PUERTO RICO'S LEGISLATIVE POWERS AS AN UNINCORPORATED TERRITORY OF THE UNITED STATES

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Introduction

This paper aims to identify several key aspects of Puerto Rico's relationship with the United States (US) in the context of its exercise of legislative power over local matters. This will require an analysis of the island's history and its current situation regarding autonomy and self-rule, and then comparing its constitutional status with that of the several states that make up the US. Taking into account the different elements identified in the "Initiative for Negotiating an Autonomy Statute for the Sahara Region", this paper will focus on several relevant aspects of the Puerto Rican experience and situation: (1) the constitutional structure of the United States, including its federal system, the role of the States, and the position occupied by the Territories; (2) Puerto Rico's historical and legal relationship with the United States; (3) Puerto Rico's historical and current experiences regarding the exercise of legislative power over local matters; and (4) lessons to be extracted from these experiences.

I. General background

1) Legislative Power in the United States

We start with an obvious fact: the United States is a federal republic. Sovereignty resides with the "People of the United States" acting as a single political unit, although they mostly channel that sovereignty through (subnational) state structures and institutions. For example, the President of the United States is selected through an Electoral College that distributes votes among the states, depending on their populations.[32] As a matter of domestic US constitutional law, the ultimate choice of Electors formally resides with the **State Legislatures**.[33] As a historical matter, these local legislative bodies have delegated that prerogative to their citizenry through free elections to choose Presidential Electors. But the election of the federal Presidency is still made indirectly through the mechanisms established by the individual State Legislatures.

Something similar happens with the United States Senate, which constitutes the upper chamber of the federal Congress. Originally, the Senate was composed of two senators per state, regardless of population, selected, again, by the State Legislatures themselves. After the democratization of that process during the 19th century, which included the adoption of state laws that transferred that power from the legislatures to the peoples of each state, in 1913 the 17th Amendment to the US Constitution was adopted, which required the direct election of federal

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[32] Sec. 1, Art. II, U.S. Const.
[33] *Id*.

Senators by the electorate of each state. The US House of Representatives is selected directly by the People in single-member districts apportioned to each state depending on their population.[34]

As such, governmental power in the United States, particularly of the **legislative** kind, is divided into two separate spheres: (1) the federal Congress, and (2) the State Legislatures. It should be stressed that this vertical division of power **does not mean that there are two absolutely separate spheres, each to the exclusion of the other**. It does not mean absolute coexistence between the two either. The actual situation is one of **substantial overlap** between federal and state legislative power.

Most of the legislative power in the United States **is exercised by State Legislatures**, not by the federal Congress. This is a direct result of the federal government's nature as one of "delegated powers."[35] In other words, the US Congress does **not** exercise all of the available legislative power in that country. Instead, Article I of the US Constitution clearly states that Congress only possesses "[a]ll legislative Powers **herein granted**."[36] This means that, unless a particular legislative power has been given to the federal Congress, all powers not granted or delegated are preserved by the State Legislatures.

It is settled US law that Congress does not possess the so-called **police power**,[37] which refers to the general legislative power normally exercised by national legislatures in unitary states that allows them to adopt laws that address the needs of society, particularly those related to health, safety, morals, and general welfare. This is why, for example, the US Congress is unable to adopt a national law regarding family relations, since that would be a classic instance of an area that can be only regulated through the police power, which belongs solely to the States.

Congress does have substantial legislative power with regard to other important matters. For example, it has sole authority regarding currency, international relations, declaration of war, among others. It also possesses inherent powers related to national sovereignty. The main sources of congressional legislation are the Commerce Clause and the Necessary and Proper Clause. The former is substantive, while the latter is mostly auxiliary and aids in the enforcement of the other granted powers. Under the Commerce Clause, Congress is able to adopt laws over areas and issues that significantly impact the national economy of the United States. This accounts for vast areas of current federal law, including environmental and labour regulations.

Although the US Congress has limited powers, it is **supreme** with regard to the powers it does possess. This is the direct result of the Supremacy Clause of the US Constitution.[38] And while individual States retain the bulk of the legislative power by way of their police powers, it should be noted that States are somewhat limited with regard to the regulations and laws they can pass **that impact the national economy**. In the language of domestic US constitutional law, State Legislatures may not enact local laws, under the guise of their police powers, when such laws have a significant impact over interstate commerce, i.e., the national economy, **and** they are either

[34] Sec. 2, Art. I, U.S. Const.
[35] Screws v. United States, 325 U.S. 91, 109 (1945) (plurality opinion).
[36] Sec. 1, Art. I, U.S. Const.
[37] National Federation of Independent Business v. Sebelius, 567 U.S. 519, 536 (2012).
[38] Art. VI, U.S. Const.

discriminatory against economic actors from their sister states,[39] **or** impose a considerable burden over the national economy that outweighs their local benefits.[40]

This creates an interesting overlap: there are areas Congress cannot reach because it lacks police power, yet it is supreme over matters regarding the national economy, which are broadly defined. On the other hand, States possess very broad police power over local matters, which may incidentally impact the national economy within constitutional bounds.

