SOVEREIGNTY CONFLICTS: THE EUROPEAN DEBATE

Deliberative Constitutionalism to the Rescue of Complex Democratic Settings

Alain-G. Gagnon



Demonstrations in favour of "yes" and "no" in Quebec, during the previous months of the 1998 referendum. Illustrator: César Cromit.

Current debates about sovereignty should not be limited to issues of legality or legitimacy as is too often times witnessed on the terrain of politics. Time and again, we have seen political actors intervening on behalf of the majority nation – hiding behind the veil of legality – to undermine or seek to discredit claims made by minority groups and minority nations. The initiative led by the Eusko Ikaskuntza and the Institut d'Estudis Catalans comes at a crucial moment as several countries are facing internal tensions that are associated with a push in favour of centralization, symmetrisation, and performance. Unitary and federal states have frequently implemented similar strategies to respond to forces associated with globalisation that they used as a pretext to take away powers that have been assumed at the sub-state level at different periods.

In this short article, I intend to, first, revisit the terms of the debate concerning the exercise of sovereignty, second, highlight different forms of legitimacy before, third, distinguish between constitutional authority and constitutional morality and finally, in the last segment, I am challenging the position considered to be acceptable in some circles that *might makes right*. I adopt instead a position that consists in endorsing a liberal republican model that

feeds on deliberative constitutionalism as a way forward to advance a just democracy.

Reformulating the terms of the debate about sovereignty

Political actors, acting on behalf and behest of the state, are quick to declare that all individuals are equal before the law, that the rules of the law have been set once and for all and that the State is there to guarantee its territorial integrity against all possible external as well as internal threats. In such a context, there is no palpable intention to adhere to the central principles of constitutionalism which are encapsulated in the notions of political consent, cultural and legal continuity and reciprocity, notions that political philosopher James Tully had identified as foundational elements of constitutionalism, twenty-five years ago, in his classic work entitled *Strange Multiplicity*.

With ongoing political transformations taking place below and above the State, one ought to question the postulate according to which the State has a monopoly of legitimate public authority within a set of predetermined frontiers – be they the result of a war, of a process of decolonization or, among various scenarios, of an expressed desire to come together as single political entity at a given historical moment following a logic of territorial aggregation.

> Actors discussing territorial integrity are likely to focus on legality and pay only lip service to the notion of legitimacy

Actors discussing territorial integrity are likely to focus on legality and pay only lip service to the notion of legitimacy. The later, however, remains highly important since it is crucial for state managers to obtain the highest level of popular support possible behind state reforms in order to advance policy preferences emanating from all political communities. Constitutional and political arrangements are there to be negotiated not to be imposed so that the legitimacy principle is at its highest.

Which forms can sovereignty take to meet both the needs of citizens and political communities? Such an undertaking is particularly crucial in cases where several nations cohabit, comes immediately to mind countries such as Belgium, Canada, Spain, and the United Kingdom.

Reconciling different forms of legitimacy

Inter-community relations would gain to be reimagined on a new basis. Here, I argue that we ought to replace the dyad of legality/legitimacy by the dyad legitimacy/legitimacy. Nothing less, without which the parties to the conflict will continue to lock themselves into logics that are impossible to reconcile due to the fact that they operate on parallel paths with no possibility of converging.

Rethinking the conflict in terms of legitimacy makes it possible to give a voice to all potential political actors rather than disqualifying certain actors or taking them out of the political equation for all sorts of reasons.

We have to start from the premises that both sides in a political conflict have or can invoke valid arguments to question (1) the fairness in power sharing; (2) the equal capacity of everyone to accomplish oneself and fully exercise one's civil, political, social and cultural rights; and (3) the validity and importance of their counterpart's political legitimacy.

Argument heard too frequently that "there is no legitimacy beyond legality" (Bossacoma Busquets, 2020: 275) is not an acceptable one since it closes all democratic channels and constitutes an imposition of political strength on weaker political partners. It is as if a state, whatever the political preferences expressed by their constituent political communities, has the right to be intolerant toward cultural, ideological, social and societal differences. Legality simply cannot exhaust legitimacy.

