencia reducida en exclusiva al ámbito privado. El límite de este planteamiento, no obstante, es que es incapaz de reconocer la existencia de minorías nacionales con derecho a una vida autónoma como colectivo diferenciado y con derechos propios. Es incapaz, además, de superar las contradicciones entre el principio del mestizaje y la realidad del dominio, en cada territorio, de un determinado y concreto modelo cultural.

De hecho, la paradoja de un planteamiento de este tipo es que no resulta incompatible con ninguna posición cultural, siempre que ésta sea la que se imponga, razón por la que en Euskadi constituye de hecho un patrimonio común de todos los partidos, incluso de Batasuna. De hecho, salvo excepciones, ningún nacionalismo, ni de Estado, ni de una nación que aspira a tenerlo, reniega en última instancia del concepto de nacionalismo «ciudadano», producto del mestizaje, siempre eso sí que no ponga en peligro la cultura dominante defendida por cada nacionalismo.

Sin embargo, el mestizaje depende de que ésta sea la opción libremente deseada por aquéllos que están llamados a practicarlo y de que el proceso se desarrolle en igualdad de condiciones, pudiendo dar lugar la

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<sup>18</sup> Uno de los fenómenos más llamativos, y poco conocido, del autonomismo español es la consolidación de movimientos sociales opuestos a las políticas autonómicas de minoración del castellano o español, normalmente sin traducción política directa (entre los que podríamos citar a AGLI, el Foro Babel, etc.).

convivencia de varios grupos nacionales tanto a la creación de una nueva forma de identidad nacional común como a la participación diferenciada en diferentes identidades complementarias o, como se ha acordado en Bélgica, a una vida separada o yuxtapuesta de cada grupo nacional dentro de un espacio político territorial común. En definitiva, es preciso aceptar —a partir del principio de la autoidentificación— que a ninguna persona puede obligársele a participar de varias identidades o a fundirse en una única cultura, por encima de sus deseos personales.

Resulta por eso reduccionista insistir en el principio del mestizaje en situaciones culturalmente desiguales, con expresiones culturales y lingüísticas minorizadas (como ocurre en el conjunto español con el euskera, el catalán o el gallego o, en Galicia o Cataluña, con el castellano). Los límites del mestizaje resultan entonces nítidos: o la integración —por muy peculiar que ésta pueda llegar a ser— en la cultura dominante o la marginación/enfrentamiento político e incluso social con dicha cultura. Pero en tales casos no puede ya hablarse de auténtica integración sino de asimilación, no habiendo por supuesto nada más opuesto a la idea de mestizaje que la de asimilación.

*Un elemento complementario necesario:  
la autonomía o soberanía cultural de los pueblos nacionales*

El problema vasco —tanto si lo vemos desde una u otra de las partes enfrentadas— parte, en buena medida, de no ser capaces de hacer frente al problema que acabamos de plantear y de no renovar el mensaje federalista en su sentido más profundo. Aunque por las circunstancias de la época este aspecto no pudo ser desarrollado, uno de los elementos claves del federalismo español, en la forma desarrollada por Pi i Margall, es la idea de que cada orden de intereses requiere de un marco de autonomía propio<sup>19</sup>. En sociedades plurinacionales como la española o la vasca eso significa establecer un complemento al federalismo territo-

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<sup>19</sup> Refiriéndose a los intereses humanos, PI I MARGALL, en su obra *Las Nacionalidades* señalaba que «[D]ebemos organizarlos todos y crear una representación y un poder para cada uno de sus grados, si deseamos que la humanidad llegue a ser algo real en el mundo» (pág. 110). «La unidad ... está en la existencia de unos mismos poderes para cada orden de intereses, no en la absorción de todos los intereses por un solo poder ... partiendo de este principio, se puede sin violencia llegar a recoger en un haz la humanidad entera, ... partiendo de la contraria ... [N]o será sólo el individuo el que reivindique eterna-

rial, distinguiendo aquellas materias de orden territorial, propias del círculo del conjunto de los ciudadanos, de aquéllas más vinculadas al orden cultural, exclusivas a las personas que participan de una cultura determinada. La distinción y complementación entre un federalismo territorial y un federalismo cultural ha sido, precisamente, una de las vías que han permitido a Bélgica superar, aunque no de forma totalmente adecuada<sup>20</sup>, los conflictos culturales de la segunda mitad del siglo pasado.

