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BACKGROUND PAPER**

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**FEDERALISM AND NATIONAL GROUPS**

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In certain federations or regionally decentralised states there are various groups, clearly differentiated in terms of their respective national characteristics, which live together.

Among these national characteristics we can mention the fact the members of these groups recognise themselves as such because they share some cultural patterns; they also share some sense of historical distinctiveness in relation to other groups; they are situated in a more or less clear territory, and display a will to maintain its distinctiveness in the political sphere. When there are different national groups living together within the same federation or regional state we refer to a plurinational federation or a plurinational regional state. This, for example, is the case in Belgium, Canada, India, Russia or Spain. These are plurinational federations with institutional and regulatory challenges distinct from those faced by mononational federations such as the USA, Germany, Austria, Brazil or Australia. National pluralism is a reality that is not shared by all federations; nor, until recent times, has it received sufficient attention in the analysis of federal states. Current assessment of the subject is related to the growing processes of globalisation, and to those of cultural pluralism (multi-culturalism). In this paper I will briefly outline certain elements pertaining to liberal-democratic federalism within plurinational contexts (1), the characteristics of the main types of federal agreement (2) and the bases of a proposal for a federal organisation more adequate to the needs of plurinational states (3).

**1. General aspects**

1.1 The disconnection between differing types of theoretical analyses. We could say, in general terms, that there has been little connection between the analyses of federalism, democracy and the various types of nationalism. On the one hand, in comparative federal studies, the distinction is not always made between federal systems that are democratic and non-democratic, or between those which are mononational or plurinational. And on the other hand, analyses of nationalism do not usually assess relations with democracy in any great depth, whilst theories of democracy - particularly those of a more philosophical character - have not paid significant attention to the analysis of federal systems.

1.2 Few empirical cases. In comparing the political make-up of federal democracies, we do not find a high number of plurinational democratic federations. Basically there is Canada, Belgium, India, Switzerland and - to a lesser extent - Spain (which is not, technically speaking, a federation). Faced therefore with these cases, we need to be particularly careful in making judgements, avoiding inferences that are based on limited information, and refraining from generalised conclusions. The basic issue here is that of how to accommodate diverse national realities within the same federation. Distinct national groups are habitually characterised by real and perceptible differences (demographic, linguistic, income-related, cultural, in civil law, etc.) which have consequences on their self-perception, and the ways in which this does not correspond to that of other groups. We also need to bear in mind other factors such as whether or not populations with distinct national identities are territorially inter-mixed, and the importance of 'dual national identity' in relation to the 'member state' and the 'federation'.

1.3 Democracy and nationalism. The current debate on democratic legitimacy within plurinational contexts lies between two fundamental approaches to understanding

democratic liberalism. The first of these views defends a concept based, essentially, on individual rights of a 'universal' kind, on a 'non-discriminatory' idea of equality for all citizens, and on a series of procedural mechanisms that regulate institutional principles and the collective processes of decision making. It is a form of political liberalism that distrusts the notion of collective rights, suspecting such a concept of bringing authoritarian risks in its wake (liberalism 1). To the above ideas, the second approach adds those of the protection and development, in public and constitutional spheres, of recognition and self-government for distinct national groups living within the same democracy. It holds that the absence of such recognition, and of broad-ranging self-government, results in a discriminatory bias against national minorities and in favour of national majorities, and that this thereby violates the principle of equality (liberalism 2). If one of the traditional criticisms levelled at liberalism - and made both from conservative and socialist positions - was that of the contrast between the ideas described in liberal theory, and what was actually carried out by those states calling themselves liberal, then today such criticism broadens from purely social or socio-economic components to include the cultural components that are to be found in democracies. The possible conflicts that might arise between collective values or rights and those of an individual nature (a distinction which often becomes less than clear in practice) will have to be resolved by means of institutional mechanisms similar to those that resolve the conflicts arising between individual rights themselves (1). Variations in the formulation of possible federal solutions within plurinational contexts will be brought about by the choice of which of the two versions of political liberalism is adopted.

1.4 Federalism is not the same as decentralisation. As many scholars have pointed out in relation to federal structures, there are two perspectives that are often found interconnected, but that individually imply rather distinct aims and conclusions. These are the perspective of non-centralisation and that of decentralisation. The practical consequences of this go significantly beyond what the apparently academic character of the distinction might seem to suggest. And this is particularly so in plurinational democratic federations.

