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Permanent Mission of the Kingdom of Morocco to the United Nations
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DEVOLUTION OF LEGISLATIVE POWERS IN REGIMES OF TERRITORIAL AUTONOMY

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TABLE OF CONTENTS

FORWARD

Since its first edition in 2009, the international research seminar on autonomy, which the Permanent Mission of the Kingdom of Morocco to the United Nations in New York has organized annually, in Dakhla, Geneva or New York, provides an excellent opportunity and a key meeting point for renowned international academicians, scholars and experts, to get informed and examine all the aspects surrounding territorial autonomy, through an exercise of analytical comparison of the systems of territorial autonomy in different regions of the world.

The fifteen seminars organized to date provided an opportunity to consider several aspects of the Moroccan Autonomy Initiative, presented by the Kingdom of Morocco to the Secretary General of the United Nations, on April 11, 2007, and to compare their relevance with the systems applied in other autonomous regions around the world.

The 2022 edition of this international seminar aimed to highlight the very important and pivotal question of the devolution of legislative powers in the autonomous regions. This latter constitutes an essential component that guarantees the success and sustainability of autonomy, as it is a founding principle of inclusive and participatory democracy and a very important aspect of the rule of law and good governance.

The Moroccan Autonomy Initiative for the Sahara region includes several provisions that enshrine the devolution of legislative powers. Articles 5, 12, 19, 20, 22 and 24 lay out, in a clear manner, the competences that the populations of the Sahara region will have, in terms of running their own affairs through legislative, executive and judicial bodies, enjoying exclusive powers, in in keeping with democratic principles and procedures.

The seminar concluded that, while each territorial case has certainly its own context, dynamics and specificities, the comparative study between the different models of autonomy reinforces the fundamental elements of Morocco's autonomy offer. More essentially, it demonstrates that the Moroccan Autonomy Initiative meets international standards, respects international legality and takes into consideration the socio-cultural specificities of the Sahara region. Finally, it fits perfectly with the systems of autonomy that are most democratic, participatory, viable, visionary, fair and compliant with international law.

This publication aims to make the proceedings of this seminar available to diplomats, politicians, academics, researchers and civil society representatives, in order to serve as a reference benchmark and a basis for reflection on territorial autonomy. In addition, it aspires to promote a convergence of practices in this area, in a comparative approach of the provisions of the Moroccan Autonomy Initiative with other autonomy experiences in the world, through focusing on the systems of devolution of legislative powers in the Canary Islands, New Caledonia, Puerto Rico and Rodrigues Island.

Omar HILALE
Ambassador, Permanent Representative of the Kingdom of Morocco
to the United Nations in New York

INTRODUCTION

Dr. Marc Finaud[1]

Ladies and Gentlemen,

On behalf of the Permanent Mission of the Kingdom of Morocco to the United Nations in New York, I am pleased to welcome you to our new international research seminar on "Devolution of Legislative Powers in Regimes of Territorial Autonomy". This is the fifteenth such seminar, and the second on line due to the persisting pandemic. This series was started after Morocco introduced its Initiative for the autonomy of the Sahara Region to the United Nations Security Council in 2007.[2]

Since then, academics from all over the world have addressed some aspects of autonomy regimes on all continents such as the right to self-determination, democracy and human rights, institutions and mechanisms, natural resources, representation and legitimacy in negotiations, solidarity and equalization between regions, development models, Human Rights Commissions, civil society and non-governmental organizations, external relations of autonomous regions, regionalization and territorial autonomy, models of territorial autonomy, autonomy as a means of settlement of conflicts, and devolution of judicial powers.

The comparative studies discussed the cases of: Aceh, Andalusia, Azores and Madeira, Bangsamoro, Cameroon, Caribbean island states, Catalonia, Eastern Malaysia, Greenland, Indian Northeast, Iraqi Kurdistan, Italian autonomous regions, Mexican states, New Caledonia, Newfoundland, Nicaragua's Atlantic Coast, Northern Ireland, Nunavut, Puerto Rico, Quebec, Spanish Provinces, South Tyrol, Vojvodina, Wallonia, Zanzibar, etc.

As a reminder, the proceedings of those seminars have been published by Morocco and are available on the dedicated website of the International Academic Network on Autonomy (www.academicautonomynetwork.com).

Today, we will focus on devolution of legislative powers, an important aspect of regimes of territorial autonomy, and our guest speakers will address the following cases and compare them with the Moroccan Initiative for the autonomy of the Sahara Region:

- Dr **Joan-Josep Vallbé**, Associate Professor, University of Barcelona, Spain, will present the Canary Islands,
- Dr **Carine David**, Professor of Law, University of French Antilles, Pointe-à-Pitre, Guadeloupe, France, will speak about New Caledonia,
- Mr **Jorge M. Farinacci Fernós,** Associate Professor, School of Law, University of Puerto Rico, United States Commonwealth, will address Puerto Rico

[1] Head of Arms Proliferation, Head of Diplomatic Tradecraft, Geneva Centre for Security Policy (GCSP).
[2] United Nations Security Council, Document S/2007/206, 13 April 2007.

- and Ms **Marie Valerie Uppiah**, Head of the Faculty of Law and Management, University of Mauritius, will deal with the island of Rodrigues.

At the end of those presentations, I will try to draw some conclusions.

Before giving the floor to the speakers, let me briefly remind the main relevant provisions of the Moroccan Initiative for the autonomy of the Sahara Region, which the UN Security Council, in over a dozen resolutions, qualified as "serious and credible", and which is endorsed by an increasing number of countries. Those countries indeed recognize both the importance of this Initiative as a means of political settlement of the ongoing dispute and in the light of the efforts made by Morocco in terms of economic, socio-cultural, environmental, and human development of that region.

Indeed, Morocco adopted in 2008 a policy of "**Advanced Regionalization"** aiming at promoting citizens' participation, democracy, and decentralization to facilitate economic, social, and cultural development as well as modernization of State structures and improvement of local governance. This reform was then enshrined into the 2011 **constitutional revision** that adopted the principle of self-government for regions and granted them, among others, the main competency in terms of economic, social, cultural, and integrated sustainable development.[3] This process established mechanisms for dialogue and consultation to involve citizens and NGOs in the elaboration and monitoring of development programmes.

Regarding **legislative powers**, the Initiative for the Autonomy of the Sahara Region includes several provisions:

- Art. 5: (…) the Sahara populations will themselves run their affairs democratically, through **legislative**, executive, and judicial bodies enjoying exclusive powers.

- Art. 12: In keeping with democratic principles and procedures, and acting through **legislative**, executive, and judicial bodies, the populations of the Sahara autonomous Region shall exercise powers, within the Region's territorial boundaries, mainly over the following:

    - The Region's local administration, local police force and jurisdictions
    - In the economic sector: economic development, regional planning, promotion of investment, trade, industry, tourism, and agriculture
    - The Region's budget and taxation; infrastructure: water, hydraulic facilities, electricity, public works, and transportation
    - In the social sector: housing, education, health, employment, sports, social welfare, and social security
    - Cultural affairs, including promotion of the Saharan Hassani cultural heritage
    - The Environment.

[3] Moroccan-American Center, "Morocco is Irreversibly Committed to Democratic Reform and Good Governance, www.moroccoonthemove.com (Jan. 2012).

- Art. 19. The **Parliament** of the Sahara autonomous Region shall be made up of members elected by the various Sahrawi tribes, and of members elected by direct universal suffrage, by the Region's population. There shall be adequate representation of women in the Parliament of the Sahara autonomous Region.
- Art. 20. Executive authority in the Sahara autonomous Region shall lie with a Head of Government, to be elected by the regional **Parliament**. He shall be invested by the King […].
- Art. 22: Courts may be set up by the regional **Parliament** to give rulings on disputes arising from enforcement of norms enacted by the competent bodies of the Sahara autonomous Region. These courts shall give their rulings with complete independence, in the name of the King.
- Art. 24: **Laws**, regulations and court rulings issued by the bodies of the Sahara autonomous Region shall be consistent with the Region's autonomy Statute and with the Kingdom's Constitution.

As one can see, this regime of autonomy, once in place, will grant extensive powers for the autonomous region to exercise. Of course, as we will see, existing regimes in the world can go beyond such devolution, but most actually are less generous. If the Moroccan Initiative does not solve all the details of the autonomy governance system, it is because this plan remains to be negotiated with the relevant parties and will be necessarily developed and complemented.

I am now pleased to yield the floor now to our speakers and thank you for your attention.

LEGISLATIVE DEVOLUTION IN SPAIN: THE CASE OF THE CANARY ISLANDS

Dr. Joan-Josep Vallbé[4]

1. Introduction

When Spanish dictator Franco died in November 1975, Spain was a strongly centralized polity, where the only existing subnational tiers (provinces and municipalities) had just a few administrative duties. Three years later, a new democratic Constitution (CE1978 hereinafter) acknowledged the existence of historic nationalities with their own identity, allowed the creation of new regions, and guaranteed regional self-government. The text also established a list of policy areas over which regions would have executive and legislative power – including environmental protection, agriculture, culture, urban planning, housing, social welfare, health, and economic development. Although such list of areas did not exclude further regional competencies, the Constitution did establish (art. 149 CE1978) a list of areas over which the central State would have exclusive power – including granting constitutional citizen rights, migration, international relations, defence and the military, justice, taxes, and the capacity to approve framework legislation applicable to the whole territory (e.g., on the organization of local government). Therefore, although the Constitution did not establish a fixed model of regional autonomy, following the path of many other democratization processes (Treisman 2007), it did define a general framework of regional authority that would frame the development of the so-called "state of autonomies" (Aragón Reyes 2006). Figure 1 shows how the new framework set up by the 1978 Constitution transformed Spain's level of decentralization compared to the world's average (Marks, Hooghe, and Schakel 2008).