En países multiculturales, un modelo federalista que únicamente tenga en cuenta la dimensión territorial está abocado al etno-federalismo, es decir a un modelo en el que la distribución del poder político territorial en cada una de las partes se fundamenta prácticamente en exclusiva en el dominio del grupo étnico mayoritario en cada uno de ellos, al margen de cualquier planteamiento de consolidación de una idea de ciudadanía común y de la aceptación del derecho de todas las nacionalidades a una vida cultural y lingüística propia y autónoma, susceptible de desarrollarse al margen de unos teóricos límites territoriales. La rápida desintegración de la Yugoslavia socialista y de la URSS no es ajena a la consolidación de este tipo de modelo etno-federal. De hecho, la reciente aprobación en Rusia de una ley para la autonomía cultural de los grupos minoritarios persigue precisamente introducir contrapesos al rígido e inadecuado planteamiento etno-federal soviético, garantizando ciertos derechos a las minorías nacionales<sup>21</sup>.

Si se analiza con detalle el origen de los conflictos existentes en Euzkadi, comprobamos en efecto que éstos no se relacionan sólo con cuestiones ligadas a la capacidad de decidir el futuro del territorio; también se relacionan con cuestiones ligadas al reconocimiento de la propia nacionalidad y de la capacidad de los distintos pueblos presentes en el

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mente su autonomía; reivindicarán la suya todos los grupos sociales y no faltará en tanto que la alcancen ni causas de anarquía ni gérmenes de guerra» (pág. 112).

<sup>20</sup> El modelo belga resulta, en este sentido, característico de la idea de multiculturalismo entendida en tanto que conformación de sociedades paralelas. Tal y como es planteado en el modelo belga de comunidades o en las propuestas quebequesas relativas a las minorías, el modelo no ofrece, en este sentido, perspectiva alguna de solución integradora. Su principal característica, en efecto, es la creación de servicios paralelos en materias tales como los medios de comunicación, la educación, la sanidad o los servicios sociales. Éste es igualmente la esencia de la propuesta de autonomía cultural aprobada en países como Estonia. Frente a este modelo, resulta necesario defender el principio del derecho a la convivencia multicultural en un contexto de servicios públicos integrados y universalistas.

<sup>21</sup> Ley Federal sobre Autonomía Nacional Cultural, de 17 de Junio de 1996, N.º 74-FZ.

territorio de mantener su propia identidad cultural, sin perder por ello su derecho a la ciudadanía. De ahí que una solución al problema vasco, incluso desde una perspectiva de integración y no de separación, no pueda pasar sólo por un acuerdo relativo a distribución de competencias entre los distintos poderes territoriales. Una propuesta de solución realista también debe suponer dar una respuesta a la necesidad de reconocimiento de cada nacionalidad y a la necesidad de garantizar formas específicas de autonomía o soberanía cultural que permitan actuar de forma autónoma en el contexto estatal e internacional a cada grupo cultural-nacional, de forma que pueda defender adecuadamente en dicho entorno su lengua y su cultura. Al mismo tiempo, y por las mismas razones, también supone el respeto de los mismos derechos para las personas que pertenecen a otros pueblos «nacionales» y que son minoría dentro de cada territorio, lo que desde luego afecta a las personas que, residiendo en Euskadi/Navarra, como en Cataluña o Galicia, tienen una identidad «nacional» diferenciada<sup>22</sup>.

En definitiva, además del federalismo territorial, es necesario asumir el principio complementario de la autonomía o soberanía cultural de las nacionalidades presentes en el territorio del Estado, traducido en una gestión propia y diferenciada de sus asuntos culturales. Estas nacionalidades con conciencia propia deben ser jurídicamente reconocidas; deben igualmente poder concretar unas formas de organización política propia —de naturaleza estatal, en tanto que fragmento de Estado— y tener una acción internacional autónoma, reconocida en Europa y en el mundo **(autonomía o soberanía cultural como complemento del federalismo territorial)**.