In the liberal tradition, on the one hand, the federations' basic nucleus is related to the territorial separation of powers. This principle, originally associated to agreements on the centralisation or non-centralisation of specific political functions, is of a kind that is distinct from other organisational principles also in operation within liberal federations, such as those of participation, efficiency or decentralisation. Decentralization, on the other hand, starts with a single political unit and consists of dispersing powers outwards from the centre to other centres. Because this arrangement presupposes the existence of a centralized structure before any constituent agreement can take place, the demos can be seen in more uniform terms in this model than in the traditional federal interpretation. Even a territorial organisation presided over by a significant degree of municipal decentralisation, such as that found in certain Nordic countries, is still a far cry from the spirit of federalism. Moreover, the political decentralization of an uninational state, and the constitutional and political accommodation of different national realities which live together in a plurinational state can hardly be regulated with the same mechanisms. Depending on the dominant perspective adopted - decentralization; uninational federalism; plurinational federalism- we can observe different practical consequences, especially in the symbolic and institutional spheres (use of flags and anthems, upper chambers, constitutional or supreme courts, representation in the international arena, etc), which are fundamental for the recognition of national pluralism in liberal-democratic systems.

1.5 Federalism is not the same as subsidiarity. Although we are talking here about a term that may well acquire various meanings, the most frequent use of the word 'subsidiarity' refers to an organisational and territorial principle according to which a political decision, or at least its implementation, must be carried out at the closest possible level to the people. In this sense, subsidiarity is understood as a distribution of powers between various administrative levels - ranging from international to municipal organisations designed to guarantee the highest possible efficiency in the global system and the greatest proximity to the citizen. As a notion of organisation, subsidiarity might at first sight appear

to come fairly close to the philosophy of federalism. However, a more detailed analysis of the issue shows us that subsidiarity may actually represent an important erosion of federal principles. And this is a subject particularly relevant to the situation found in plurinational federations. It can be said that the differences between the principles of subsidiarity and federalism are not to be found in what we are looking at, but in how we look at it.

As we have already observed, federal organisation is linked to the separation (rather than the distribution) of powers between distinct territorial levels. In fact, we could say that the separation of powers is really federalism's starting point; it is not its destination. To question or subordinate this principle in the name of (supposedly) greater efficiency, or in the name of principles aimed at 'uniforming' the population, is to argue in terms that are more unitary than federal, particularly in relation to the self-government of federal units. And this is also an issue of particular importance to plurinational federations. As a matter of fact, in those states in which the federal principle has an important role to play, subsidiarity does not fit very well. Even within a mononational and 'co-operative' federation such as that of Germany, the Constitutional Court has proved to be less than willing to recognise subsidiarity as a convenient form of political organisation. The federal principle may be complemented by the principle of inter-territorial solidarity, but not by that of subsidiarity. This is a useful technical and democratic principle that can be used to legitimised both, centralisation and decentralization. But, in any case, it is not useful in designing the political accommodation of plurinational states.

## **2. Federal agreements and Federations**

Basing ourselves on what are the most widespread typologies within the current study of federalism, we can distinguish - in very general terms - four main classes of federal agreement (a broader concept than that of 'federation') (2).

2.1 Regional states. These are states in which the double level of government is a consequence of the process of political decentralisation, guaranteed by the state's Constitution. Unlike what has happened in historical federations (USA, Switzerland, Germany) which are based on a process of the centralisation of previously existing and independent units, in the case of regional states what previously existed was a unitary centre that, at a given moment, becomes decentralised. The ceding of rights, responsibilities and powers is passed downwards, so to speak. 'Regional' political decentralisation, which logically presupposes the prior existence of a centre, has in practice only really been established by certain regions of the state. Judicial, fiscal and economic powers usually remain within the institutions of central power. In the process of constitutional reform, the power of the 'regional' institutions is largely marginal, or even non-existent. The prototype of a regional state is Italy, from the Second World War onwards.