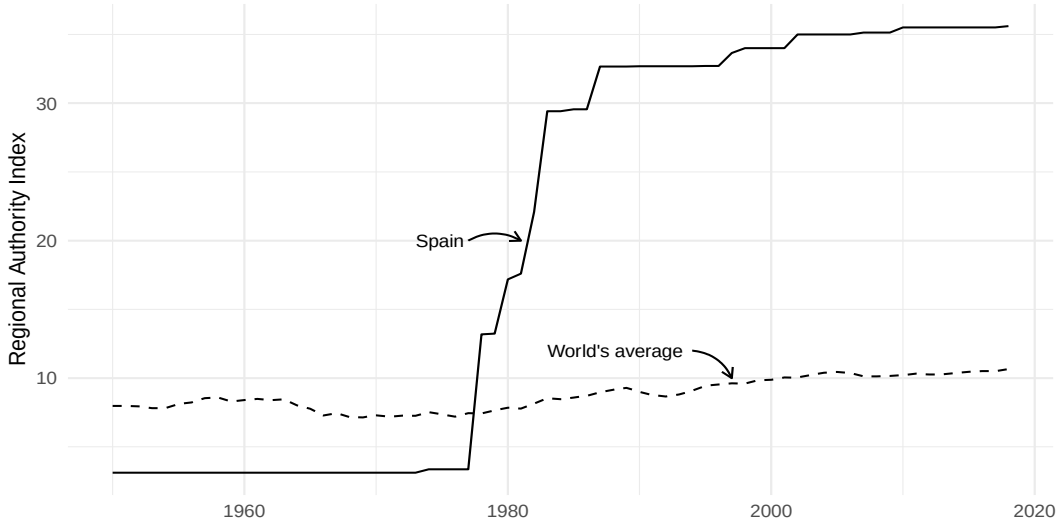

Figure 1. Evolution of Spain's level of regional authority.

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This general framework is established in the very first articles of the Constitution. It combines the acknowledgment that there is one single State (art. 1.1) and that national sovereignty lies in the whole Spanish people (art. 1.2) with the granting of regional autonomy (art. 2 CE1978), the ways through which regions might be created from existing provinces (arts. 143 and 151 CE1978), and that regions would have both executive and legislative powers.

Certainly, between the end of the dictatorship (1976) and the approval of the democratic Constitution (1978), several transitional government decisions were already oriented towards a decentralized model. For instance, in 1977 the Spanish government restored the regional government of Catalonia (suppressed by Franco in 1938)[5] and appointed Josep Tarradellas as its regional prime minister, who had acted as such in exile since 1954.[6] In the beginning of 1978, another governmental decree provided the status of "pre-autonomy" to the Basque Country.[7]

The cases of Catalonia and the Basque Country illustrate the resurgence of old demands for political autonomy by certain communities with different national identities, but the openness and generalization of the decentralized model contained in the Constitution also expressed a degree of belief in decentralization as a general organizational principle contrasting with the traditionally strong centralization of the Spanish state.

Certainly, then, the provisions contained in the Constitution – expressing the equilibrium between the different bargaining elites of the transitional period, mainly those of the dictatorship and the democratic opposition (Colomer 1990; Przeworski 2005) – had a marked influence in the way political autonomy would evolve in the following decades (Aja 2003).

The Constitution set up two tracks for territories to establish themselves as autonomous regions. On the one hand, a so-called ordinary procedure (regulated by arts. 143 and 144) established the way most regions would be created as a result of bringing together neighbouring provinces having certain historic commonalities. On the other hand, an exceptional, fast track to autonomy was granted for those territories – actually, only Catalonia, Basque Country and Galicia – that had been acknowledged as regions during the Second Republic before the war and the Francoist dictatorship and were defined as "historic nationalities" in the Constitution.

In this context, the Statute of Autonomy of the Canary Islands was approved following the ordinary, slower procedure, and the region gained political autonomy in 1982, three years later than the faster regions. Despite following the slower track, the distinctiveness of the Canary Islands as a region – the archipelago had been conquered by the Spanish in the 15th century – was clear from the beginning. Actually, a royal decree enacted even before the Constitution[8] affirmed that "the insularity gives the Archipelago a unique feature within the unity of Spain," which would justify the institutionalization of the archipelago as an autonomous region. In fact, before being a region, the Canary Islands had already a distinct form of administrative organization (*cabildos insulares*) by which all the islands of the archipelago functioned. By the cited royal decree of 1978 these *cabildos* were connected through a common governing body

[5] Real Decreto-ley 41/1977, de 29 de septiembre, sobre restablecimiento provisional de la Generalidad de Cataluña

[6] Real Decreto 2596/1977, de 17 de octubre, por el que se nombra a don Josep Tarradellas Joan Presidente de la Generalidad de Cataluña.

[7] Real Decreto 1/1978, de 4 de enero, por el que se desarrolla el Real Decreto-ley 1/1978, que aprueba el régimen preautonómico para el País Vasco.

[8] Real Decreto-Ley 9/1978 de 17 de marzo.

(*Junta de Canarias*) that would pave the way to full political autonomy in 1982 (Ríos-Rull 1996; Trujillo 1997).

Regions created through the ordinary procedure gained competencies following a two-step process. In the first phase, after the approval of their Statute of Autonomy, regions automatically received a fixed set of 22 competencies listed in article 148.1 of the Constitution. These included the capacity to establish functioning regional parliaments and governments, as well as competencies for urban planning, transportation, agriculture, environmental protection, health, social services, and cultural promotion. After five years of this limited autonomy, the Constitution enabled regions to broaden their autonomy in a second phase that would provide them access to further competencies, with the only limit of those matters that the Constitution explicitly assigned to the State (art. 149 CE1978).

This institutional design provided that five years after the approval of most statutes of autonomy (around 1990) all Spanish regions started reforming their statutes of autonomy aiming at maximum levels of autonomy, thus progressively deleting the starting differences across regions and fostering a *de facto* convergence in autonomy that culminated with a second wave of statute reforms in the first decade of the 2000s.

The next section will briefly describe Spain's decentralization model regarding legislative powers of regions. After that, another section will describe the case of the Canary Islands and its legislative capacity. Finally, a last section will compare the Canary Islands and the legislative provisions for the Sahara region provided by the *Initiative for the Autonomy of the Sahara Region*.

2. Decentralization of legislative powers in Spain

2.1 Scope and limits of legislative regional power

The Spanish Constitution guaranteed self-government to regions as a general principle. The initial pack of competencies included city and urban planning, health, housing, public works, transportation, agriculture, forests and fishing, environmental protection, culture, tourism, promotion of sports, social welfare, and economic development (art. 148 CE1978). After completing the first five-year phase of autonomy, slow-track regions might assume further powers if established by their statutes of autonomy (art. 149.3 CE1978), or otherwise through a reform of their statute of autonomy. The central government has exclusive power over a number of matters – foreign policy, defence, justice, labour law, civil and commercial law, social security, public safety, customs and trade, and the currency, as well as citizenship and immigration (art.149 CE1978). Despite this, the central government may also transfer or delegate powers to regions, or issue framework, harmonizing legislation even for matters exclusively reserved for regions (art. 150 CE1978).

A first wave of reforms of regional statutes of autonomy and bilateral negotiations with the central government took place in the 1990s, which produced further decentralization and brought the competencies of slow-track regions closer to those of the fast-track regions. Major cases were Comunitat Valenciana (1994), Galiza (1995), and the Canary Islands (1996). A major bulk reform in 2002 devolved responsibility in health and education to those slow-track regions that had not adopted these competencies during the first wave of reforms. A second wave of reforms took place in the 2000s, the last one of which was the new Statute of Autonomy of the Canary Islands (Ordinary Law 1/2018).

2.2 Legislative institutions

The first and foremost exclusive regional competence is the capacity of all regions to assume the "organization of their own self-government institutions" (art. 148.1 CE1978). By self-governing institutions, the Constitution meant a regional executive, a legislative assembly, and a fully-fledged public administration. For fast-track regions, article 152 of the Constitution sketches the main features that their legislatures should have:

- First, regional parliaments must be elected by universal suffrage of eligible citizens within the region – national citizens older than 18 years old.
- Second, elections to regional parliaments should be based on proportional representation with the aim of representing all parts of the region's territory.
- Third, the regional prime minister must be elected by the regional parliament among elected members of parliament (MPs).
- Fourth, regional prime ministers will appoint the rest of the members of the executive and will be the highest representatives of the State within the region.
- Finally, the prime minister and the executive will be responsible before the regional parliament, which will be able to remove the prime minister through a vote of no confidence.

For the organization of the institutions of slow-track regions, the Constitution did not establish specific requirements, but left it to each region's statute of autonomy, which must contain an explicit reference to such organizational principles. In any case, the general principles affecting fast-track regions provided enough framework for all Spain's regions to develop rather similar institutions, especially regarding legislative powers and organization. Regarding legislative functions, these were of course limited by the competencies held in exclusive by each region. And regarding organization, all regions opted for unicameral legislatures sized according to both population and number of electoral districts, and most regions have provinces as electoral districts, although some differences arose regarding electoral design at the regional level. It is precisely in this regard that the Canary Islands present sharp differences compared to other regions.

2.3 Legislative representation of regions at national level

After 40 years of a unicameral, non-democratic national legislature, the first democratic reforms before the 1978 Constitution (e.g., the Law 1/1977) did foresee a bicameral legislature with an upper chamber (*Senado*) that could somehow accommodate territorial representation. This was further elaborated in the Constitution, which defined the *Senado* as the chamber of territorial representation (art. 69 CE1978). However, the principle of territorial representation of the *Senado* was never developed as being exclusively based on regions. Actually, out of the 266 members of the *Senado*, 208 are elected through plurality vote using provinces as electoral districts (as in the lower chamber) whereas only 58 senators are selected by the regional parliaments themselves, unlike other territorial upper chambers such as the German *Bundesrat*. According to article 69.5 CE1978, the assembly of each region selects at least one senator up to a limit of one senator per one million inhabitants, to the point that larger regions appoint more senators (e.g., eight by Catalonia and nine by Andalusia) than smaller ones (La Rioja or Cantabria select just one). The assembly of the Canary Islands select three senators. Given the unbalance between purely regional

representation (22 percent of senators) and the share of senators elected by popular vote (78 percent of seats), the *Senado* can be seen more as a second-reading legislative chamber than a territorial one at that (Aja 2003).