Here, federalism has some valuable cues to provide, since a federal constitution "is one premised upon territorial constituent power which prioritises the constitutional status, symbolically and substantially, of its constituent territories. It is the consent of these territories that gives the constitution its foundational and ongoing legitimacy and which operates within the constitution to condition fundamentally, the constitution's pattern of authority (Tierney, 2018)."

The source of political authority in a multinational political setting and, by extension the strength of its legitimacy, is the popular will expressed first and foremost through political institutions operating at the sub-state level as well as through the state itself. It is the combined aspirations of these two forms of representation that will give political actors their legitimacy to put forward political solutions and to implement public policies.

Differentiating between constitutional authority and constitutional morality

Some states are of the view that the constitution is a sacred document that, once adopted, can no longer be modified. Their spokespersons use various strategies either to undermine or to oppose political changes as being expressions of disloyalty toward the all-encompassing state or as going against the national interest. Such a pursuit has been properly qualified by jurist Pau Bossacoma Busquets, when discussing Judgement 42/2014 of Spanish Constitutional Court denying the Catalan parliament the right to consult the people of Catalonia with respect to its political future, as a clear expression of *constitutional fundamentalism*. "According to the latter [constitutional fundamentalism], there is no legitimacy beyond legality, there is no democracy outside the constitution… (Bossacoma Busquets, 2020: 275)."

> Believing that the Constitution is a sacred document that once

> adopted can no longer be modified is a clear expression of constitutional fundamentalism

Difficult for anyone to imagine that the principle of legitimacy can be reduced to mean so little. According to Judgement 42/2014, only a formal constitution can serve as a source of legitimacy. Clearly here, constitutional fundamentalism stands in the way of deliberative constitutionalism, acting as a straitjacket from which it is impossible to extract oneself, emptying the principle of liberty of its essence.

In such a context, what are we to make of the exercise of democracy itself, of the expression of constitutional morality as well as of the informal constitutional principles or set of ongoing abeyances on which a country has established its key foundational principles giving a purpose to its continuing pact?

Examining the Canadian experiment through an appraisal of the 1998 Reference case with respect to Quebec's right to secede, it becomes clear that political partners in a democratic political setting need to abide by a set of criteria to be able to engage in a trustworthy manner and have the possibility of confronting their respective positions without undue pressure. The Supreme Court of Canada identified four central principles that are assigned an *equiprimordial* value, namely the federal principle, the democratic principle, constitutionalism and the rule of law, and the protection of minority rights. Each of these principles cannot trump any of the others. They need to taken into account simultaneously and concurrently for fair decisions to be reached. This can complicate negotiations between political partners due to the number of conditions to be met, but at the same time it identifies the conditions to be assembled for constitutional reforms of various intensity to be undertaken and brought to fruition.

Formulated differently, constitutional fundamentalism is simply not an acceptable position for a state to adopt in the context of a complex democratic political setting. We need to find room for the maintenance and pursuit of political deliberations, for the expression of protest and resistance, for the possibility to contest decisions and, with peaceful and democratic means, to dissent. Come to mind the possibility of holding elections or organizing referendums to appraise public opinion and assess community's preferences. Such actions can be undertaken either by a state or by a sub-state. What matters is that the population being consulted is provided with all relevant and balanced information to reach an informed decision without improper pressures or intimidation. Fairness and transparency are essential to the success of democratic processes.

In the Canadian context, we owe a lot to the late James Alexander Corry who has coined the notion of *constitutional morality* to highlight the value of treating all political partners in the Canadian federations with fairness and respect. Here is what Corry had to say with respect to the uneasy Quebec-Canada relations:

- *"Quebec's objections about [federal priorities and patterns built into shared*

> *programmes] have not been primarily the distribution of powers under the sections 91 and 92 but rather the stamp of English-Canadian preferences and outlook on most of what the federal government does. This is why English Canadians have to think more sympathetically about what it would be like to stand in Quebeckers' shoes, and try to modify their preferences and outlook to take into account of the preferences and outlook of Quebeckers in a wide range of matters. Here indeed we do need a new and more scrupulous constitutional morality*" (Corry, 1878: 8-9).