2.2 Symmetrical federations. The 'pact' with which this type of federation is 'constituted' is based on a centralising process that involves the federated units ceding a series of responsibilities and powers to the central authority. The symmetry of this arrangement lies in the fact that the cessions involved and, more generally, the relations between all federated units themselves and the federation, are more or less homogeneous. The federated units carry out legislative, executive, judicial and economic responsibilities. In this case, and unlike the preceding model, the territory of the federation as a whole is equal to the sum of the territory of the federated units. In certain mononational federations (Germany, Austria), the number of mechanisms for co-operation or co-ordination between the two levels of government has increased in recent years, due to the increase in shared responsibility.

2.3 Asymmetrical federal agreements. There are two types of agreement: asymmetrical federations, and specific asymmetrical agreements between different types of 'units' (federacies, associated states). The perspective of centralisation that we have seen in model 2.2 is also present in the case of asymmetrical federations, but in this particular case the relationship between the federated units and their central authority is not

homogeneous. The federal Constitution establishes different relations for certain given units, and this is reflected in the varying levels of self-government, in the symbolic and institutional framework, in the representation of the state abroad, in economic questions, etc. Reasons for governing on the basis of legal asymmetries are various, but they are all based on the de facto asymmetries (cultural, geographic, historical, etc.) existing between the federated units. Belgium (1993) is an example, from recent history, of an asymmetrical federal state.

Other asymmetrical agreements are represented by the federacies and associated states. Federacies consist of an agreement between a large unit and one or several much smaller units. In this agreement, the smaller unit retains a high degree of self-government, yet still has a limited role to play within the decisions of the larger unit. The agreement cannot be broken unilaterally; both parts must agree to its dissolution (Puerto Rico-USA; Bhutan-India). For their part, associated states are similar to federacies, but in this case the agreement may be dissolved unilaterally, following pre-established guidelines (Cook Islands-New Zealand; Marshall Islands-USA).

2.4 Confederations. These are agreements between different states aimed at establishing common governments for the development of specific tasks or objectives (which are, basically speaking, those of international politics, defence or the economy). The common government however, depends entirely on the governments of the confederated states. This effectively gives rise to what we might call a government of 'delegates' from the confederated units. The units can, at any time, draw the agreement to a close. Some confederations have subsequently given rise to federations (the North-American states between 1776 and 1787; Switzerland between 1291 and 1847). Other examples are the Caribbean Community, The Community of Independent States, or certain aspects of the European Union itself (3).

### **3. Plural Federalism.**

Referring to the models that we have just outlined above, we can now ask ourselves the following question: is the federal state an effective model for the accommodation of plurinational societies, in terms of liberal-democratic patterns?(4)

Broadly speaking, federalism is a model that in principle is unrelated, historically or morally, to any regulation of national pluralism. Both institutional and normative analyses of federalism have been dominated, moreover, by the historical example of the United States. This is an empirical case that is not linked, historically, to national pluralism (5). If we remain within the orbit of American federalism, the answer to the question about the possibilities of accommodating plurinational societies seems to be basically a negative one. The reasons are both historical and organisational. It is fundamentally a mononational model that avoids the basic question, unanswered in democratic theory, about who the people are, and whom decides who they are. In my view, it is practically impossible from these presuppositions to accommodate the different demos of a plurinational society within the constitutional rules of the game.

The history of federalism, or more accurately, the history of federations, has been characterised chiefly by the development of symmetrical models. Fundamentally, these models have been linked to mononational entities and to their processes of nation-building; they have encountered problems when it comes to accommodating distinct national realities within the liberal-democratic scheme of things. Such models have not shown themselves to be a particularly promising path to follow when there are co-existing or juxtaposed processes of nation-building within the same polity. Symmetry stimulates uniformity in the 'rules of entry' to a given political system. This is an issue which makes it particularly difficult to achieve a degree of accommodation, when what the pluralism of national minorities aims at is, specifically, that recognition of plurinationality be established by these very 'rules of entry'; and that the rules should also regulate minority national self-government. The challenges that plurinational societies present to the notion of federalism are, by and large, significantly different from the challenges presented by

mononational societies. In addition to the search for common positions within the federation, what plurinational societies are mainly preoccupied with is establishing 'liberal' institutions and mechanism of protection, on a constitutional scale, that safeguard the minority national demos from the decisions taken by the majorities (6). Experience of comparative politics would tend to suggest that this is a difficult thing to achieve, if we base ourselves on the 'regional' and 'symmetrical' models outlined in the previous section.