As a result, **there is considerable overlap between federal and state legislation over several matters, issues, or areas**. The general rule in these circumstances is harmony and co-existence between both. In other words, citizens, businesses, and other entities must comply with **both** federal and state laws simultaneously. Under domestic US constitutional law, there are three instances in which state law gives way to federal law: (1) when the US Congress, acting under the guise of one of its delegated powers, explicitly forbids state regulation in a particular area; (2) when the US Congress, again acting under one of its delegated powers, regulates an area of significant federal interest with such comprehensiveness and detail, that the only reasonable conclusion is that it left no room for state regulation; and (3) instances of physical impossibility, when a person or entity cannot comply simultaneously with both laws without violating one of them.[41]

2) ***States and Territories***

As a matter of domestic US constitutional law, the United States is made up of States, Territories, and federal enclaves. Places like the District of Columbia, where the federal government has its seat, have special constitutional status[42]. Most people in the United States live in either a federated State or a Territory.

Section 3, Article IV of the US Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This refers to populated spaces that fall outside State boundaries (territory), or unpopulated spaces that directly belongs to the federal government (property). It should be noted that, while the federal Congress is limited by Article I of the US Constitution with regard to its legislative powers and its application to the people who reside in the States, **with regard to the Territories, this Clause grants Congress full legislative powers**. In other words, **as it pertains to the Territories**, Congress **is** the general Legislature, and thus can access the full potential of the police power that states possess within their respective jurisdictions. That means, under the Territorial Clause, Congress can directly govern a Territory by itself.

This is in sharp contrast with the relationship between the federal government and the States discussed previously. In that circumstance, legislative power is inherently separate: State Legislatures possess the police power, while the federal Congress can only exercise its granted powers. When it comes to Territories, Congress is the **sole** source of legislative power. This means that (1) Congress possesses the full scope of the legislative power, including the aforementioned-

[39] C&A Carbone, Inc. v. Town of Clarkston, 511 U.S. 363 (1994).
[40] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
[41] *See* Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992).
[42] *See* Sec. 8, Art. I U.S. Const. and U.S. Const., Amend. 23.

police power, (2) Territories do not possess inherent legislative or police power, and (3) that any exercise by Territories of these powers must be the result of congressional delegation.

Historically, once Territories of the United States became sufficiently populated, politically organized, and economically viable, **they became federated States of the Union**.[43] This explains how the US grew from 13 original states to its current makeup of 50. When the transition is complete, Congress loses its general legislative powers under the Territorial Clause, and the federal-state relationship that we explained earlier takes over.

This physical and political expansion was made through different mechanisms and historical events, from purchases (Louisiana from France, Florida from Spain, Alaska from Russia) to treaties after military conflicts (California and other states after the war with Mexico). But the overseas expansion of the United States during the end of the 19th century, particularly when it acquired several populated islands after the Spanish-American War in 1898, generated a crisis for US constitutional law.

The results were the so-called *Insular Cases*, which are a series of judicial opinions issued by the US Supreme Court that distinguished between two types of Territories possessed by the United States.[44] The first were the **incorporated Territories**. These refer to the historical experience of the United States: substantially populated and politically organized territories that had initiated their journey to become a full member of the Union as a federated State. During this transition, the US Constitution would apply full force. The second were the **unincorporated Territories**. These refer to newly acquired territorial possessions that had not, and need never begin, their march towards annexation as federated States. These territories **belong to, but are not a part of, the United Sates.**[45] As a result, only particular provisions of the US Constitution apply, particularly those that referred to fundamental individual rights.

With one very minuscule exception, **all current Territories of the United States are unincorporated**.[46] This includes places such as the US Virgin Islands, Guam, the Northern Mariana Islands, among others. This means that they are subject to the full legislative powers of the US Congress and can be governed directly by it under the federal Territorial Clause. Unlike the States, they do not enjoy inherent legislative power, even over local matters. And while many of the inhabitants of these Territories are US citizens, they also lack political representation in the federal Congress. This is so, because, as we saw, the voting members of the federal Congress are derived exclusively **from the States**. Territories are explicitly excluded from these federal structures.

It should be noted that recent US Supreme Court decisions have somewhat blurred the line between both types of Territories.[47] In the end, the unincorporated version has triumphed:

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[43] Raúl Serrano Geyls, 'The Territorial Status of Puerto Rico and its Effects on the Political Future of the Island' (2005) 39 *Revista Jurídica Universidad Interamericana de Puerto Rico* 13.

[44] *See*, *e.g.*, Downes v Bidwell, 182 U.S. 244 (1901). *See also*, Efrén Rivera-Ramos, *The Legal Construction of Identity: The Judicial and Social Legacy of American Colonialism in Puerto Rico* (Washington D.C., American Psychological Association, 2001).

[45] *See* Downes, *supra*, at 347.

[46] *See* U.S. v. Vaello Madero, No. 20-303 (slip opinion) (Gorsuch, concurring).

[47] *See, e.g.,* Puerto Rico v. Sanchez Valle, 136 S.Ct. 1863 (2016).

Territories of the United States are subject to Congress' full legislative power, limited only to the fundamental provisions of the federal Constitution. This status can be permanent and indefinite.

But, depending on the particular historical moment and Territory, Congress has sometimes **delegated** some of its legislative powers to local legislative bodies for the exercise of home-rule. Puerto Rico is one of those instances.

II. Puerto Rico's status

Under domestic US constitutional law, Puerto Rico is currently, and has been since 1898, an **unincorporated Territory of the United States**.[48] This means that, unlike the federated States, Puerto Rico does not possess an independent source of legislative power. All its current legislative powers are the result of a delegation of such power by the federal Congress.[49] They do not spring from the Constitution or any other separate source.