3. Canary Islands

After having outlined the general constitutional framework regarding regional legislative development, in this section, this paper will explain how legislative power is organized in the Canary Islands. The autonomous community of the Canary Islands was created in 1982 with the approval of its first Statute of Autonomy (EACAN 1982). The Statute has experienced two major reforms, one in 1996 and the last one in 2018 (EACAN 2018).[9] Actually, EACAN 2018 has been the last Statute of Autonomy reformed in Spain, thus marking the end of the second wave of statutory reform after the first one in the 1990s.

In this section, this paper will briefly outline the main elements that constitute the legislative power of the Canary Islands as an autonomous region: the political nature of its legislative assembly, the electoral system, its main functions, and the mechanisms to ensure that legislation respects the limits of the Constitution.

3.1 Nature of legislative assembly

As commented above, the definition of the nature and organization of the legislative assembly of the Canary Islands is an exclusive competence of the region, and it must be explicitly contained in its Statute of Autonomy. However, as we also already commented, this competence is limited by the principles of the constitutional framework (arts. 147 and 152 CE1978). Article 2.2 EACAN establishes that the powers of the autonomous region of the Canary Islands are exercised by the region's parliament, prime minister, and government. Article 38 EACAN defines the Canarian Parliament as the representative instrument of the Canarian people, and it establishes that it is elected through universal suffrage. All Canarian citizens older than 18 are eligible to vote. The Parliament serves terms of four years, although elections might be held in advance in a number of cases – e.g., if the Parliament is unable to build a majority to elect a prime minister. Parliament can also be dismissed by the regional prime minister except when facing a vote of no-confidence or during the first year of term (art. 38.3 EACAN).

Once new MPs are elected, after the election the Bureau of the Parliament must be elected, including the Speaker of the Parliament. Once elected, the Bureau will determine the date of the first session, and ten days after the Speaker must propose the name of the candidate to be prime minister (according to the distribution of seats in Parliament), who will be invested through majority vote (further details below).

3.2 Election to the Canarian Parliament

The electoral system of the Canary Islands (regulated by art. 39 EACAN) is distinctive among Spanish regions as it reflects a clear tension with the principle of proportionality and territorial balance established by article 152 of the Constitution. To account for any electoral system, a number of elements should be considered, including the size of the assembly, the number and size of electoral districts, the existence of an electoral threshold for parties to be entitled to

[9] Ley Orgánica 1/2018, de 5 de noviembre, de reforma del Estatuto de Autonomía de Canarias

representation, how candidates are presented and whether they are ordered in lists, and the electoral formula.

Since its first Statute of Autonomy, the Canarian legislature had 60 MPs, which is medium sized compared to other Spanish regions. The insular and archipelago nature of the Canary Islands have resulted in a historically unequal and disproportionate election system based on the so-called triple parity (López-Aguilar 1997). The first parity gives equal treatment to both provinces of the Canary archipelago (Las Palmas and Santa Cruz de Tenerife). The second one is a parity between the two major islands (Gran Canaria and Tenerife) and the so-called minor islands (Fuerteventura, Lanzarote, La Palma, La Gomera, and El Hierro). And the third parity is between the so-called "capital" islands (Gran Canaria and Tenerife) and those who aren't, both across islands (30 *vs.* 30 MPs) and within provinces (15 *vs.* 15 MPs). In practical terms, this equality turned out to produce great inequality of representation because smaller islands were largely overrepresented, and this favoured political parties strongly rooted in each island instead of cross-sectional parties. This resulted in a fragmented parliament and a challenge for governance.

After 36 years of electoral experience and concerns about electoral inequality, the new Statute approved in 2018 intended (art. 39 EACAN) to regulate further the Canarian system – which should be elaborated in a separate law – through a number of principles:

- First, the electoral system should be proportional (art. 39.2a).
- Second, the number of MPs elected to parliament should always be between 50 and 75 (art. 39.2b).
- Third, the Statute of Autonomy offers three options regarding the number of electoral districts: either one single regional district, insular districts, or a combination of both. In case the future law opts for insular districts, the Statute establishes that each island will constitute a different district.
- Fourth, importantly, the Statute does not determine a particular electoral threshold.
- Finally, the Statute also contains a transitional disposition establishing the basic characteristics of the electoral system at work until a parliamentary majority approves a new electoral law.

As a result of the implementation of this transitional disposition, the working electoral system presents the following characteristics:

- First, the current Canarian parliament has 70 MPs.
- Second, the Statute opted for a combination of insular and regional representation, which makes the Canary Islands the only case of combined representation across Spain's regions. According to the new system, 61 MPs will be distributed among 7 insular districts, while 9 MPs will be distributed within a single regional district covering the whole autonomous region. This, of course, entails that in each election Canarian voters have two votes – one among the parties within their insular district, and another among parties within the general, regional district. According to López-Aguilar (2020), the combination of insular and region-based district will produce higher levels of "parliamentarization of Canarian politics" through higher levels of cohesion and regional integration of the Canarian parliament and decreasing insular fragmentation.

- However, the most distinctive element of the current Canarian electoral system, and the one that still produces higher levels of inequality, is the electoral threshold required to parties to be entitled to representation, especially concerning the election of the 61 MPs across insular districts. The transitional disposition establishes that, in order to be entitled to representation, any party should reach at least 15 percent of valid votes within each respective island, or 4 percent of valid votes cast within the whole region. Although the second threshold (4 percent of all valid votes) is intended to balance the tendency of the system toward insular fragmentation, the 15 percent threshold within insular districts really is a barrier of entry to catch-all parties and favours parties with strong insular identity.

3.3 Functions of the Canarian parliament

The process of political decentralization in Spain configured a regional system that mirrored that of the national political system in terms of the relationship between the executive and the legislative, with the only exception that while the national legislature is bicameral, regions would have only one chamber. Inspired by the German Fundamental Law, the Spanish constitution reflects a preference for a strong executive both at the national and regional level. Also in both tiers, the prime minister is elected by a plurality vote in the legislative assembly, and then the PM can appoint ministers at will. However, the PM can only be removed through a constructive motion of no-confidence followed by an absolute majority vote (that must include an alternative candidate). This gives members of the executive priority to access the floor in parliamentary debates (Field and Hamman 2008; Vallbé and Sanjaume 2022), and most legislation approved by the national and regional parliaments are initiated by the executives (Magone 2008; Aja 2003).

However, the Statute of Autonomy of the Canary Islands gives the Parliament a central political role, which sometimes is interpreted as being the dominant power in the Canarian political system (Iglesias-Machado 2020). Apart from appointing the prime minister, the Parliament has other several functions such as legislating on the matters over which it has exclusive power; controlling the executive; and approving the budget of the Canary Islands public administration. Let us briefly explore these functions, that are described in article 43 EACAN.

Legislative function

The legislative function of the Canarian Parliament is further developed in articles 125ff of the Regulation of the Parliament. The legislative function is focused on the Plenary of the Parliament, with the power not only to pass bills, but also to making all other decisions concerning the legislative process. This process is carried out in full autonomy, with no *a priori* interference of any national-level actor or agency. As will be explained below, the constitutional control over legislation produced by the Canarian (and all other regional) legislature is always *a posteriori* – i.e., once the legislation has been enacted by the regional parliament.

Although the Parliament organizes its work in committees where the legislative process is discussed and effectively carried out among members of parliament, all legislative procedures begin and end in the Plenary.

Despite this central role, article 44 EACAN gives the legislative initiative mainly to the executive, although the insular *cabildos* individually (art. 44.2 EACAN)[10] can also initiate legislation as can the general population through the popular legislative initiative (art. 31 EACAN). As the regional

[10] *Cabildos* are the main administrative units of each island.

executive is responsible to drive the political action of the autonomous community (art. 50 EACAN), it also takes a dominant role in legislative action through bills.

Other than that, members of Parliament and insular *cabildos* can also initiate the legislative process (art. 44.1 EACAN). Regarding the former, a legislative proposal can be presented by a group of five individual MPs, or by one or various parliamentary groups. As for *cabildos*, one single *cabildo* (arts. 18 and 19 EACAN) can exert the legislative initiative through proposals sent to the Parliament Bureau. These proposals must be first approved by the absolute majority of the members of the *cabildo*.

Finally, the Canarian Statute of Autonomy includes also the right of the people of the Canary Islands to participate directly in the legislative process (art. 31 EACAN). There are two requirements for that initiative to begin, though:

- On the one hand, proposals must have been supported (signed) by at least 15,000 Canarian citizens, or by 50 percent of one insular electoral district in cases when the proposed legislation has a direct effect on one single island of the archipelago.
- On the other hand, the popular legislative initiative has also limits in scope – it can only tackle matters over which the Canary Islands have exclusive competency, and cannot deal with economic organization, reform of the Statute of Autonomy, institutional organization of the Canary Islands, or the electoral system.

Approving the budget of the autonomous community

The budget corresponding to the administration of the Canary Islands must be approved through a law of the Parliament of the Canary Islands (art. 144ff Regulation of the Parliament). This is important and gives the Parliament a pivotal role in the Canarian political system because the law containing the budget will determine the policymaking capacity of the regional executive. The budget will be approved like an ordinary law, although when its legislative procedure is initiated (by the regional executive), it is given priority over the rest of parliamentary procedures. Following the initiation, the Plenary will have a first-round debate on the budget, where the law is thoroughly discussed. During the debate, parliamentary groups present their proposals for amendment, which may be partial or complete. Of course, the Parliament can in principle vote and return the budget bill to the executive through the approval of a complete amendment (a vote against the bill as a whole). This is exceptionally rare and in practical terms would entail the loss of the parliamentary majority by the executive, thus leading to new elections. Actually, this has only happened twice in Spain's national legislature (Iglesias-Machado 2020), and not one time in the Canary Islands.