La base de la participación en estas estructuras no es, sin embargo, territorial sino estrictamente personal, implicando por tanto la aceptación plena del principio de autoidentificación. Es a la persona, al margen de su posición en el territorio, a quién le corresponde definir su adscripción nacional, la cual puede ser única o múltiple, o simplemente inexistente. En este sentido, el concepto de nacionalidad aparece claramente diferenciado del de ciudadanía, realidad y derecho común a todos los residentes en el territorio, con independencia de su adscripción nacio-

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<sup>22</sup> Como señalaba PI I MARGALL, en su obra sobre *Las Nacionalidades*, «cada grupo tiene igualmente determinados por su respectivo orden de intereses su libertad y su órbita. Luego cada uno es, dentro de esa órbita, igualmente autónomo, sin que ninguno de los otros reciba límites de su autonomía».

nal (**distinción entre nacionalidad personal y ciudadanía en el territorio**). De ahí que la participación de esta idea de nacionalidad pudiera ser propia tanto de los vascos de Euskadi como de los de Navarra o de los residentes en cualquier parte del mundo. Al mismo tiempo, en tanto que derecho personal reconocido a todos los residentes en el territorio, debería ser plenamente compatible con la ciudadanía española o la europea (**idea de ciudadanía universal** en España y Europa para el conjunto de la población residente, con independencia de su nacionalidad).

Este planteamiento<sup>23</sup> tiene especial interés en el contexto de la integración del pueblo vasco en el modelo político europeo. En realidad, la viabilidad de un modelo de autonomía/federalismo territorial, complementado con un sistema «nacional» de autonomía o soberanía cultural, es una alternativa cuya viabilidad dependerá, en gran medida, de la capacidad de articular dicho modelo en el marco del actual proceso de reforma de la Unión Europea. Conviene por tanto analizar brevemente la situación de este proceso de reforma.

*Las implicaciones del modelo en el  
contexto de la «constitucionalización» de Europa*

Más allá de la retórica al uso sobre Europa, resulta indiscutible que los Tratados que delimitan la actuación de la actual Unión Europea siguen siendo, en lo fundamental, instrumentos de cooperación interna-

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<sup>23</sup> Aunque esta cuestión desborda el marco de esta comunicación, debe mencionarse que la consolidación de un modelo como el que aquí se plantea, basado en gran medida en la autonomía o soberanía cultural de los pueblos nacionales, para ser políticamente legítima debe enmarcarse en un sistema democrático ciudadano, lo que tiene dos implicaciones fundamentales. En primer lugar, toda la población debe tener garantizados sus derechos y libertades individuales básicas, sin que del ejercicio de su derecho a participar o no en organizaciones políticas nacionales pueda derivarse cualquier limitación a estos derechos individuales básicos. En segundo lugar, la existencia de un sistema de autonomía o soberanía nacional no debe suponer, en ningún caso, una diferencia de tratamiento de las personas, en el ámbito del derecho público o privado, en función de la adscripción nacional. De esta forma, el fundamento último que permite legitimar este modelo es la existencia de un sistema político y judicial que garantice el acceso de la población a los derechos básicos y la igualdad jurídica de toda la población ante los mismos. (Ver a este respecto la Sentencia del Tribunal Europeo de Derechos Humanos relativo al asunto Refah Partisi contra Turquía, de 31 de julio de 2001, particularmente el párrafo 70 de los argumentos del Tribunal).

cional entre los Estados miembros. Al situarse en este marco de las relaciones exteriores, tradicionalmente reservado competencialmente a los Estados, éstos se han consolidado como los auténticos protagonistas de la construcción europea. Sin embargo, en el momento actual de desarrollo de la Unión, este modelo de aproximación plantea algunas importantes distorsiones que hacen necesario «constitucionalizar» la realidad política que representa la Unión.