What is currently known as Puerto Rico is the result of a long historical process that includes the settlement by the Spanish at the dawn of the 16th century. Puerto Rican nationhood continued its evolution from then on, incorporating important cultures and peoples, including native *taínos*, imported African slaves, and transplanted Spanish settlers, among others. For centuries, Puerto Rico was governed by the Spanish under the structures of *Indies Law*. Puerto Rico was never incorporated into the Spanish nation, remaining as an overseas territory during the 19th century. During this time, Puerto Rico did not enjoy considerable autonomy, and whatever it had was in the hands of royal governors appointed by the Spanish Crown.

By the end of the 19th century, Spain had lost most of its American possessions, with the exceptions of Cuba and Puerto Rico. Because the former was in the midst of a rebellion, Spain granted Puerto Rico a so-called Autonomy Charter, which gave significant powers to a locally elected government for the island. These reforms – and their potential – were short lived after the US took military possession of the island in July 1898 as part of the Spanish-American War. That conflict ended with the signing of the Treaty of Paris in September of that year. Under the Treaty, Spain ceded sovereignty over the island to the United States. The Treaty specified that the political and legal status of the island's residents would be determined by the federal Congress.

After two years of direct military occupation and government, in 1900 Congress passed a statute titled "An Act temporarily to provide revenues and a civil government for Porto Rico", also known as the Foraker Act, which created Puerto Rico's civilian government.[50] The government created by federal statute in 1900 is the direct predecessor of the current Commonwealth government. The Foraker Act was approved pursuant to the federal Congress' vast powers under the Territorial Clause to, as we saw, "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." In other words, unlike the States, the government of Puerto Rico **is a creation of the federal Government**.

Per congressional design, from 1900 until 1917, the Puerto Rican People were only able to elect the lower house of the insular Legislature. All other mayor officials – distributed among three

[48] *Id*.
[49] *Id.*
[50] Public Law No. 56-191 (1900).

equal branches – were designated by the President of the United States, subject to federal senatorial confirmation. In 1917, Congress adopted a second organic statute – known as the Jones Act –,[51] which included three important differences from its previous counterpart: (1) it incorporated a Bill of Rights that protected citizens from the actions of the insular government, (2) granted US citizenship to the inhabitants of the islands and all those born there, and (3) allowed the Puerto Rican People to elect both houses of the territorial Legislature. In 1947, Congress amended the statute to allow Puerto Ricans to elect the Governor, who acted as head of the local Executive Branch.

In light of international events after the conclusion of the Second World War and in the face of considerable dissatisfaction within the island with the system in place at the time, in 1950 the federal Congress adopted Public Act 600, which authorized Puerto Ricans to write a constitution for its territorial government, to be adopted "in the nature of a compact."[52] Via a referendum, the Puerto Rican People accepted Congress' offer and, from 1951 until 1952, an elected constitutional assembly drafted a territorial constitution. After it was approved by the assembly and ratified by voters in a referendum, the US Congress imposed several changes to the text and conditioned the adoption of the constitution on their acceptance by the Puerto Rican people. A second referendum ratified the changes imposed by Congress and the Constitution went into effect. That is the Constitution that is still in use today.

Although adopted "in the nature of a compact," neither Public Act 600 nor the territorial Constitution that resulted from it are considered treaties, amendments to the US Constitution, or irrevocable accords. Because Puerto Rico **remained** an unincorporated Territory of the United States, the federal Congress reserved the ability to unilaterally alter the terms of the US-Puerto Rico relationship. More importantly, it maintained full access to the general legislative powers given by the Territorial Clause. The "in the nature of a compact" language merely refers to the voluntary nature of the offer made in Public Act 600 that would allow the Puerto Rican People, if it so chose, to draft a local Constitution.

The nature and characterization of this process are highly disputed. Recent US Supreme Court decisions have stressed that the 1952 process merely constituted a **revocable delegation of power** from Congress to the Puerto Rican People to (1) write a charter for the local government, and (2) – as a result of that charter – elect the officials that would run such government.[53] In other words, the 1952 Charter –officially known as the Constitution of the Commonwealth (*Estado Libre Asociado*) of Puerto Rico- is a **territorial constitution adopted under congressional authorization meant to institutionalize democratic self-rule within the autonomy granted by Congress**. This autonomy was, and still is, subject to congressional revocation or modification.[54] Puerto Rico is still subject to the Territorial Clause and Congress retains the power to disregard the local Constitution and directly exercise the legislative power over Puerto Rico. Such scenario is impossible with regard to the federated States.

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[51] Public Law No. 64-368 (1917).
[52] Puerto Rico Federal Relations Act of 1950, Public Law No. 81-600, § 1 (1950).
[53] F.O.M.B. v. Aurelius Investments LLC, 140 S.Ct. 1649 (2020).
[54] For example, after it was approved by the Puerto Rican People in a referendum, the federal Congress required several modifications to the text, including the removal of an entire section of the Bill of Rights that recognized important socioeconomic rights.

Article VII of Puerto Rico's 1952 Constitution regulates the mechanisms by which it can be amended. **At the behest of Congress**, Article VII includes significant substantive limitations on the amendment power. Originally, it only required that there were a republican form of government and the the Bill of Rights never be abolished. But Congress required additional language: no amendment may be contrary to (1) the US Constitution, (2) Public Act 600, (3) The Puerto Rico Federal Relations Act (the remnants of the Jones Act), and (4) the Resolution by which Congress approved the Puerto Rico Constitution in 1952.