Election of the prime minister

Parliamentary confidence is regulated by articles 161ff of the Regulation of the Canarian Parliament (RCP), as well as articles 48, 54, and 55 EACAN. Once elections to the Canarian Parliament have taken place and elected representatives have been assigned to each party according to the electoral rules, a first Plenary meeting is called to nominate and appoint the members of the Parliament Bureau, including the Parliament Speaker, and create the different parliamentary groups. Once this is complete, the first role of Parliament is to elect a prime minister. In order to do that, the Speaker will call the leaders of the parliamentary groups individually and will discuss with them which candidate is more likely to gather a majority vote. After that, the Speaker will call the Plenary to the investiture debate and will propose a candidate for prime minister among elected MPs – usually the leader of the group holding a majority of seats, although

this is not mandatory. To be elected prime minister, a candidate needs the absolute majority of votes in a first-round vote, or plurality vote in a second round to be held 48 hours after the first vote. Should no candidate reach a sufficient majority after two months counting from the first-round vote, the Parliament is automatically dissolved and new elections are called (art. 48.4 EACAN).

Control of the executive

Parliamentary control over the executive is a substantive element of parliamentary systems (Lijphart 1999). Although this control is carried out in multiple ways, including the production of legislation, the authorization of law-decrees produced by the executive (art. 46.3 EACAN), the control over legislative decrees (art. 45.6 EACAN), or establishing expenditure ceilings. But perhaps parliamentary control is most essential when Parliament explicitly gives or denies its confidence to the executive. In the Canarian system, this is done either through a motion of censure (art. 55 EACAN and 166 RCP) or a vote of confidence (art. 54 EACAN and 164 RCP). Both the success of the former or the failure of the latter entail the fall of the executive.

Electing representatives of the Canary Islands to Spain's Senate

The Canarian Parliament has the right to appoint three senators to the Spanish Senate (upper chamber). The Parliament Bureau assigns (the capacity to nominate) candidates to parliamentary groups according to their proportional representation in the Canarian Parliament. Elected senators will act in the Senate as representatives of the Canary Islands.

Referring legislation to the Constitutional Court

According to the Spanish Constitution (art. 161.1 and 32.2 of the Organic Law of the Constitutional Court), regional parliaments may refer legislation to the Constitutional Court if they deem it conflicts with regional competencies established in the Statute of Autonomy and in the Constitution. A plurality vote in the Canarian Parliament can initiate the referral, which must detail the specific rulings or articles of the referred piece of legislation that are infringing the Constitution or the Statute of Autonomy. If, on the contrary, it is a Canarian law that is referred by a nation-wide actor (national legislature, government, or ombudsman) to the Constitutional Court, the Canarian Parliament Bureau will act as the party representing the Canary Islands, with the right to present arguments or allegations to defend the integrity of the referred piece of regional legislation.

3.4 Conflicts between regional and national legislation: constitutionality control

When dealing with the issue of constitutionality control, the drafters of the Spanish 1978 Constitution opted for the Kelsenian model of constitutional justice – a concentrated model of constitutional review in which this special jurisdiction is exclusive of the Constitutional Court (SCC) and not given to ordinary judges (Ortiz-Herrera 1997; Rodríguez-Patrón 2016; Garoupa and Magalhães 2020). The main functions of the SCC are to act as a *negative legislator* with the exclusive power to determine whether laws, regulations, and decisions produced by both national and regional legislative and executive branches are contrary to the Constitution and thus to remove unconstitutional norms from the Spanish legal system (Rodríguez-Patrón 2016).

This gives the SCC a special status within the Spanish legal and political system as a whole and a pivotal actor in the relationship between regions and the central government. Although the Constitutional Court is not an ordinary court, some of its justices are career judges, it has jurisdiction over the whole territory of Spain, and compliance with its decisions is mandatory for everyone. At the same time, the SCC has a political dimension, because its main purpose is to

"allocate values" (Hodder-Williams 1992), its decisions impact fundamentally all other branches of the political system (Sala 2010; Alaez-Corral and Arias-Castaño 2009; Harguindéguy, Sola-Rodríguez, and Cruz-Díaz 2020), and its members' policy preferences can be traced back to their appointment and mapped onto a political space (Hanretty 2012; Garoupa, Gómez-Pomar, and Grembi 2013).

Composition and appointment

The SCC has 12 members, one of whom acts as Chief Justice who is elected among currently serving SCC justices through absolute majority of the SCC justices. Nominations to the SCC come from four different sources. Four justices are nominated by the Spanish lower chamber (*Congreso de los Diputados*); four by the upper chamber (*Senado*); two are directly nominated by the Spanish Government; and two by the governing body of the judiciary (*Consejo General del Poder Judicial*).[11]

For the purposes of this paper, it is interesting to note that regarding the four justices nominated by the upper chamber (*Senado*), the 2007 reform of the Organic Law of the SCC established that this nomination will be among candidates proposed by the legislative assemblies of the regions. Each regional assembly may nominate up to two candidates, so the four candidates nominated by the *Senado* are elected from a pool of up to 34 different candidates nominated by regions. However, in practice there are never as many candidates, because regional assemblies form coalitions to propose the same candidates, who will be finally elected by the upper chamber.

Types of cases heard

The SCC hears six basic types of cases:

- First, *a posteriori* reviews (*recursos de inconstitucionalidad*) challenge the constitutionality of already enacted laws and regulations produced by either national or regional legislatures. These appeals may be brought to the SCC by the Spanish prime minister, the Ombudsman, 50 members of either the lower or upper chamber, or by any of Spain's 17 regional executives and legislatures.

- The second type of cases are constitutional complaints (*cuestiones de inconstitucionalidad*), which can only be brought to court by ordinary judges regarding enacted norms applicable to a particular judicial process which they find contrary to the constitution.

- The third type are individual constitutional complaints for protection of fundamental rights (*recursos de amparo*), which any natural or legal person may bring to the SCC as the last judicial instance in cases referred to the protection of fundamental rights.

- The fourth type are conflicts of powers or competencies (*conflictos de competencia*), which examine "the conformity of non-legislative acts with norms delineating division of powers between state and autonomous communities in the Constitution and the Statutes of Autonomy" (Garoupa and Magalhães 2020).

[11] In turn, the Consejo General del Poder Judicial (CGPJ) has 12 members, all of whom must be career judges but who are nominated directly by the upper and lower legislative chambers. The president of the CGPJ is also the Chief Justice of the Spanish Supreme Court.

- The fifth type are conflicts between constitutional bodies (*conflictos entre órganos constitucionales*) which challenge decisions made by institutions that violate the distribution of competencies between these institutions as defined by the legislation.
- Finally, the first 1979 version of the OLCC established the possibility of an *a priori* abstract review (*recurso previo de inconstitucionalidad*) against bills of regional Statutes of Autonomy, which would prevent them from coming into force after being approved by both national legislative chambers. The provision was removed from the law in its 1985 reform, due to misuse by legislative minorities (Alaez-Corral and Arias-Castaño 2009). In the last reform of the law (2015), the provision was reintroduced, which gives additional control to the national government and legislature to prevent the enactment of new Statutes of Autonomy that might not conform with the Constitution. This and the procedure to perform a preventive review of international treaties prior to its ratification are the only instances when the SCC may carry out constitutional review *a priori*.

Therefore, the Spanish system of constitutionality control gives the Constitutional Court a central role, whose decisions are binding for all constitutional powers. In addition, the system gives the central government some leverage *vis-à-vis* regional governments. On the one hand, when regional legislation is referred to the Constitutional Court by the central government through *a posteriori* review, the central government can ask the Court to suspend the referred law until a decision has been made, which the Court usually grants. On the other hand, if a region produces a bill to enact a new Statute of Autonomy, the possibility to fill in an *a priori* abstract review gives federal actors the capacity to prevent the bill from coming into force until the Court has reviewed it.

4. Comparison with the Initiative for the Autonomy of the Sahara Region

The extent to which regions have the power to legislate on issues over which they have exclusive jurisdiction is key to evaluate political decentralization (Treisman 2007; Marks, Hooghe, and Schakel 2008). The *Initiative for the Autonomy of the Sahara Region* reflects in principle the aim that the Sahara Region will have such power (art. 5). Considering the content of the *Initiative* and comparing it with what has been explained regarding the case of the Canary Islands, four considerations should be made.

4.1 Scope of legislative powers

The first consideration refers to the fact that the *Initiative* in its article 12 details the policy areas over which the institutions of the Sahara Region would exercise powers. The first stage of a credible decentralization process should include a clear list of the competencies assigned to regions and to the central state. In the case of Spain, above we have seen that article 148.1 of the Constitution assigned a first set of competencies to regions while article 149 assigned another set exclusively to the central State, although neither list is exhaustive and thus further competencies might be taken by both tiers of government in the future. In the case of the *Initiative*, importantly, the powers defined in article 12 cover an ample range of matters, from the organization of the local administration within the region's boundaries to key aspects of political power such as the ability to set up its own budget and taxation scheme, and pursuing its own policy making in areas such as infrastructures, energy, transportation, health, education, industry, or environmental protection.

However, in our opinion, as much wide-ranging as these matters are, two different aspects would deserve more elaboration in this respect.

- On the one hand, article 12 indicates that the "Sahara autonomous Region shall exercise powers" over a list of competencies, but it does not indicate the extent to which these powers will be exclusive of the autonomous region or somehow shared with the central State – e.g., through the approval of framework legislation.

- On the other hand, the fact that the *Initiative* does not include (to our knowledge) a list of the matters that will be under exclusive control of the central State leaves the process perhaps too open.

While the first question is important in order to shape how deep decentralization will be, this second question is relevant to evaluate to what extent the Sahara decentralization process entails an actual distribution of power. Both aspects are important for actors in the process because they affect the extent to which the process entails a credible commitment from both parts.

4.2 Election of the Parliament of the Sahara region

The second consideration on the legislative dimension of the *Initiative* refers to the election of the Sahara autonomous region. Article 19 deals precisely with the election process to the Parliament of the Sahara autonomous region. The article reflects, on the one hand, a commitment to the democratic election of the Parliament, including an active participation of the Sahrawi tribes and an "adequate representation of women." Three different comments should be made on this issue.

- First, while article 19 establishes that the election of members of the Sahara Parliament will be elected through universal suffrage, further details about the electoral system might help granting that fair representation springs from such elections. As we saw in the case of the Canary Islands, elements such as electoral thresholds and the number and size of electoral districts shape the whole proportionality of the electoral system. This, in turn, is essential to produce a type of representation where all sectors of society can feel as fair and fully democratic (Blais 2000).