As we know, starting from strictly liberal premises there are federal models, other than the symmetrical, with greater potential for including national pluralism within the same state. It is in this sense that I propose a model of plural federalism - in which certain asymmetrical or confederal regulations are also included - as a better model for plurinational states. This would be, in effect, an institutional model based on the perspective of liberal-democratic revision mentioned above (liberalism 2), which aims at articulating ethical considerations related to the 'justice' of a plurinational federation, and at outlining those political considerations referring to the federation's stability and efficiency.

Essentially, plural federalism includes three basic types of federal agreement:

1. The constitutional regulation of the state's 'national pluralism', at the level of 'federation'.
2. The establishment of a series of agreements, of an asymmetrical or confederate character, for the regulation of those aspects decisive to the recognition of, and self-government for, stateless national groups. The object of these agreements is the defence and development of such groups, both in relation to the federation and in relation to the international situation as a whole. And finally,
3. The regulation of more symmetrical agreements in other areas of self-government.

The first type of agreement is based more on the perspective of the constitutional recognition of plurinationality, whilst the other two are more concerned with the self-government of federated groups. The basic aim of plural federalism is that of regulating different types of federal agreement in accordance both with the functional sphere to be regulated, and the characteristics of the federated units (7). The basic nucleus of plural federalism is constituted by the first two types of agreement outlined above.

Obviously, a good accommodation for plurinationality cannot simply consist of a mere adaptation of a 'formal model', but also requires political content and constitutional regulation stemming from the notion of plurinationalism. When the national reality of a state or federation is asymmetrical, the regulation of federal asymmetries does not in itself constitute a guarantee of accommodation for the state's national asymmetry. Such regulation represents a necessary precondition to constitutional accommodation, but in itself cannot guarantee conditions of sufficiency for such accommodation. Notwithstanding this fact, however, we could say that, based on the social and historical conditions in plurinational societies, in the absence of constitutional regulations on the recognition of plurinationality, and without asymmetrical or confederate regulations in the field of self-government, it is particularly difficult to obtain a satisfactory resolution of the 'national question' in terms of liberal-democratic demands for a reality that is both plural and complex.

The application of the three types of federal agreement covers five basic areas: the symbolic-linguistic; the institutional; the area of responsibilities and powers; the fiscal-economic and the international. In this way, the inter-relationship of the three agreement types with the five areas of application gives rise to fifteen possible intersections. In the symbolic-linguistic area, for example, the first two types of agreement (regulation of plurinationality at a federal level, and asymmetrical agreements) include questions such as the regulating of pluri-lingualism in the name of the state, in the currency, in personal identity documents (passports, etc.); the question of international representation for national sports teams; the differentiated design-content and use of flags, anthems, etc, within the various national territories; linguistic regulation pertaining to civil, property

registers and so on (8). Other intersections between types of plural federal agreement and areas of regulation would be asymmetrical regulations in institutional and international ambits. This could require specific regulations such as second chambers, that regulate the right available to national minority parliamentarians to veto in given issues, as well as a specialised and symmetrical bicameralism. Regulation of the composition of Supreme or Constitutional Courts would also have to be addressed. Plurinational federalism requires the articulation of rules and procedures both of a majority and 'consociative' character. It is aimed more at maintaining the unity of plurinational states already in existence than at paving the way for new ones to develop.

In general terms we might say that liberal, democratic and national logics and values are, on the whole, desirable; but they are not always univocal, nor do they always work towards the same aims. In plurinational contexts, the basic demand is, specifically, that values of liberty, equality and individual dignity be allowed to develop in a more careful manner; and that these values should be implemented through the effective accommodation of the different national realities co-existing within one and the same democracy.