As previewed**, federated States of the Union are not subject to direct congressional control**. When it comes to the States, Congress may only legislate directly for the general population through one of its **delegated** powers. It cannot directly intervene with a state government, take over its legislative procedures, or take away its general powers.[55] Congress can do that with a Territory like Puerto Rico.[56]

Before turning our attention to more recent developments – particularly the PROMESA statute that constituted a direct use of Congress' power to govern the territories and which **unilaterally altered the island's 1952 Constitution and its governmental structure** –, a general overview of the island's legislative power over local matters before those events is warranted.

The exercise of legislative power by Puerto Rico's territorial Legislative Assembly

In 1952, **Congress delegated considerable legislative power to Puerto Rico**, both with regard to the **design** of its local constitutional structure (branches of government, individual rights) and as to the actual **exercise** of legislative power itself for local matters. The 1952 Constitution creates a tripartite governmental structure with an elected, bicameral Legislative Assembly at its centre. The Executive and Judicial Branches are co-equal within a system of checks and balances, but legislative power is only granted to the Assembly.

Similar to the other federated States – but, unlike the States, as a result of congressional delegation –[57] Puerto Rico's Legislature **possess general police powers**. This means that the Puerto Rican Legislature can pass laws over, almost, the same sort of subjects that State Legislatures can.[58] This includes local laws regarding health, safety, economic, environmental, labour, cultural, and social issues that impact the general welfare of Puerto Ricans. This accounts for a vast quantity of local laws ranging from marriage and divorce to traffic regulations and discrimination in the workplace. It was a broad delegation of powers similar to the States. The main difference between these powers was its **origin**: the federated States possess **inherent** legislative powers as members of the Union; Territories only possess **delegated** legislative powers.[59] Congress cannot diminish the former, but it can unilaterally alter the latter.

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[55] New York v. United States, 505 U.S. 144 (1992).

[56] Congress may have some power under the Republican Guarantee clause of the US Constitution that would allow Congress to intervene, for example, if a state were to adopt a military government.

[57] The State's police powers are **not** a grant of Congress, since (1) Congress does not possess such powers outside the territorial context, and (2) the source of the States' power is independent from the federal government. A Territory's police power **does** derive from Congress, which has such power under the Territorial Clause.

[58] State Legislature do have additional prerogatives that its Puerto Rican counterpart lacks, but those are mostly related to the federal structure (i.e., the power to consent to amendments to the U.S Constitution), and do not implicate the police power as ordinarily understood.

[59] *See* Sanchez Valle, *supra*.

The 1952 Constitution placed the Legislative Assembly at the centre of the exercise of a broadly defined police power.[60] This was the result of the constitutional drafters' conviction that a strong legislative power was needed to address many of Puerto Rico's social and economic ills.

In that sense, Puerto Rico's Legislature possesses – at least until 2016 –, roughly the same amount of police powers as the State Legislature. As we saw, the main difference between them pertain to the **source** of that power: States possesses inherently as constituent parts of a federal republic, while Puerto Rico enjoys it as a result of a broad congressional delegation of its powers under the Territorial Clause that occurred in 1952. From 1952 until 2016, Puerto Rico's Legislative Assembly was able to enact numerous laws related to ordinary social situations. These laws, like the laws of the States, co-exist rather harmoniously with federal statutes subject to, as we saw earlier, instances of pre-emption or displacement. It should also be noted that most federal laws apply to Puerto Rico unless Congress decides to exclude Puerto Rico.[61]

With regard to the exercise of local legislative power, it seemed, at least until 2016, that there was no real difference between States and Territories. Evidently, if Puerto Rico were an independent nation, it would exercise all legislative powers available to sovereign countries. The main differences between the legislative power exercised by Puerto Rico and the States pertained to (1) participation with regard to the election of **federal** officials and consideration of federal constitutional amendments – which are most rare –,[62] and (2) the ability of Congress to **exclude** the Territories, including Puerto Rico, from certain federal legislation or federal benefit programmes.[63]

Exclusively from the point of view of the actual exercise of the local legislative power, the distinction between Puerto Rico and a State was mostly negligible. For all practical purposes in terms of the exercise of ordinary legislative power over local matters, it seemed as if Puerto Rico operated as if it were a State.

There seems to be general agreement that, until and unless Puerto Rico becomes a formal federated State, it remains a distinct political unit and community with a separate and shared national identity. It should be stressed that Puerto Ricans are mostly Spanish speakers, with customs and traditions that are wholly separate from the United States. As an example, Puerto Rico currently sends a separate delegation to the Olympic Games, and actually competes against the United States. Federated States are unable to do so. Puerto Rican society is considerably divided over what should be the future of the US –Puerto Rico relationship. It is split between those who favour (1) becoming a federated States – this fully integrating into the Union –, (2) remaining as it is, (3) becoming an independent republic, or (4) become a sovereign entity closely associated with the United States.

Prior to 2016, the issue of Puerto Rico's exercise of local legislative power was addressed through mostly traditional mechanisms of federalism known to countries outside the US. The

[60] *See* Sec. 19, Art. II, PR Const.
[61] *See* Puerto Rico v. Franklin California Tax-Free Fund, 136 S.C.t 1938 (2016).
[62] Puerto Rico, like the US Virgin Islands and Guam, elects a single, non-voting member of the US House of Representatives. Puerto Rico's delegate is officially known as "Resident Commissioner".
[63] The US Supreme Court has ruled that, because Puerto Rico is not a State, Congress may exclude residents of Puerto Rico from federal benefit programs, as long as it has a rational basis for doing so. *See* Califano.

territorial condition meant that, on the one hand, Puerto Rico was not made a full member of the federation, but, on the other hand, it was able to retain important aspects of nationhood.