- Second, article 19 affirms that the election to the Parliament of the Sahara autonomous region must ensure an "adequate representation of women," but it does not give further details regarding what share of women in Parliament would be "adequate," or how this representation might be achieved. There is a general understanding that equal gender representation in parliaments should lead to equal MP participation. Although legal quotas enforcing gender equality in the electoral system are a common practice in liberal democracies (e.g., zipper system in party lists), the path to gender equality in MP participation is still far from straightforward. The variation in the institutional mechanisms to enforce legal quotas, electoral systems, and party strategies has led to mixed conclusions regarding the relationship between equal representation and equal participation. Recent literature on comparative parliamentary debates using data at individual level has shown that overall female MPs participate less, although particular case studies point out that, all other things being equal, female MPs are equally active as male MPs (Bäck and Debus 2019), and that increasing female representation might have "acceleration" or "spill-over" effects on other elements of the institutional structure (O'Brien 2015). However, these effects might be mitigated by strong backlashes produced by political actors and

accommodated by inherited institutional structures and networks (Yildirim, Kocapınar, and Ecevit 2019), thus hindering equal opportunity for women to become leading and active MPs (Sanjaume, Vallbé, and Muñoz-Puig 2023).

- Third, another element that remains to be further clarified from the regulation of the election of the Parliament of the Sahara Region is to what extent the region itself will be able to regulate its own electoral system and process. This power does not appear in the list provided by article 12, but the absence of a list of exclusive competencies in the hands of the central State leaves the issue rather open.

4.3 Internal organization of the Sahara region

The third consideration refers to the internal institutional organization of the Parliament of the Sahara region and its relationship with the executive authority of the region. Article 20 of the *Initiative* points to a parliamentary model in which the head of government (the regional prime minister) will be elected by the regional Parliament. This, as we have seen, is a similar model to that of Spain's regions.

However, the text of the *Initiative* leaves open the relative weight of the regional executive and legislative branches in the future political dynamics of the region.

- On the one hand, it would be important to detail further functions of the Parliament of the Sahara region such as who holds legislative initiative and to what extent both the executive and the legislative have veto power during the legislative process.

- On the other hand, the balance of power between the regional executive and legislative powers should also be further detailed. In particular, in the case of the Canary Islands, we have commented that the model tends to give the executive higher control, because once the prime minister is elected it is the executive that eventually holds most legislative initiative, although mechanisms of legislative control such as votes of confidence or censure may give the legislative the ability to check on the power of the executive. The shape of this inter-power checks is still to be further clarified in the *Initiative*.

4.4 Constitutional conflicts

Finally, the fourth consideration deals with the mechanisms to ensure the constitutional control of legislation. Article 24 of the *Initiative* affirms that "laws, regulations and court rulings issued by the bodies of the Sahara autonomous Region shall be consistent with the Region's autonomy Statute and with the Kingdom's Constitution." However, two different elements should be included in a further regulation to make this article efficient.

On the one hand, the *Initiative* does not offer details about the particular mechanism through which decisions will be made about the conformity of regional legislation with the Kingdom's Constitution. On the other, while it is rather clear from article 24 that some control will be exerted on regional legislation, it is not so to what extent there will be a mechanism through which the Sahara region will be able to refer national legislation that is deemed to erode the autonomous region's power.

As we have seen above, the case of Spain opted for a federal arbiter in the form of a Constitutional Court with the exclusive power to annul pieces of legislation that violate the Constitution, which

also includes the statutes of autonomy of all regions. This is important because when Spanish regions refer national legislation because it is eroding the scope of their statutes of autonomy, they do so because their statutes *are* part of the Constitution. In the same manner, if the Statute of Autonomy of the Sahara autonomous region is considered a constitutive part of the constitutional corpus of the Kingdom of Morocco, the control of constitutionality should include a mechanism through which the institutions of the autonomous region be able to defend its integrity when national legislation erodes it.

Judicial review is one of the key elements of the relationship between federal political systems and the courts (Sala 2010; Aroney and Kincaid 2017; Delaney and Dixon 2018). Through the exercise of judicial review, courts can shape federal systems through their interpretations of constitutional norms. These norms most prominently concern the distribution of powers between the federation and its constituent polities, but they also often concern interpretation of the structural features of the federal system, such as the representation of the constituent polities within the federation's political institutions (Hueglin and Fenna 2006). The scope of judicial review is crucial in diverse polities, where the recognition of identities and the related distribution of powers and resources is systemically contested (Schertzer 2017).

This is particularly important in an incomplete decentralized system such as Spain, whose "federal" constitutional arrangements are by nature ambiguous and unended. But it would also be important in the case of the Sahara autonomous region. If we understand decentralization as a credible commitment problem (Amat and Rodon 2021), then in order to have a functioning decentralized system, regions should have both the capacity to exercise power effectively (and legislative power is of utmost importance for that matter), and to resort to effective tools to ensure compliance with the rules of the game.

Naturally, the purpose of the *Initiative* is not to address every single detail regarding the organization of the decentralization process. However, it provides very relevant points towards an advanced level of decentralization for the Sahara autonomous region, which will be finally shaped by the negotiation of the final agreement between the parties.

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LEGISLATIVE EMANCIPATION OF NEW CALEDONIA: COMPARISON WITH MOROCCO'S AUTONOMY INITIATIVE FOR THE SAHARA REGION

Dr. Carine David[12]

A French colony since its annexation by France in 1853, New Caledonia is an archipelago located in the South of the Pacific Ocean. As a settlement, it is now home to a diverse society, deeply divided on a mainly ethnocultural basis, which clearly reflects on a political level. On the one hand, you have the original people, indigenous Melanesians called "Kanaks", overwhelmingly pro-independence. On the other hand, you have the descendants of former settlers and former convicts, but also descendants of Asian and Oceanian workers who migrated to this territory during the second half of the 19th century and throughout the 20th century.

In 1946, New Caledonia became an overseas territory. Under the pressure of a pro-independence movement encouraged by a French State unable to maintain the autonomy granted in 1956, New Caledonia later on had to go through a series of statutes, also called 'institutional yo-yo'[13] which started in the 1960's and lasted almost three decades. Indeed, between 1956 and 1988, around ten statutes were successively implemented, which were to progressively shape New Caledonia's current statute.

New Caledonia's current institutional architecture indeed stems from progressive statutory evolution which turned this overseas territory into a collectivity (*collectivité*) of indisputable originality within France's unitary State[14].

Therefore, Deferre's 1956 framework law initiated a considerable autonomy through massive devolution of power and a local collegiate executive. The Lemoine Statute of 1984 introduced internal federalism by dividing the territory into 'six countries', the logic of which will be confirmed in the successive statutes that culminated in 1988 in the current provincial division. The 1998 Nouméa Accord finalized this architecture by providing the local parliament, called Congress of New Caledonia, with a legislative power that elects the local executive whose members, elected under a proportional system, represent the main local political forces, loyalists and pro-independence.

The Nouméa Accord of 5 May 1998, which for the first time went beyond the constitutional framework established by the 1958 Constitution, stemmed from a tripartite negotiation between the State and local political representatives from two political movements, and required a revision of the French Constitution to lead to the establishment of a *sui generis* territorial collectivity with strong institutional and normative autonomy.

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[13] G. Agniel, "The statutory experience of New Caledonia or the study of the yo-yo movement in the service of the institutional evolution of an overseas territory", in "The statutory future of New -Caledonia. The evolution of France's links with its peripheral communities", Studies of French documentation, 1997, p. 41.

[14] C. David, "Essay on the law of the Caledonian country - The duality of the legislative source in the unitary State", ed. L'Harmattan, Coll. GRALE/CNRS, 656 pages, 2009

The exceptional legal and political framework thus established can be explained by a logic of progressive emancipation[15], New Caledonia being on the United Nations' list of non self-governing territories in need of decolonization. It is thus no coincidence that the 20 year cycle established under the Nouméa Accord would end with the exercise by the Caledonians of their right to self-determination. Three referendums thus took place in 2018, 2020 en 2021, which each time led to the rejection of independence for New Caledonia[16].

Uncertainty nevertheless remains in New Caledonia due to the fact that most pro-independence voters did not take part in the third referendum organized on 12 December 2021. The comparison with this territory nevertheless remains useful in so far as while the current statute is only meant to last for another few years, the next statute can only a priori move towards greater autonomy. In any case, the granting of legislative power is an achievement which will never be questioned in the future statute of New Caledonia.

New Caledonia's political and administrative organization is based on several elements, resulting from the political balance found during the tripartite negotiations between the State, pro-independence representatives and loyalist representatives during the negotiation of the Nouméa Accord.

New Caledonia is subdivided into three provinces, endowed with a deliberative assembly and an executive through the Speaker of the Assembly, and deputy speakers. This political structure allows for power sharing between the main political parties of the territory. New Caledonia itself has its own assembly, the Congress of New Caledonia, whose members come from the provincial assemblies; a government elected by the Congress by proportional representation; a customary Senate representing the Kanak custom, whose members are appointed by the traditional authorities and a state representative who ensures the exercise of state competencies, as well as the legality of decisions made by local authorities.

Within the Caledonian institutional setup, the Congress of New Caledonia acts as a real parliament (I). In this respect, it is the only assembly of French territorial authorities with legislative power, thanks to its capacity to adopt 'country laws'.

I - The Congress of New Caledonia, the only local parliament in the French legal order

The Congress is thus the only local assembly with legislative power under French law. Just like in the case of Morocco, the fact that France is a unitary state indeed normally prohibits any devolution of legislative power.

In order to fully understand the role played by the Congress of New Caledonia in the local institutional architecture, it is important to understand how it is appointed, based on a distortion of representation among its members with a view to ensuring political rebalancing (A). We shall also look into its role within the Caledonian legal order (B).