La primera distorsión hace referencia a la efectiva consolidación de una realidad política supranacional, que afecta de forma creciente a la vida cotidiana de las personas y que, por esa razón, requiere una clara delimitación de las competencias de las partes y una configuración de un modelo democrático de gestión y control de las mismas.

La segunda distorsión se asocia a la creciente incidencia de la acción de la Unión Europea en la organización interna de los Estados. La intervención de las instituciones europeas está incidiendo de hecho, de forma creciente, en las competencias de las entidades subestatales, condicionando su margen de maniobra política y financiera e incluso vulnerando algunos de sus derechos, sin que estas entidades participen en la elaboración de las medidas, la toma de decisiones o el seguimiento de los programas que les afectan. Esta circunstancia es tanto más paradójica que en muchas ocasiones la transposición legislativa de las directivas comunitarias les corresponde directa y exclusivamente a ellas.

Esta situación plantea, además, problemas internos de importancia en la relación de las entidades subestatales con los Estados. Por la vía de la acción europea, en efecto, ha aumentado el intervencionismo estatal en las competencias tanto regionales como locales, proceso que se interpreta —con argumentos de peso— como un intento de los Estados de recuperar competencias atribuidas constitucionalmente a entidades subestatales.

La consolidación de un sistema de actuación política que cambia, en la práctica y de forma significativa, el sistema de organización interna de los Estados, y que afecta a los derechos individuales, exige por tanto superar la fase del sistema de tratados internacionales para proceder a la constitucionalización efectiva de la actual Unión de Estados.

Planteado de esta manera el problema, la cuestión fundamental no se asocia tanto, sin embargo, a la necesidad de «constitucionalizar» la distribución de competencias entre la Unión Europea, los Estados miembros o las Regiones sino, más bien, a la necesidad de definir de manera clara cuáles van a ser las competencias de la Unión, de forma que quede correctamente precisado el ámbito en el que ésta va a poder actuar y de

qué manera. En este contexto, parecería conveniente consolidar un modelo en el que quedarán delimitados con precisión dos aspectos concretos: de una parte, el ámbito en el que se establece para la Unión Europea una capacidad de actuación y, de otra, la naturaleza —estatal o no— del ámbito en la que se establece dicha capacidad de actuación.

En cuanto a la capacidad de actuación, dado que por medio del principio de subsidiariedad, la ejecución de los programas seguirá normalmente correspondiendo a los Estados, de acuerdo con lo previsto en su organización interna, habría que distinguir entre capacidad de actuación legislativa y lo que podríamos definir como capacidad de fomento, es decir aquel ámbito de intervención relacionado con programas sectoriales que puedan afectar a competencias que, en principio, corresponden en exclusiva a los Estados y/o a las entidades subestatales.

En cuanto a la naturaleza del ámbito de intervención, convendría diferenciar dos ámbitos muy diferentes. El primero hace referencia a aquellas competencias que, habitualmente, son consideradas de naturaleza estatal y el segundo a aquellas que, de acuerdo con los sistemas constitucionales realmente existentes, pueden ser consideradas regionalizables, es decir sujetas a una atribución competencial, legislativa o no, a entidades subestatales —regionales, provinciales o locales.

En el caso de la dimensión regionalizable, sería necesario limitar la capacidad de intervención de la Unión Europea a acciones de fomento y a la elaboración de opiniones, recomendaciones o propuestas de coordinación abierta, sin atribuirle la posibilidad de establecer líneas legislativas de intervención. El ámbito regional es precisamente aquel en el que puede hacerse realidad la diversidad de los pueblos de Europa. Es, por tanto, fundamentalmente en el ámbito de competencia de los Estados en el que conviene proceder a una delegación legislativa hacia Europa.