Such an understanding underlines the need to develop a normative constitutional theory (LaSelva, 1996, 2018; Marti, forthcoming) that would focus no so much on the content of a constitution but on the moral principles on which it rests. The work of Samuel LaSelva on the *Moral Foundations of Canadian Federalism* (1996) and more recently his book entitled *Canada and the Ethics of Constitutionalism: Identity, Destiny, and Constitutional Faith* (2018) highlight the conditions under which a democracy would last and prosper. At no moment in these two treatises does the author suggest that the rule of law can trump the democratic or the federal principle or the ethics of constitutionalism. Rather the author stresses the importance to sustain negotiation and take into account the needs and desires of all partners in a (federal) democracy (Burgess and Gagnon, 2012). LaSelva goes on to argue that Canada has been successful in putting in place its own model of governance, distinct from the United States and the United Kingdom. Reading between the lines one can infer from LaSelva's analysis that it is the gradual development of an ethics of constitutionalism – prone to accept deep diversity and listen to oppositional camps – that explains Canada's overall success at actualizing its constitutional pact. In other words, the ethics of constitutionalism gives legitimacy to the political order.

Might Makes Right: An Inescapable Clash in Deliberative Democracy

In some democracies, deliberations have been discouraged when not denounced for mounting opposition against the state while political leaders and spokespersons from civil society feeding these deliberations have been depicted as renegades, imposters or rebels that pursued self-centered aspirations. As if deliberation, protest and contestation could not produce anything positive for a country. In *The Power of Identity*, Manuel Castells highlights the value of resistance identities when discussing women movements and liberal nationalist projects which have raised up to resist impulsive might used by dominant political forces.

In some countries, one could lament the days when political authority rested on the support of all constitutional partners. In situations where political authority rests on the support of all constitutional partners, legal authority will find it much easier to gather political support as well as adhesion to the country's overall objectives (Kelsen: 1945).

> In some democracies, deliberations have been discouraged when

> not denounced, and leaders feeding these deliberations have been depicted as renegades, imposters or rebels that pursued self-centered aspirations. As if deliberation, protest and contestation could not produce anything positive for a country

What we have seen in the case of Spain is that bonds of trust between historic nationalities and the state have become strained over the years. In good part, this is due to a political process that takes its distance from the tenets of a deliberative democracy and wants to subject minority nations to a culture in which *might makes right*. In such a context, coercion takes precedence over social harmony and legitimation and remove from the policy process exactly what Jürgen Habermas had called "the unforced force of the better argument (Habermas, 1998: 37)". In short, there is much more to democracy that the election of representatives to a parliament and the majoritarian principle.

Resistance and contestation are essential components of a healthy democracy. The work of Philip Pettit casts an important light of the nature of the liberal (republican) democratic process. Pettit insists on a series of self-reinforcing elements among which accountability, transparency, informed disagreement, fairness, impartiality and civic engagement (Pettit, 2012: 215-228) Pettit makes the additional point that a "resistive culture" is essential for the maintenance of a healthy (republican) democracy (Pettit, 2012: 219) that operates in accordance with the aforementioned elements.

Conclusions: What are we to make of these theoretical and normative considerations with respect to territorial conflicts of sovereignty?

Contemporary democracies are in need of new attributes that would contribute to give a voice to the relevant others rather than to seek to silence them. Monism needs to give way to pluralism. In my recent writing, I have formulated the hypothesis that sovereignty ought to be relational rather than monolithic (Simpson, 2014). This is a lesson that First people in Canada have taught us through their continued mobilisation in favour of a federal system that would be in tune with all communities occupying the vast span of land north of the 49th parallel.

It is essential to distinguish between the goals that are being pursued by political partners. In the context of divided societies, representatives of the majority nation have a tendency to impose and maintain its sovereignty over all other components. This leads at times to unfair treatments and use of coercive measures. Whereas minority nations aspire generally to acquire some control over sovereignty for the benefit of the cultural, economic, institutional and political emancipation of their respective political community.

A word now with respect to the right to decide that has acquired some prominence in both

Catalonia and the Basque country during the last decade. The right to decide comes with its attributes. For instance, it appears not challenge/undermine the territorial legitimacy of an existing state as long as the later is keeping constitutional channels opened, allows its constituent units to consult its population and does not bully its member states. As a by-product, the right to decide augments and strengthens relationships between the constituent *demoi* and the state itself (Lopez, 2014; Bengoetxea, 2020).