[15] Despite this logic of progressive emancipation, the local population is represented in the national Parliament, just like the rest of the population, since two Caledonian MPs are members of the National Assembly, the lower house of the national Parliament, and two senators are appointed to the upper house.
[16] https://www.nouvelle-caledonie.gouv.fr/Politiques-publiques/Elections

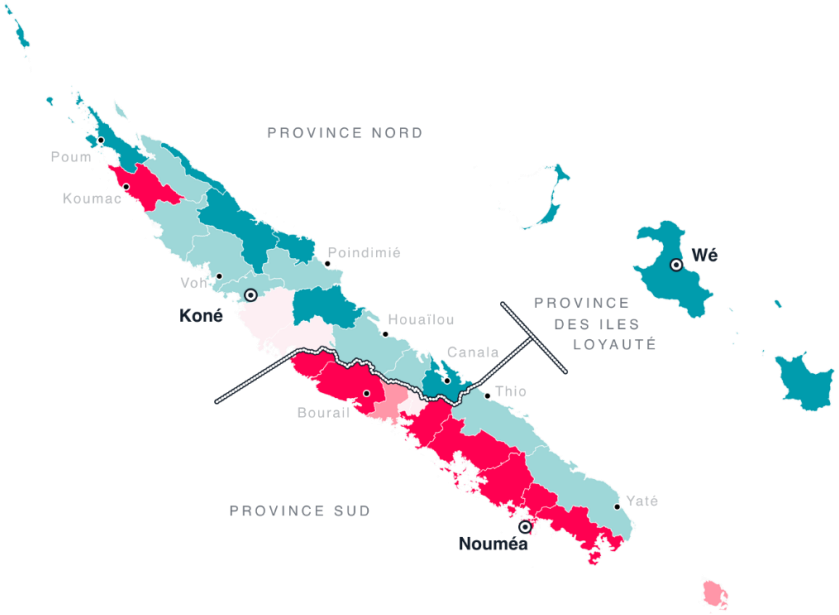
A - The Congress of New Caledonia[17], a symbol of the political rebalancing wanted in the Nouméa Accord

The Congress of New Caledonia is in many respects an original institution. The same applies to its composition which implies that certain parts of the territory are overrepresented to ensure political rebalancing in favor of the first people (2). This distortion rests on the appointment of local parliaments by proportional representation within provincial constituencies and by a highly restricted electorate (1).

1/ Appointment of the members of Congress

The appointment of the members of Congress of New Caledonia is not subject to an election as such. Councilors are indeed appointed during the elections to the provincial assemblies.

It is worth highlighting here the major political clout of the provincial level. The provinces were established by the Matignon agreement following bloody events, and they are a federal response to the need to ensure political power sharing in a territory that is deeply ethnically divided. The three provinces thus allow each major political group to enjoy political power over the parts of the territories where it represents the majority.



https://www.lemonde.fr/les-decodeurs/visuel/2017/12/02/nouvelle-caledonie-l-histoire-d-un-territoire-divise_5223594_4355770.html

Each province thus represents one electoral district for the purpose of electing the members of the Congress, based on a first-past-the-post proportional representation system. The election takes place every five years. The 1st Congress took office in 1999 and was later renewed in 2004, 2009,

[17] www.congres.nc

2014 and 2019. The next election will thus take place in 2024, unless political representatives find an agreement by then, which would lead to a new institutional set-up.

The peculiarity of this election lies in the electorate allowed to vote. A static and restricted electoral roll was indeed established. To put it simply, we can say that anyone who came to settle down in New Caledonia after 1998 is not allowed to vote in this election. In other words, as we speak, some residents of over 20 years are not allowed to vote in the elections to the provincial assemblies and to the Congress. These people are not citizens of New Caledonia since formal citizenship is only based on the right to vote in this election.

The maintenance of this electoral roll in the upcoming statute is a sticking point in the political discussions to come. Pro-independence activists indeed want to keep this electoral body because it gives them more representation since the people who settled down in New Caledonia generally come from mainland France and want the territory to remain a part of France and thus mainly vote for loyalist parties. As for loyalist political representatives, they want, at the very least, a more flexible electoral roll, with the support of the State. The main argument has to do with the fact that such deprivation of the right to vote is unconventional. The European Court of Human Rights was indeed given the chance to express itself on this electorate in the case Py vs. France in 2005[18]. If it hasn't condemned France for a violation of the convention it is only because this restriction is said to be transitional and that perpetuating it would therefore not be possible.

Some 50.000 people are currently excluded from the electoral roll[19], they can vote in the national elections (presidential and legislative), in the European and municipal elections, but not in the elections to the provincial assemblies and to the Congress of New Caledonia.

This measure favors the representation of the pro-independence camp by minimizing the electorate of loyalist political parties, and goes hand in hand with an overrepresentation of voters from the Northern province and from Loyalty Islands Province.

Finally, it is worth noting that gender equality applies in the election of the members of provincial assemblies and of Congress, there must be perfect balance between men and women on the lists of candidates. In this respect, they seem to go further than the Moroccan initiative which provides for *"adequate representation of women"*, without giving any more details.

2/ Overrepresentation of the Melanesian population in the Congress of New Caledonia

The allocation of seats in the Congress of New Caledonia is thus decided at provincial level. However, the number of seats allocated to each province is not proportional to their population

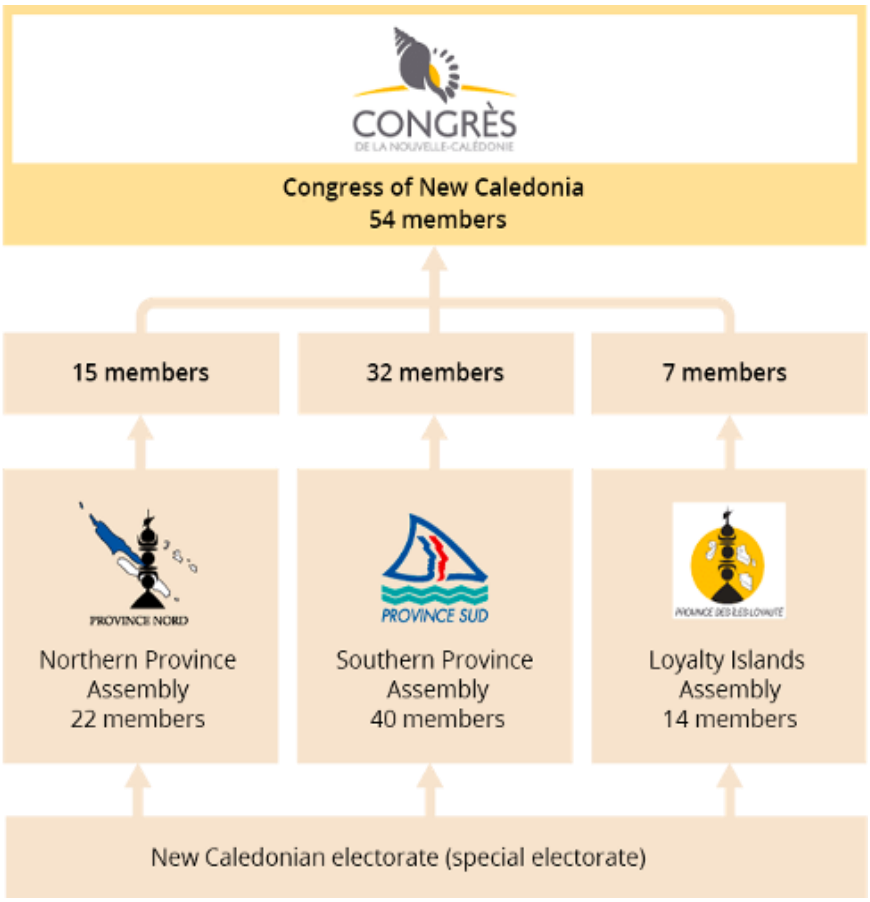
[18] CEDH, Court (second section), Affaire Py c. France, 11 January 2005, 66289/01.

[19] For the 2022 legislative elections in New Caledonia, 219,260 people were on the general electoral roll. For the latest 2019 provincial elections, 169,552 people were on the electoral roll (21,205 in Loyalty Islands Province, 39,903 for the Northern Province and 108,444 for the Southern province.

or its electorate and the people of the Northern province and that of Loyalty Islands Province, where the Kanak population is largest, are overrepresented.

Therefore, nearly 95% of the population of Loyalty Islands proclaimed themselves Kanak during the latest census carried out in 2019.[20] They were 72% in the Northern province.[21] By way of comparison, the Kanak people only represent some 29% of the population of the Southern province.

The Congress of New Caledonia is made up of 32 of the 40 representatives elected to the Southern Province Assembly, 15 of the 28 members of the Northern Province Assembly, and 7 of the 14 members of the Loyalty Islands Province Assembly, i.e. 54 members in total.



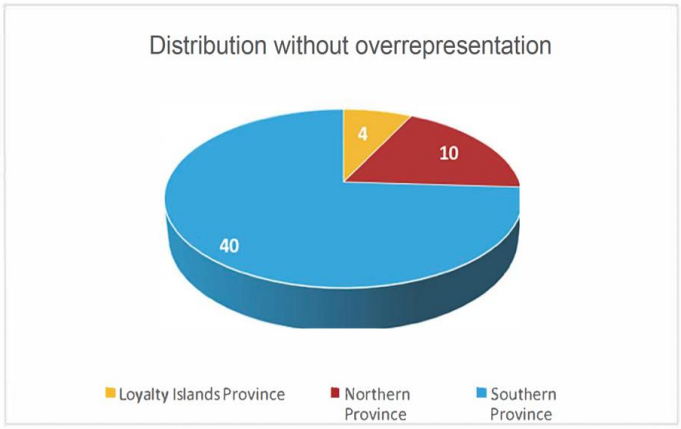
https://www.congres.nc/lassemblee/composition

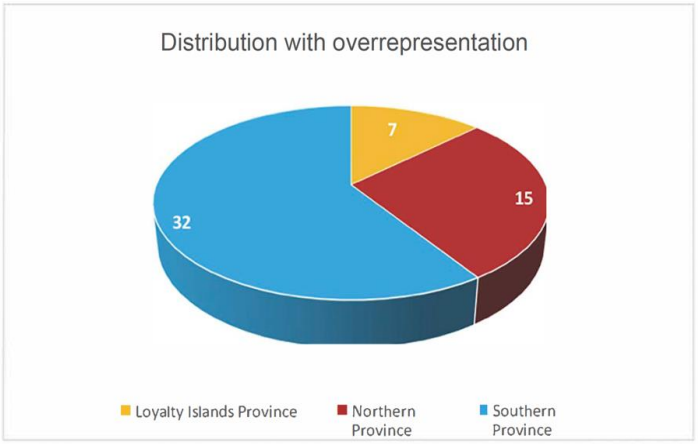
[20] Knowing that out of the remaining 5%, 2% declared that they belong to several communities. Only 1.75% of the population declares itself of European origin.