As previewed, the language in Public Act 600, stating that the constitution that was drafted in 1952 was "in the nature of a compact," created much debate and confusion. For some, this meant that Puerto Rico had ceased to be an ordinary unincorporated Territory of the United States and had become a separate political entity that was closely associated with the United States in equal terms. Under this arrangement, Congress had relinquished its powers over Puerto Rico, except with regard to defence, currency, international affairs, and trade.

This explains why the Puerto Rican case could have been a source of interest for the settlement of similar situations around the world, like the Sahara Region. Of course, since 1952 many on the island were convinced that no such relinquishing had occurred, and that Puerto Rico had not ceased being an unincorporated Territory of the United States subject to the plenary powers of Congress. While it was true that Congress did delegate a broad swath of its legislative power to elected local institutions, such as the Legislative Assembly, that delegation was subject to unilateral withdrawal, which meant that Puerto Rico's legislative power was inherently contingent on the will of Congress. Then came 2016.

III. The arrival of PROMESA and the erosion of Puerto Rico's legislative autonomy

From the previous discussion we can conclude the following:

- Legislative power in the United States is shared between the federal Congress (Article I) and individual State Legislatures;
- State Legislatures possess the general (legislative) police power, while the federal Congress can only exercise certain delegated powers, although these are broadly construed and are supreme if they come into conflict with state laws;
- The U.S. Constitution permits the federal Government from acquiring Territories, whether through purchase or treaty;
- Territories do not possess inherent legislative powers, and are subject to the plenary powers of the federal Congress;
- With regard to the Territories, Congress possesses full legislative powers and is unconstrained by the limitations of Article I, unlike when it acts as the federal Legislature as to the States;
- Historically, Congress has voluntarily delegated some of its legislative powers to territorial institutions, so that these may legislate with regard to local matters;
- In many respects, the amount and kind of power that the federal Congress has delegated to Territories such as Puerto Rico is similar to those enjoyed by the federated States;
- Unlike the States, the source of Puerto Rico's legislative power over local matters derives from a grant from the federal Congress;

– As such, and again unlike the States, Congress can unilaterally revoke such delegation and exercise full legislative power over Puerto Rico if it ever choses to do so.

For decades, Puerto Rican public entities, including the Commonwealth government itself, amassed considerable amounts of debt. Eventually, the service to the debt became untenable. The problem was that, during the 1980's, the federal Congress excluded Puerto Rico (not its residents) from the protections of the federal Bankruptcy Code. Yet, in included Puerto Rico in the prohibition – which also applies to the States – from adopting a local statute on the matter.[64] There is significant doubt whether Congress could do the same thing to a federated State.

When, eventually, Puerto Rico was unable to service its debt obligations, Congress had to step in and adopt a federal statute that would allow governmental entities to file bankruptcy. The result was the approval of the PROMESA statute ("Puerto Rico Oversight, Management, and Economic Stability Act").[65] Just from the very title of the Act we can appreciate the power of Congress over Puerto Rico. Unlike what can be done to a federated State, Congress passed a federal statute that allowed it to directly legislate regarding Puerto Rico's finances, whether through "oversight" or actual "management". Again, it would not be possible for Congress to adopt such a statute with regard to the States.

The PROMESA statute was explicitly adopted under Congress' authority under the Territorial Clause.[66] Because in 1952 Congress had merely delegated some of its legislative authority, it still possessed the power to take it back and exercise it directly. As the statute expresses quite explicitly: "Nothing in this Act is intended, or may be construed… to limit the authority of Congress **to exercise legislative authority over the territories pursuant to Article IV, section 3 of the Constitution of the United States**."[67]

PROMESA included several important elements that are relevant to the topic currently under discussion.

The Act created a Fiscal Oversight Board that would have considerable power to direct Puerto Rico's public finances, **including the authority to overrule the judgments and decisions of Puerto Rican elected officials**, **even those of the Legislative Assembly**.[68] It should be noted that none of the Board's members are elected by the Puerto Rican People.[69] It is an externally imposed entity selected solely by federal officials. This is contrary to the political culture established in 1952, when **all** territorial officers and bodies were selected, whether directly or indirectly, by the Puerto Rican People.

The power to expressly overrule the decisions of the Legislative Assembly over matters the Board concludes are within its jurisdiction is a direct erosion of the legislative power delegated by Congress in 1952. And by giving that power to an unelected entity, it further eroded democratic self-government and autonomy. The result has been a very aggressive policy of austerity that has

[64] Franklin California Tax-Free Fund, *supra*.
[65] The PROMESA acronym means "promise" in Spanish.
[66] Sec. 101(b)(2).
[67] (Emphasis added) Sec. 401(1).
[68] *See* Sec. 204(a).
[69] Sec. 101(e).

caused much social harm and political backlash.[70] Only a minority of the population supports this current arrangement with the Board.

While both the PROMESA statute and the US Supreme Court's ruling in the Aurelius case state that the Board is "an entity within the territorial government,"[71] it is unclear where on Puerto Rico's governmental structure the Board is located. For example, the Act establishes its own supremacy over locally enacted law ("The provisions of this Act shall prevail over any general or specific provisions of territory law, State law, or regulation that is inconsistent with this Act"),[72] and prohibits elected territorial entities from supervising or even holding to account the Board.[73] This is evidence of the broad power that Congress has under the Territorial Clause: it can act with full structural creativity and need not even specify how its modifications correlate to the rest of the territorial government.