In sum, I am of the view that a code of good practices, such as the ones proposed by the joint effort of Eusko Ikaskuntza and the Institut d'Estudis Catalans, in the context of complex democratic political settings would insist on attaining the following six objectives:

- Encouraging bottom up rather than top-down policy initiatives;
- Seeking a balance between shared rule and self-rule;
- Promoting reciprocity rather than uniformity;
- Implementing national pluralism rather than state nationalism; and,
- Advocating relational sovereignty rather than a sacrosanct monist sovereignty.
- Ending constitutional fundamentalism in favour of deliberative constitutionalism.

To the extent that complex democratic political settings advance these six objectives in concert, one would assume that the democratic principle will be further entrenched and that states will gain both in political stability and legitimate authority.

BIBLIOGRAPHY

- Bengoetxea, Joxxerramon, "El *demos* como Grundnorm. Autodeterminación, derecho a decidir y constitución democrática," in *Eunomia. Revista en Cultura de la Legalidad*, no 19, October 2020 – March 2021, pp. 459-471.

- Bossacoma Busquets, Pau, *Morality and Legality of Secession. A Theory of National Self-Determination*, Cham (Switzerland), Palgrave Macmillan, 2020.

- Burgess, Michael and Alain-G. Gagnon, ed., *Federal Democracies*, London, Routledge, 2010.

- Constitutional Court Judgement 42/2014 (Spain).

- Castells, Manuel, The Power of Identity, 2nd edition, Chichester (UK), Wiley-Blackwell, 2010.

- Corry, James Alexander "The Political Uses of a Constitution" in *The Constitution and the Future of Canada*, Special Lectures of the Law Society of Upper Canada, Toronto, Richard de Boo, 1978, 1-15.

- Habermas, Jürgen, *The Inclusion of the Other: Studies in Political Theory* (Studies in Contemporary German Social Thought), Cambridge, Massachusetts Institute of Technology Press, 1998.

- Kelsen, Hans, *The General Theory of Law and State*, Cambridge, Harvard University Press, 1945.

- LaSelva, Samuel, V. (1996) *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*, Montreal and Kingston, McGill-Queen's University Press.

- LaSelva, Samuel, V. (2018) *Canada and the Ethics of Constitutionalism: Identity, Destiny, and Constitutional Faith*, Montreal and Kingston, McGill-Queen's University Press.

- Marti, José Luis (forthcoming) "The Right to Protest and Contestation in a Deliberative Democracy" in Martin Belov, ed. *Peace, Discontent and Constitutional Law: Challenges to Constitutional Order*, Routledge (under review).

- Simpson, Audra (2014) *Mohawk Interruptus: Political Life across the Borders of Settler States*, Durham, Duke University Press.

- Tierney, Stephen, "Courts in Federal Systems: Consolidating or Subverting the Federal

Idea", Conference presented at the International Workshop on *Defensive Federalism. How Self-government can be Protected from 'the Tyranny of the Majority?* Institut d'Estudis del Autogovern, Barcelona, 29 November 2019.

- Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995.



Alain-G. Gagnon

Alain-G. Gagnon és titular de la Càtedra d'Investigació del Canadà sobre Estudis quebequesos i Canadencs, director del Centre de Recerca Interdisciplinari sobre la Diversitat del Quebec i catedràtic del Departament de Ciència Política de la Universitat del Quebec, a Mont-real. També és membre i director fundador del Grup d'investigació sobre la Societats Plurinacionals i del Projecte Internacional canadenc sobre Etnicitat i Governança Democràtica. Ha impartit docència a les universitats de Queen's, Carleton i McGill, i ha sigut professor convidat a l'Institut d'Estudis Polítics de Bordeus, a la Universitat Autònoma de Barcelona i a la Universitat Pompeu Fabra. És autor de més de 60 obres, a més d'un centenar d'articles científics, i ha intervingut en més de 200 conferències arreu del món. Els seus treballs, centrats en els àmbits de recerca dels partits polítics, la identitat, la diversitat, el federalisme i les democràcies plurinacionals, han estat traduïts a una desena d'idiomes. L'any 2007 va ser guardonat amb el Premi Marcel-Vincent en Ciències Socials, atorgat per l'Associació francocanadenca per a l'avenç de les ciències (ACFAS).