[21] Moreover, 10% of them declared that they belonged to several communities. Just under 10% of the population declared themselves of European origin.

This distribution is however not proportional to the population of the various provinces. The Southern Province has 203,144 inhabitants, the Northern Province has 49 910 inhabitants, and the Loyalty Islands Province has 18,853 inhabitants.

Here is how biased representation is:





This overrepresentation of the Northern Province and of Loyalty Islands Province stems from the logic of political, economic and social rebalancing wanted in the Nouméa Accord and ensures relative political balance within the local assembly.

During the latest renewal of the assembly in 2019, a new political party representing the population of Wallesians and Futunians (another French territory in the Pacific), i.e. around 8% of the population, made inroads. Therefore, there currently are in Congress 26 pro-independence representatives, 25 loyalist representatives, and 3 representatives of this party.

As we shall see, beyond the leading role this gives the new party within the very assembly, by tipping the majority one side or the other, the distribution of seats in Congress is also important in the light of the place of Congress within the local institutional architecture.

B - The Congress of New Caledonia within the local institutional architecture

The role of Congress within the institutional architecture of New Caledonia is typical of a parliamentary system. In any event, New Caledonia's statutory organization is much closer to that of a state than to that of a local government. The functions of New Caledonia's Congress are clearly characteristic of a parliament, in that it carries out the following typical missions: the exercise of legislative power and the oversight of government actions. This attests to the parliamentary nature of New Caledonia's political system in so far as the policy direction of the executive depends on that of the assembly which appoints its members and holds the power to stop it from acting through a vote of no-confidence.

Moreover, in order to take into account the sociocultural specificities of New Caledonia and its projection in the functioning of the political system, the members of the Government of New Caledonia are appointed by Congress based on proportional representation. The lists of candidates, who are not necessarily members of the assembly, are presented by the political groups constituted within Congress.[22]

The composition of the local executive is undeniably original. Its appointment based on proportional representation means that the Government in its composition reflects that of the assembly and representatives of the various political movements represented in Congress sit side by side, in other words loyalist and pro-independence representatives serve together in government.

As can be seen, the role of the local parliament and its relations with the local executive differ substantially from what is offered in the Moroccan Initiative for the Sahara Region. If the regional parliament plays a key role in the appointment of the executive, its role is limited to the appointment of the head of government, who then forms his government. The other difference is that, in New Caledonia, the state isn't involved in the appointment of the government since it is the Speaker of the Congress who announces the results of the elections of the members of government and immediately sends them to the High Commissioner, while it is expected that the Head of the Government of the Sahara is invested by the King.

Besides the exercise of legislative power, to which we will return in part 2, Congress enjoys powers in terms of oversight of government action, which can lead it to end the government's term.

Congress can therefore, at the request of the Bureau or at least 20% of its members, establish commissions of enquiry based on proportional representation of elected groups. These are mandated to collect information either on specific incidents, or on the management of New Caledonia's public services with a view to presenting their conclusions to congress.

This mechanism is rarely used since, as a matter of fact, only one commission of enquiry was ever established since 1999.

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[22] Section 11 of Congress deliberation No. 0009 dated 13 July 1999 establishing the standing orders of the Congress of New Caledonia provides that a minimum of 6 members are required to set up a political group in Congress.

The Organic Act also makes it possible for congress to question the government of New Caledonia's management by voting a no-confidence motion modeled on its national counterpart. It must be signed by no less than one-fifth of its members (one-tenth at the national level). Congress must then meet two days after the no-confidence motion has been tabled. Members vote over the two following days. Only votes in favor of the no-confidence motion are counted and it can only be carried by an absolute majority of congress.

The adoption of the motion terminates the government, although it must continue to manage day-to-day business until a new government is elected.

This system is however not balanced since the government of New Caledonia has no power to dissolve the Congress. The Organic Act indeed provides that when it is impossible for the Congress to operate it can, on advice from its Speaker and from the government, be dissolved by reasoned decree in the Council of Ministers. Such dissolution, pronounced by the state, automatically leads to the dissolution of provincial assemblies and necessarily terminates provincial and territorial executive powers.

The fact that the Government of New Caledonia is appointed based on proportional representation implies that political groups are somehow neutralized, which makes no-confidence motions pretty unlikely since the decisions made within government are made collectively during so-called "collegiality" meetings. This is why the motion of no-confidence has never been used.

II - The legislative power of the Congress of New Caledonia[23]

The primary function of the Congress of New Caledonia nevertheless remains the exercise of legislative power, in the form of the power granted to the local assembly to adopt acts of a legislative nature, called "country laws", which in the hierarchy of norms stand at the same level as the acts adopted by the National Parliament in its fields of competences. Since the State no longer exercises the powers irreversibly transferred to New Caledonia, it can no longer involve itself in these matters. However, there is no procedure by which local bodies could establish the State's encroachment on the powers of the collectivity, whereas such a mechanism exists in other overseas collectivities[24] though they have no legislative power.

Such legislative power is exercised on a substantial matter (A) and through an adoption procedure (B) according to the monitoring procedures (C) established in the Organic Act adopted by the national parliament.

A - Matters covered by country laws

The Organic Act distributes powers between the State, New Caledonia and the provinces, the first two enjoy jurisdiction ratione materiae whereas the provinces - a politically highly sensitive level

[23] Collective, “Fifteen years of local laws in New Caledonia – On the paths to maturity”, C. David (dir.), ed. PUAM, coll. Overseas law, 2017, 330 pages.

[24] A procedure before the Constitutional Council allows French Polynesia and Saint Martin and Saint Barthélemy's collectivities in the Antilles to enforce their powers in case of encroachment by the State.

- enjoy ordinary jurisdiction. The State thus still exercises a number of powers, such as guaranteeing public freedoms, defense, the currency or even justice, higher education and research.

As for the Congress of New Caledonia, it exercises its powers through regulations, in the form of decisions, or through the legislative route, in the form of "country laws". In this respect, and this may be a unique case in the world, depending on the subject matter, Congress has to determine the nature of the measure adopted. This reminds us of New Caledonia's previous statutes in so far as the local assembly used to intervene - just like other collectivities (French Polynesia, for instance) - in matters that fell under national law but were regulated by local regulatory acts, since until 1998 and the Nouméa Accord, the devolution of legislative power to a local collectivity had never been considered by the French State.

Therefore, though article 22 of the Organic Law lists over 30 competencies entrusted to New Caledonia, to which now have to be added a certain number of competencies over time, only the subject matters mentioned in article 99 of the Organic Law are considered as the local legislative domain. It is worth noting that it doesn't match the national legislative domain. Some legislative powers at national level don't come under the purview of New Caledonia but are in the hands of the State[25] or of the provinces[26]. Moreover, certain local legislative powers have no national equivalent.[27] Finally, other competencies which are decided by New Caledonia, come under its regulatory powers[28].

In other words, the study of the substantial domain of the country law doesn't truly reflects the legislative powers of the Congress of New Caledonia and of the scope of the competencies devolved to the local authorities, even though the most important ones come under the country law.

Country laws are thus legally binding in the domain established in article 99 of the Organic Law. If they are adopted outside the local legislative domain thus established, they become regulatory measures. Such regulatory nature can be invoked during legal proceedings within three months.

In any case, in practice, country laws mainly come into play in two material fields:

- Rules related to the tax base and tax collection, duties and taxes of any kind. Taxation and customs are two domains in which country laws are frequently adopted with about 40% of the country laws adopted since 1999 in this area.
- The fundamental principles of labour law, union law and social security law; the fundamental guarantees of the public administrations of New Caledonia and the communes. This is the second biggest area in which the local legislator intervenes since, here again, some 40% of country laws have been adopted in these areas.

The local legislator thus only marginally intervenes in other areas, such as:

[25] Higher education, for instance.
[26] The environment, for instance.
[27] Customary law or the Kanak identity, for instance.
[28] Education, for instance.

- Identity signs and the name of the territory. Only one country law was adopted in this area to establish the motto of New Caledonia[29], it's anthem and the effigy on its bank notes;
- The rules regarding foreigners' access to the labour market;
- Customary civil status, customary land tenure and customary assemblies; the limits of customary areas; the procedures for appointing the members of the customary senate and traditional councils;
- The rules regarding hydrocarbons, nickel, chromium, cobalt and rare earth elements;
- The rules related to state lands law for New Caledonia and the provinces;
- The rules governing access to local employment, based on the principle of local preference;
- The rules governing people's condition and capacities, matrimonial regimes, successions and gifts;
- The fundamental principles governing property ownership, rights in rem as well as civil and commercial obligations;
- The distribution between provinces of operating and equipment grants;
- The powers transferred and the timelines for these transfers, within a calendar established by the statutory organic law;
- The establishment of independent administrative authorities, in the areas that come under its purview.

As can be seen, the local legislative field differs considerably from the one proposed in Sahara.

The budget or education, for instance, are indeed decided by New Caledonia but under its regulatory powers. The environment is regulated by the provinces and is therefore not covered by country laws, whereas it would be the case for the Sahara. A few commonalities however emerge: taxation, trade, social protection, employment or the culture of the local populations are decided at the local level.

B - The adoption of country laws

The statutory organic law establishes the modalities for the adoption of country laws, complemented by the standing orders that Congress adopted for itself.

The legislative initiative concurrently lies with the Government of New Caledonia and the members of Congress.