Certain specific questions arising from the relationship between federalism and plurinationality, in the context of liberal democracies, and which belong to current debates both at a theoretical and institutional level, are the following:

1. Should there be constitutional regulation of procedural mechanisms that would allow for national groups to secede from a plurinational federation? This includes questions such as the majority required in such cases, rules of procedure, the time-scales involved, possible economic compensations, etc. In principle, it would seem that there is no moral superiority implicit in maintaining the unity of a state or federation. The fact of sharing liberal-democratic values does not, in itself, indicate anything about the wish of national groups to live together within the same state.
2. What kind of representation, and what sort of responsibilities and powers, should member states with national characteristics have at international level?
3. With respect to the symbols of the federation, what should the relationship and priority of national entity symbols be?
4. Within the current process of globalisation, what responsibilities and powers are viewed as impossible to renounce, if we are still to consider a federation as such? How can equality between distinct national demos be constitutionally articulated in terms of the most traditional criteria of individual equality?
5. How does the party system affect the practical running of inter-governmental relations and institutions?
6. In a plurinational federation, what should the composition and functions of the second chamber be? The nature of the participation in central authority, undertaken by federated groups, is affected by this question. Would it be advisable, with reference to parliamentarians from different national groups, to introduce the possibility of veto mechanisms in certain issues?
7. What should the composition and functions of the Supreme and Constitutional Courts be? With reference to a given federated national entity, what subjects and areas may be undertaken by its highest court as the final institution for the resolution of conflicts?
8. What role should the plurinationality of the federation play in the process of constitutional reform?

#### **Footnotes**

1. It is certainly not without significance that, in plurinational states, the supporters of liberalism are the majority in Ottawa, Toronto, London or Madrid; whereas the supporters of liberalism are more likely to be found in cities such as Montreal, Edinburgh or Barcelona.

2. Here, I follow Daniel Elazar's and Ronald Watts' comparative analysis of federalism.
3. Leaving aside these four basic types of federal agreement, there are other arrangements of a more limited character and implication, and which we will mention here only very briefly: a) Unions, in which the constituting units maintain their integrity, principally by means of general institutions such as councillors' double mandate (regional and general): this was the case in Belgium before 1993; b) Leagues, in which agreements are established between different states in order to achieve specific objectives through a secretariat, and not through a government (the Arab League, ASEAN, NATO, The Nordic Council, etc.); c) Condominiums, in which certain territories are under the control of a group of other states (Andorra before its 'constitutionalisation' in the 1990's; d) Shared Functional Authorities, or agencies created by various states in order to carry out specific policies (the International Atomic Energy Agency; the International Labour Organisation, etc.). Obviously, there are also eclectic cases which are characterised by the combination of several agreement traits (such as that of the European Union after the Maastricht Agreement, 1992).
4. In general terms, it can be said that federalism aims to combine the advantages of unity with those of diversity. In the words of one of its best known analysts, Daniel Elazar, on the one hand classical liberal federalism "is designed to prevent tyranny without preventing governance", and on the other hand, it "has to do with the need of people and polities to unite for common purposes yet remain separate to preserve their respective integrities. It is rather like wanting to have one's cake and eat it too".
5. In contrast to those federal states which embrace their plurinational character, such as Canada, Belgium and, to a lesser extent, Switzerland. In the analytical field, traditional studies of federalism have often committed the fallacy of taking only a part, the USA, to represent the whole.
6. The inter-group regulations of a plurinational state require certain constitutional guarantees relating to liberal "negative liberty" at a collective level, or, using the terms of Will Kymlicka, the regulation of "external protections" which accompany the lack of "internal restrictions" within inter-group relations. In the cultural sphere, the "tyranny of the majority" has also had wayward consequences on the evolution of traditional liberalism, especially in relation to the absence of recognition given to national pluralism existing in certain states. In this sense, as Charles Taylor and James Tully (amongst others) have analysed, accommodating a plurinational reality means that the collective rights and values of national minorities need to be recognised, protected and promoted at the same level as those collective majority rights and values established and set out within traditional constitutionalism.
7. This is not, therefore, a question of comparing a global federal model of an essentially 'asymmetrical' character with another (also global) model of a symmetrical kind. Rather, it is an issue of combining both types, and - in the case of nationally plural states - assessing the territories in which they are to be applied.
8. In more juridical terms, this situates the issue in the context of the recent and important sentence handed down by the Canadian Supreme Court, which established that democratic principles must be articulated and evaluated alongside other principles, namely: federalism, respect for the rule of law, and respect for minorities (Supreme Court of Canada, 25506, 1998).

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