These facts reveal a broader reality: through the PROMESA statute, **Congress, in fact, unilaterally and informally amended the 1952 Constitution to create an entity not established in that document or through the enactments of the institutions it created**. Maybe more accurately, we can conclude that the 1952 Constitution does not contain the totality of the norms regarding the makeup of Puerto Rico's governmental structure, and that PROMESA works parallel to Public Act 600, which authorized the drafting of Puerto Rico's local charter. In other words, both statutes simply operate simultaneously, and the result is the current organization of the Puerto Rican government.

With regard to the legislative power proper, PROMESA did not entirely strip the territorial Legislature of this power. The Oversight Board is mainly charged with fiscal and public finance-related matters. Also, excluding the broad policy power it has with regard to public resources allocation, the Board does not have legal authority to directly enact legislation.

In that sense, the Board's legislative powers (1) are limited to fiscal matters, and (2) are more negative than positive (the fiscal plan being the main positive vehicle for legislative exercise). For example, the Board may not enact – and should not be able to block – a bill regulating family relations or transit violations. The other main responsibility of the Board is to lead the Puerto Rico government's bankruptcy proceedings under PROMESA. The Puerto Rican Legislative Assembly still possesses all other legislative powers originally delegated in 1952 and not transferred to the Board through the PROMESA statute.

Finally, the PROMESA Act establishes how the Board will terminate its functions, since it is not meant to be a permanent feature of Puerto Rico's government.[74] It should be noted that PROMESA was adopted in 2016 and there is still no indication that the Board will cease operations any time soon. This has contributed to a further erosion of autonomous institutions, particularly

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[70] The Board's main powers pertain to the adoption of a fiscal plan and the approval of Puerto Rico's governmental budgets. *See* Secs. 201 & 202. The Board is not supposed to exercise general legislative power over non-fiscal matters.
[71] Aurelius, at 1661, c.f. Sec. 101(c)(1) ("shall be created as an entity within the territorial government for which it is established"). *See also*, Sec. 101(c)(2) ("shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government").
[72] Sec. 4.
[73] Sec. 108 ("Neither the Governor nor the Legislature may (1) exercise control, supervision, oversight, or review over the Oversight Board or its activities, or (2) enact, implement, or enforce ant statute, resolution, policy, or rule that would impair or defeat the purposes of this Act, **as determined by the Oversight Board**") (Emphasis added).
[74] *See* Sec. 209.

the Legislative Assembly and the 1952 Constitution in general. This situation has made the Puerto Rican political crisis arguably worse.

IV. The lessons from PROMESA regarding Puerto Rico's autonomy and the exercise of local legislative power

PROMESA has dealt a blow to decade-long views regarding Puerto Rico's autonomy and its ability to exercise legislative power over local matters. Since 1952, most – if not all – local legislation has been the exclusive product of Puerto Rican institutions. The application of federal law to the island mostly tracked the practice with regard to federated States. And while Congress had the power to enact legislation that could treat residents in Puerto Rico differently from those in the federated States – as long as the disparate treatment had a rational basis –, local law was left to local institutions.

This meant that, for nearly seven decades, the territorial Legislative Assembly exercised a considerable amount of legislative power over local matters, subject only to the supremacy of federal law, as also occurs with State Legislatures. But the possibility of direct congressional intervention – whether as to a particular legislative enactment or to more generalized structural matters – has always loomed over Puerto Rico. By itself, that possibility marred the reality of Puerto Rico's supposed legislative autonomy. PROMESA demonstrated that this possibility was not just theoretical. This creates two related difficulties.

First, that Puerto Rico's arrangement with the United States is based on inherently problematic grounds. As we have mentioned repeatedly, Congress cannot intervene as easily with the federated States, since the US federal structure prevents it. No such limitation exists with regard to the Territories. This, as a conceptual matter, makes Puerto Rico's autonomy immediately and permanently suspect. It is a borrowed autonomy that is subject to unilateral revocation by the federal Congress.

Second, that Puerto Rico's current ability to exercise real legislative power over local matters has been considerably compromised by PROMESA. The Fiscal Board's ability to (1) strike down legislation adopted by the territorial Legislature because, in its judgment, it is contrary to the purposes and goals of PROMESA, and (2) develop public policy through its vast powers over fiscal and budgetary matters can only be seen as a significant reduction in the Puerto Rico's Legislative Assembly's ability to fully exercise legislative power. While this is a substantial deviation from historical practice since 1952, it is an inherent component of Puerto Rico's relationship with the United States and its legislative autonomy.

In all fairness, PROMESA has not eviscerated Puerto Rico's legislative autonomy completely. First, the Board cannot formally enact local legislation. That initiative power still resides exclusively with the Legislative Assembly. Second, the Board's jurisdiction, though broad, is still technically limited to fiscal and budgetary matters. This means that the bulk of legislative matters, such as family relations, labour conditions in the private sector, environmental regulation, and other ordinary social and economic issues continue being within the domain of the Puerto Rico Legislature. Third, the Legislative Assembly has continued operating as usual, adopting a considerable number of local statutes, comparable to previous experiences since 1952.

But the damage has been done.

First, to the credibility of Puerto Rican institutions and Puerto Rican democracy in general. That elected entities have suddenly become beholden to unelected institutions that can disregard local legislation is irremediably contrary to the message of self-rule and democratic governance that was promised in 1952.

Second, to the notion that the 1952 arrangement could not be unilaterally altered by either of the parties, and that only bilateral agreement could modify it.