Es importante destacar, no obstante, que el problema competencial no se asocia en exclusiva a la distinción entre competencias estatales y regionales. También se relaciona con el problema fundamental del reconocimiento en el marco europeo de las nacionalidades históricas, entendidas como aquellas naciones vivas, así percibidas por los pueblos respectivos, pero que carecen de un Estado propio y diferenciado. Se plantea así la cuestión del reconocimiento político, jurídico y administrativo diferenciado de estas nacionalidades históricas, especialmente en un contexto de ampliación de la Unión Europea a nuevos Estados que, en la mayoría de los casos, carecen del peso político, histórico y económico de estas nacionalidades. Si se quiere evitar que el reconoci-

miento de esas nacionalidades pase en exclusiva por la reivindicación de su estatalidad, es preciso definir por tanto una fórmula europea alternativa que implique su reconocimiento efectivo, al mismo nivel que el de los nuevos Estados que vayan a integrarse por medio de los procesos de ampliación.

Una solución podría consistir en delimitar, además de competencias de dimensión estatal o regional, lo que podríamos definir como competencias «nacionales», atribuidas de hecho en muchos Estados multiculturales a las nacionalidades históricas. Frente a la dimensión territorial del ámbito competencial estatal y regional, las competencias «nacionales» harían referencia a los aspectos culturales propios y exclusivos de los grupos nacionales, afectando así esencialmente a cuestiones como la política lingüística, la cultura, los medios de comunicación, el deporte y, en buena medida, dejando al margen la problemática de la de contenido obligatorio, por su dimensión necesariamente de integración de culturas, la educación<sup>24</sup>.

El modelo de toma de decisiones en el marco de la Unión debería ajustarse a los tres ámbitos competenciales señalados —estatal, nacional y regional—. En este sentido, y en primer lugar, si el Consejo debe lógicamente seguir asumiendo su liderazgo en materias relativas a las competencias definidas como de ámbito estatal, en las definidas como regionalizables este liderazgo debería corresponder a un órgano específico en el que cada Estado pueda verse representado por los actores políticos reales en la gestión de las competencias de referencia<sup>25</sup>. Este órgano, un Comité de las Regiones ampliado y modificado, asumiría la plena competencia en las materias regionalizables, controlaría la aplicación del principio de subsidiariedad en el nivel regional y local y tendría la última palabra en todo lo relativo a posibles transferencias de competencias de contenido «regionalizable» a la Unión.

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<sup>24</sup> Respecto a la cuestión específica de la educación, ver las críticas a la propuesta de autonomía nacional-cultural del austro-marxismo formuladas por Lenin en V. I. Lenin *Cultural-National Autonomy*. Za Pravda N.º 46, November 28, 1913. Tomado de V. I. Lenin, *Collected Works*, 4th English Edition, Progress Publishers, Moscú, 1968. Vol. 19, pág. 503-07.

<sup>25</sup> Estos actores pueden ser, en algunas circunstancias, los propios Estados pero en la mayoría de los casos serán regiones y entidades locales. Convendría, en cualquier caso, garantizar aquí la representación de todos los actores con competencias específicas y, específicamente, la participación directa de todas las regiones con competencias legislativas en las materias de referencia.

En segundo lugar, en las actuaciones que afecten a política lingüística, cultura y educación, así como a otros aspectos competenciales de dimensión no territorial, propias por tanto del ámbito de la autonomía o soberanía cultural de los grupos nacionales, la participación en el Consejo debería abrirse específicamente, además de a los representantes de los Estados, a los de las nacionalidades históricas. En estos casos, podría así hablarse de un modelo de Consejo ampliado, gozando los representantes de las nacionalidades históricas, en estos ámbitos competenciales, de los mismos derechos que los representantes de los Estados.

De acuerdo con lo que hemos planteado, por tanto, la participación de las entidades no estatales con capacidad legislativa podría, de esta forma, fundamentarse en un modelo como el siguiente:

*a)* En el caso de las competencias estatales generales, es decir aquéllas de dimensión territorial, su participación podría plantearse a través de la participación en las delegaciones de cada Estado miembro en el Consejo, de acuerdo con el actual artículo 203 del Tratado CE.