Third, to the ability of the territorial Legislative Assembly to properly legislate over local matters that now acts within the permanent shadow of the Board and its veto power.

Fourth, to the idea that in 1952 Puerto Rico exercised self-determination and had ceased to be a possession of the United States subject to its direct rule.

From the previous discussion we should conclude that the Puerto Rican model is ill-fitted for replication and imitation elsewhere. It has not settled the Puerto Rican question to general satisfaction, either within Puerto Rico or in the United States. The constitutional status of Puerto Rico as an unincorporated Territory of the United States that (1) has no real participation in the selection of federal officials, (2) possesses no inherent or constitutionally recognized source of legislative power or autonomy, (3) is permanently subject to the plenary power of Congress under the Territorial Clause, and (4) has been recently and unilaterally stripped of a great portion of its legislative power over local matters is not a model to be followed.

Were Puerto Rico to become a federated State of the Union – something that, under US domestic law would require congressional approval –, then it would obtain the same legal and political status as current States such as California and New York. Were it to become an independent nation, it would achieve all the powers generally associated with sovereignty under the current international legal order. A third possibility that has been discussed, but has not been adequately structured or developed, is that Puerto Rico could become a sovereign nation that enters into a voluntary association with the United States on an equal basis under some sort of bilateral accord that would potentially address matters such as currency, defence and citizenship. But that possibility is still in its early stages and there has been very little analysis of its viability under US constitutional law.

Ideally, any of these possibilities would settle the nature, scope, and extent of the legislative powers that Puerto Rico would be able to exercise. The current arrangement has fallen flat. Puerto Rico's autonomy and legislative authority has been seriously eroded by the unilateral actions of the federal Congress. That Congress possesses that power, and that it exercised it so freely, serves as an unsurmountable indictment to the "Puerto Rican model." It should be discarded as an option for dealing with similar circumstances.

V. The Puerto Rican model and the "Moroccan initiative for negotiating an autonomy statute for the Sahara region"

I now turn to offer a contrast between the Puerto Rican model discussed above with the relevant components of the "Moroccan initiative for negotiating an autonomy statute for the Sahara region" ("Initiative"). In particular, I mostly focus on the **substantive exercise of legislative power over local matters in an autonomous setting**.[75] At the end, I will offer some comments

[75] In that sense, I will not focus on the structural elements of the legislative bodies mentioned in the "Initiative".

regarding the approval process. With regard to the exercise of legislative power, the most relevant parts of the "Initiative" are sections 5, 6, 12, 14, 15, 16, 17, 19, 20 and 24.

1) A brief description of the "Initiative's" approach to legislative power in the Sahara region

Section 19 of the "Initiative" would create a "Parliament of the Sahara autonomous Region". This seems to be a direct result of Section 5's declaration that "the Sahara populations will themselves run their affairs democratically through legislative, executive and judicial bodies enjoying exclusive powers." This latter statement deservers further analysis.

First, we note the incorporation of **self-rule** as part of the "Initiative's" approach to autonomy ("will themselves run their affairs"). Second, that such exercise of autonomous self-governance will be of a democratic character ("democratically"). And third, that the autonomous bodies mentioned in Section 5, of which the Parliament is a key component, will exercise their bodies "enjoying exclusive powers." This seems to signal a **division of legislative areas** between national and autonomous bodies that creates separate and somewhat exclusive domains. This might be perceived as different to the US-Puerto Rico model where, as we saw, there is considerable overlap and legislative coexistence between the norms adopted by the federal Congress for the entire United States and those approved by the territorial Legislative Assembly under its delegated police powers.

The areas over which legislative power may be exercised by the "Parliament of the Sahara autonomous Region" are substantial, as outlined in Section 12. The list of matters mentioned in that provision does not seem to be closed ("mainly over the following"). The use of the word "mainly" suggests both that the list is not exclusive, but that the main bulk of powers is articulated there.

The sort of powers mentioned in Section 12 seem to be consistent with autonomous self-rule ("economic development", "trade", "agriculture", "public works", "transportation", "housing", "education", "employment", and the "environment"). This is very similar to the sort of **police powers** enjoyed inherently by federated States in the US and through delegation by Territories such as Puerto Rico.

At the same time, "the State will keep its powers in the royal domains…" (Section 6) and "shall keep exclusive jurisdiction over the following in particular" (Section 14). This language is consistent with the supremacy doctrine in the United States where national law, as adopted by the US Congress, is supreme over the States and Territories. The use of the language "over the following in particular" seems suggestive of a closed list of matters. Something similar can be said about Section 24, which states that "[l]aws, regulations and court rulings issued by the bodies of the Sahara autonomous Region shall be **consistent** with the Region's autonomy Statute and the Kingdom's Constitution."[76]

As to the substantive areas that are the exclusive preview of the State, the references to "[n]ational security, external defence and defence of territorial integrity" as well as "[e]xternal relations" and the "Kingdom's juridical order" are reminiscent of the main subject matters that the US Congress expressly referenced with regard to its relationship with Puerto Rico (defence, foreign affairs, currency, citizenship). It should be noted that the same thing occurs with federated States: these may not coin their own currency, print their own passports, conduct their own foreign

[76] (Emphasis added).

policy, or regulate national citizenship. In other words, the federal government of the United States has exclusive dominion over "[t]he attributes of sovereignty" (Section 14).[77] And even with regard to certain "external relations" on "matters which have a direct bearing on the prerogatives of the Region", the State's responsibilities with respect to these "shall be exercised in consultation with the Sahara autonomous Region" (Section 15). This includes the prospect of the Sahara autonomous Regions establishing cooperative relations with "foreign Regions", as long as they are done "in consultation with the Government" (Id). This is reminiscent of the US Constitution's Section 10, Article II, which allows the federated States to "enter into any Agreement or Compact with another State, or with a foreign Power," as long as it is done with the consent of the federal Congress.