En este caso, para las entidades subestatales con competencia en estas materias —por ejemplo, en materia fiscal—, la solución radicaría en facilitar, en el marco estatal, su intervención en el estudio y toma de acuerdos correspondientes al Estado miembro y en organizar la participación en sus delegaciones estatales<sup>26</sup>.

*b)* En el caso de las competencias ligadas a lengua, cultura y educación, así como en todas aquellas que afectaran directa y exclusivamente a pueblos o comunidades «nacionales», al mecanismo anterior se añadiría el de participación directa en el Consejo de las entidades subestatales representativas de las nacionalidades históricas existentes en cada Estado<sup>27</sup>.

*c)* En el caso de las competencias regionalizables, la participación en Comité de las Regiones estaría siempre garantizado a cada entidad subestatal con capacidad legislativa.

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<sup>26</sup> El mecanismo concreto podría traducirse en la creación de órganos específicos de colaboración interinstitucional, en cuyo marco se fijaría la posición común por vía de pacto o, en su caso, por acuerdo cualificado, garantizándose en todo caso la participación en las delegaciones estatales. Este planteamiento recogería la objetiva necesidad de mayor integración de las entidades subestatales en las instituciones generales del Estado, en especial de cara a la formación de su línea política en aspectos de concurrencia competencial.

<sup>27</sup> Este aspecto es fundamental para evitar que el reconocimiento de las naciones sin Estado quede diluido en el concepto más amplio de región.

Además de esta participación de naturaleza política, las entidades subestatales con capacidad legislativa deberían además tener la capacidad de recurrir ante el Tribunal Europeo de Justicia cuando su esfera de competencia pudiera verse afectada por una decisión, directiva o reglamento<sup>28</sup>.

Las entidades subestatales deberían, por otra parte, ser consideradas como entidades asociadas a la Unión Europea de cara a la aplicación de las políticas de ésta, permitiéndose así relaciones directas en el ámbito de competencias concurrentes entre la Unión Europea y las mencionadas entidades, directamente o en colaboración con las instituciones estatales<sup>29</sup>.

La posible funcionalidad de este modelo requeriría probablemente además de una cierta «desestatalización» de los órganos de las instituciones europeas (Comisión, Parlamento, etc.), de forma que su funcionamiento resultara más autónomo respecto al de los Estados.

### *Consideraciones finales*

La plasmación práctica del modelo descrito requiere, además del ajuste de la Constitución a las reformas federalizantes necesarias, una nueva lectura de la misma que permita desarrollar las propuestas aquí planteadas. Sin embargo, una de las grandes virtualidades de la Constitución española es la distinción entre nacionalidades y regiones, distinción que permitiría fácilmente orientar el modelo constitucional español hacia un modelo más cercano al belga de comunidades y regiones. En esta aproximación, el concepto de «nacionalidad» pudiera recoger las unidades de lengua y cultura que, por encima de las realidades de las

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<sup>28</sup> Resultan de particular interés, en este punto, las propuestas contenidas el informe de la Presidencia del Parlamento Vasco a la Convención Europea. (Parlamento Vasco. Presidencia. *La participación regional en la gobernanza europea*. Documento de trabajo presentado por la Presidencia de Eusko Legebiltzarra-Parlamento Vasco a la Convención sobre el futuro de Europa, págs. 8 y 9).

<sup>29</sup> Un mecanismo particularmente operativo, a este nivel, es el de los contratos tripartitos por objetivos entre Comisión, Estados miembros y regiones para la aplicación de reglamentos o directivas relativos a competencias atribuidas a autoridades públicas subestatales. Este modelo de actuación está previsto por la Comisión Europea (Comisión Europea. *Libro blanco sobre la gobernanza europea*, COM (2001) 428 final, Bruselas, 25 de julio de 2001).

Comunidades Autónomas, entendidas en términos de región territorial, se han consolidado a lo largo de la historia en España. A diferencia de la adscripción a una Comunidad Autónoma, definida por la residencia, la participación en estas nacionalidades dependería de una decisión estrictamente personal e inclusiva, no estableciéndose por tanto ni la obligatoriedad de la adscripción ni el carácter único de la misma. Una persona podría participar, por tanto, en la vida de más de una de estas nacionalidades.

¿Cuáles serían estas nacionalidades? Es difícil concretarlo a priori. Pero, aunque esta cuestión es sin duda polémica, si el proceso se aborda desde una perspectiva integradora, podría pensarse en cuatro nacionalidades diferenciadas, aunque ampliamente interconectadas e internamente variadas: la hispana<sup>30</sup>, la catalana, la gallega y la vasca. Precisamente por la variedad interna y las interconexiones existentes, la organización interna de estas nacionalidades, en la mayor parte de los casos, debería basarse en un modelo federativo<sup>31</sup>. Esta cuestión, en todo caso, deberá ser objeto de un debate y de un gran nivel de consenso entre los partidos a fin de evitar la tendencia al particularismo, tendencia que podría poner en tela de juicio la viabilidad del modelo.

En una perspectiva de convivencia plurinacional, la aproximación planteada —combinada con una reforma federalizante de la Constitu-

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<sup>30</sup> No es objeto de este documento profundizar en la cuestión de la existencia de una nacionalidad hispana o de una nacionalidad española, diferenciada de la vasca, gallega o catalana. El tratamiento de este problema resulta difícil dado que, contrariamente a la percepción dominante en las Comunidades Autónomas con presencia de movimientos nacionalistas, la percepción de identidades propias, diferenciadas de la española aunque compatibles con ella, es una realidad dominante en la gran mayoría de las demás Comunidades Autónomas españolas.

Debe igualmente hacerse referencia, en este contexto, a otras dos cuestiones fundamentales: la cuestión gitana y el tratamiento de la realidad de las nacionalidades no españolas. Respecto a la primera cuestión, el reconocimiento «nacional» debería depender de la propia población afectada; respecto a la segunda, la solución deberá siempre pasar por acuerdos y tratados bilaterales con los Estados de origen de la población afectada. Un aspecto clave, en todo caso, debe ser la negativa en este contexto a asociar nacionalidad y religión. El ejercicio de la libertad religiosa deberá seguir los cauces específicos previstos en la Constitución y en las normas internacionales.

<sup>31</sup> La organización de una posible nacionalidad cultural hispana, por ejemplo, sería impensable sin tener en cuenta una estructura interna de naturaleza federal o autónoma que recogiera la variedad interna, incluso en términos lingüísticos, de este colectivo. Lo mismo sucedería en el caso de la nacionalidad vasca y de la catalana, incluso planteada exclusivamente en términos culturales.

ción y una redefinición plurinacional del Estado en materia cultural y lingüística— ofrecería una alternativa de organización más ajustada a las necesidades de los diferentes pueblos de España que el actual sistema, definido por una peculiar combinación de nacionalismo estatal «español», amplia autonomía territorial y participación exclusiva del Estado en la construcción europea. ¿Cuál sería la alternativa real al modelo planteado? : la reivindicación de la autodeterminación externa por parte de las Comunidades Autónomas con base en una nacionalidad histórica, reivindicación que, salvo que se renuncie al principio democrático, deberá ser inevitablemente contemplada e integrada de alguna forma en el bloque de constitucionalidad<sup>32</sup>.

Lo que el presente texto sugiere, en conclusión, es que la alternativa a la autodeterminación externa de los pueblos de España es la garantía para ellos de una suficiente autodeterminación interna en España y en Europa, que no sólo resulte un mal menor sino que ofrezca una alternativa de convivencia más productiva y enriquecedora que la creación de un nuevo Estado. Una alternativa cuya característica fundamental consiste en garantizar en el actual territorio español la igualdad de todos los ciudadanos en el acceso a todos los derechos humanos sin excepción, dejando a las entidades territoriales y a los pueblos nacionales el margen de autonomía o soberanía que, en su ámbito de intereses propios y exclusivos, decidieran libremente mantener.

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<sup>32</sup> Ésta y no otra es, en realidad, la conclusión fundamental a retener del análisis de la Opinión de la Corte Suprema de Canadá relativa a la secesión de Quebec.