Section 17 mentions that "powers which are not specifically entrusted to a given party shall be exercised by common agreement, on the basis of subsidiarity" (Section 17). This is somewhat vague, given that (1) subsidiarity is not expressly defined elsewhere in the document, and (2) that there could be difficulty in harmonizing this language with Sections 12 and 14. Section 17 aside, it would seem that Sections 12 and 14 create separate spheres of legislative action, which would reinforce Section 5's reference to "exclusive powers" for the Region's legislative body.

Many of the "Initiative's" approaches to the exercise of legislative power by the Sahara autonomous Region is more reminiscent of federated States than unincorporated Territories like Puerto Rico. The similarities with Puerto Rico mostly have to do with a recognition of cultural sensibilities that warrant special treatment, as well as the apparent special status the Region would possess as opposed to other regions in the Kingdom. This special status could not be given to a federated States in the US, but could be given to a Territory.

Probably the most important aspect of the "Initiative" and its similarities with the United States-Puerto Rico relationship has to do with the statutes of the "Region's autonomy Statute" (Section 24) and the arrangement outlined in the "Initiative" itself. Particularly, whether it can be unilaterally modified without the assent of the Region's governmental bodies. As we saw with the United States, there are structural limitations which impede the federal Congress' ability to directly affect a State's legislative authority. Such limitations are not present when it comes to Territories. That explains, for example, why Congress was able to adopt the PROMESA statute and, in practice, unilaterally amend Puerto Rico's local Constitution and directly intervene with the exercise of its legislative powers over local matters. In other words, Congress has the power to (1) unilaterally modify its arrangement with Puerto Rico, and (2) actually do away with the arrangement altogether. This is part of the current constitutional crisis in Puerto Rico and its relationship with the United States.

An important question will be whether the same thing can be done with the Region's autonomy Statute or with the arrangement outlined in the "Initiative" as a general matter. One lesson to be extracted from the Puerto Rican experiences is that the ability of the national government to unilaterally alter the conditions and content of the arrangement is no solution at all. This unilateral authority has shaken Puerto Rico's current situation and its autonomy. It would be ill advised to repeat it elsewhere. The situation in Puerto Rico suggests that a different path would

[77] Since the early days of the Republic, the Supreme Court of the United States has expressly recognized that the federal government enjoys certain unenumerated powers simply because of its status as a sovereign, independent nation. *See* McCulloch v. Maryland, 17 US 316, 383 (1819).

be preferable: one that discards such unilateral action. That sort of mutuality can facilitate any arrangement's possibility of success in the future.

This brings us to a somewhat afterthought that merits mention: process.

The Puerto Rico constitutional process of 1952, which resulted in the adoption of the current territorial Constitution, was not carried out in accordance with international law, the principle of self-determination, or with the participation of the United Nations and the international community. It was purely a matter of U.S. domestic law. This accounts, for example, for why the Puerto Rican question is still addressed at the U.N.'s Committee on Decolonization and why the "status" question is still a divisive one within Puerto Rico. Precisely because of these defects, the Puerto Rican question has not been resolved.

At the same time, it should be noted that the 1952 constitutional drafting process itself was characterized by democratic and participatory mechanisms, although it unfortunately failed to adequately incorporate important political forces in Puerto Rico, particularly the pro-independence movement. This contradictory characteristic is part of the Puerto Rican constitutional experience. The 1952 constitutional document was approved by a wide majority of the Puerto Rican electorate in two separate referendums. The lesson to be extracted is to adequately design and execute a fully democratic and participatory process that allows the greatest popular engagement, so that its results are widely accepted.

The "Initiative" has important elements that differ from the Puerto Rican experience, mostly in a positive direction. For example, Section 27 states that the autonomy Statute "shall be the subject of negotiations and shall be submitted to the populations in a free referendum." While Puerto Rico's current constitution was submitted to a referendum, it cannot be said to be the result of a negotiation among equal partner. Quite the contrary, as we saw, the relationship between Puerto Rico and the federal government was still one of gross inequality.

It is also important to point out Section 27's commitment to the "right of self-determination, as per the provisions of international legality, the Charter of the United Nations and the resolutions of the General Assembly and the Security Council." This is in sharp contrast to the purely domestic approach taken by the United States with regard to Puerto Rico.

Probably more importantly is Section 29's commitment to amend the Moroccan Constitution "and the autonomy Statute incorporated into it, in order to guarantee its sustainability and reflect its special place in the country's national juridical architecture." As explained previously, the 1952 arrangement between the federal Congress and Puerto Rico **was not** legally entrenched nor did it require consent by both parties for its modifications. As we saw, the federal Congress' enactment of the PROMESA statute is testament to its ability to unilaterally alter the conditions of the 1952 arrangement. This is hardly an articulation of self-determination and a stable accord between parties. The possibility of constitutional amendment to entrench the autonomy Statute would be a positive deviation from the Puerto Rican example.

Finally, it is worth mentioning the remaining political commitments mentioned in the "Initiative", such as good faith (Sections 28 and 34), adequate repatriation (Section 30), blanket amnesty (Section 31), and a commitment to international legality (Section 33). These are vital for the success of any resolution to matters of this nature.