Draft laws and bills are presented to the Council of State for an opinion before they are adopted by the government deliberating as a Council for the draft laws, and before the first reading for the bills. This opinion focuses mainly on compliance of the provisions with conventions and with the Constitution; it is an advisory opinion which the Congress is free to disregard if it so wishes.

[29] "Land of speech, land of sharing".

Country laws are adopted by the congress in a public vote, by a majority of its members, unlike parliamentary deliberations which are adopted by a majority of the members present or represented.

For the rest, the procedure is mostly modeled on its national counterpart, subject to minor adaptations.

For each draft country law or bill, a rapporteur is appointed and tasked with drafting a written report to be presented, tabled, printed and sent to the members of Congress at least eight days before the session.

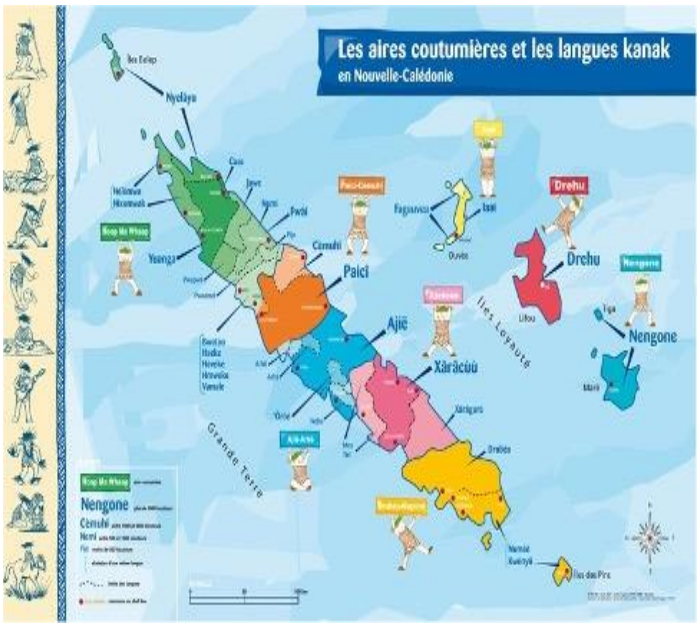
During the fifteen days that follow the adoption of a country law, the High Commissioner, the Government, the Speaker of the Congress, the president of a provincial assembly or eleven members of Congress can submit such law or some of its provisions to a new deliberation of Congress, which cannot be rejected.

This new deliberation is a mandatory precondition to be able to refer the matter to the Constitutional Council for an a priori constitutional review of the country law.

It is worth noting here that when the country law relates to the Kanak identity, in other words to customary civil status, customary land tenure, and customary assemblies, the limits of customary areas or the procedures for appointing the members of the customary senate, the procedure involves a legislative shuttle with the Customary Senate, the hallmark of partial bicameralism.

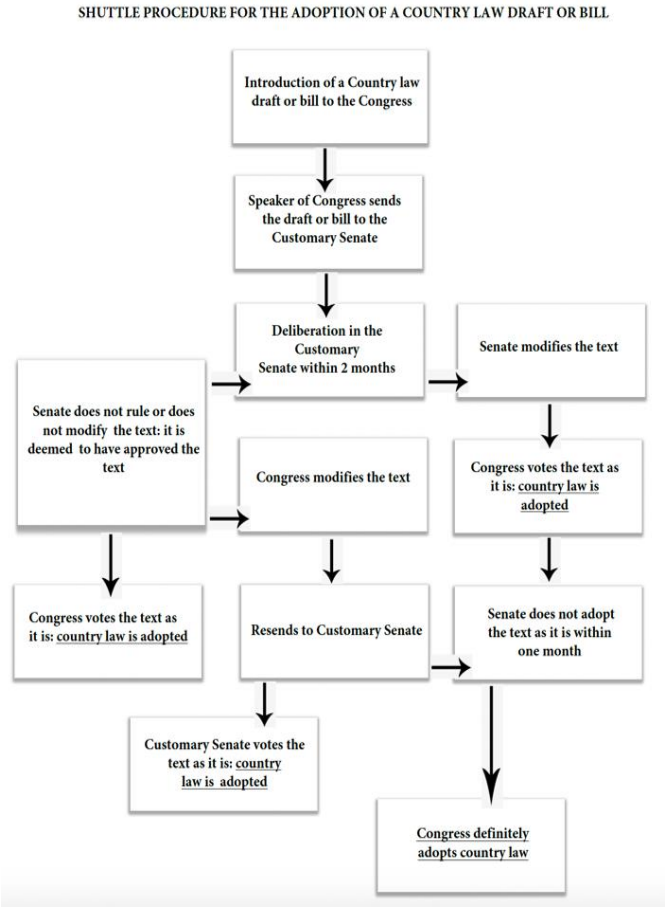
The Customary Senate is an original assembly made up of 16 customary senators, two for each of the eight customary areas of New Caledonia.

Customary areas and the Kanak languages in New Caledonia



https://gouv.nc/gouvernement-et-institutions-les-autres-institutions/le-senat-coutumier

The adoption procedure is summarized in the figure below:



In C. Gindre-David, *Essai sur la loi du pays calédonienne - La dualité de la source législative dans l'État unitaire,* L'Harmattan publishers, Coll. GRALE/CNRS, 2009, p. 76.

C - Control of country laws[30]

Just like their national equivalent, country laws can be subject to a constitutional review by the Constitutional Council, which is the symbol of the legislative nature of country laws. This optional review can be carried out via two different procedures. The law can indeed be subject to an a priori review upon referral to political authorities. Since 2010, it can also be subject to a priority preliminary ruling on constitutionality, in other words a posteriori exceptional review.

In the framework of an a priori review, a country law that is subject to a new deliberation in Congress can be referred to the Constitutional Council by certain local political authorities: the High Commissioner, i.e. the representative of the State locally, the Government acting collectively, the Speaker of the Congress, the president of a provincial assembly or eighteen members of the

[30] C. David, "The incompleteness of the control of the law of the country", in C. David (Dir.), 15 years of laws of the country – On the paths of maturity, ed. PUAM, Coll. Overseas law, 2016, p. 97-108.

Congress, in other words a third of the members of the assembly. They have ten days to do so as of the transmission of the text adopted to the High Commissioner.

The Constitutional Council then takes action within three months after referral. Its decision is published in the official gazette (Journal officiel) of the French Republic as well as in the official gazette of New Caledonia.

If the Constitutional Council notes that the country law contains a provision which is contrary to the Constitution as well as inseparable from the law as a whole, it cannot be enacted. If the Constitutional Council decides that the country law contains a provision which is contrary to the Constitution without concurrently noting that said provision is inseparable from the law, only that provision cannot be enacted.

The High Commissioner enacts the country law, countersigned by the President of the Government, either within ten days after transmission by the Speaker of the Congress when the time limit provided for to bring the matter before the Constitutional Council has elapsed, or within ten days following publication in the Official Gazette of New Caledonia and the decision of the Constitutional Council.

Country laws can moreover be subject to an exceptional a priori review introduced in French law though the national law in 2010. The provisions of a country law can consequently be subject to a priority preliminary ruling on constitutionality in conditions that are very similar to those that apply for national laws.

Therefore, a litigant can in the course of proceedings raise an objection as to the unconstitutionality of a provision of a country law. This priority preliminary ruling on constitutionality can be lodged at any time during the proceedings, in the first instance as well as at the appeal stage or even in cassation. The court seized decides whether it is admissible and, as the case may be, the highest court decides whether it is admissible, in other words the Court of Cassation or the Council of State. If it is deemed admissible, then an ordinary court stays the proceedings, refers the question to the Constitutional Council which then has three months to decide whether the contested provisions infringe "the rights and freedoms guaranteed by the Constitution" in keeping with article 61-1 of the French Constitution.

Overall, it can be said that the Constitutional Council has made few decisions on country laws. Since 1999, only seven decisions were served under an a priori review. Since country laws, to a large extent, result from draft country laws collegially discussed within Government, and have to undergo a second reading before they can be referred to the Constitutional Council, the system seems to have limited the number of appeals against provisions of country laws.

A posteriori reviews, launched on 1 March 2010, were hardly more successful. In twelve years, only six priority preliminary rulings on constitutionality were lodged against local legislative provisions.

Over the months to come, local political representatives will have to try to find a solution to end the crisis caused by a disagreement over the third and final referendum provided for in the Nouméa

Accord that took place on 12 December 2021 without the participation of an overwhelming majority of the Kanak population. This led the pro-independence camp to challenge this consultation. One thing is certain however: no one will consider backtracking on the legislative power entrusted to the Congress of New Caledonia. It is more than likely that the scope of these powers will be broadened under the next statute.

Since 1999, date of the adoption of the first country law by the Congress of New Caledonia, the local legislative assembly adopted 261 country laws. After an adaptation period, the Congress of New Caledonia gained independence from the national framework and now produces country laws that more and more accurately reflect the Caledonian identity and the specificities of this territory.

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

Dr. Jorge M. Farinacci-Fernós[31]

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.

[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

[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.

THE AUTONOMY OF RODRIGUES: COMPARATIVE ELEMENTS WITH THE MOROCCAN INITIATIVE FOR THE SAHARA REGION

Dr. Marie Valerie Uppiah[78]

Introduction

The 20th century has witnessed a growth in the number of countries which moved from a colonial status to become independent. Over a hundred countries gained their independence from 1900 to 2000. Independence brings forward various socio-economic and cultural changes in the life of a country. As countries become independent, they are able to take decisions which will work in their best interests. One example is Mauritius. After gaining its independence in 1968, Mauritius took a series of initiatives to promote education and health care for its citizens. In order to give everyone access to education and health care services, the Government established that these two public service sectors should be free for the citizens of the country. From an economic perspective, measures such as the transition from a mono-crop industry to the expansion of the tourism, textile and financial sectors created employment and contributed to the economic growth of Mauritius (Uppiah, 2015).

Along with independence, another action taken by some countries was to become autonomous. Political autonomy occurs when a territory within a particular state becomes self-governing. This means that the autonomous state has the capacity to take decisions which are tailor-made for its specific needs. Having an autonomous status also means that the territory is not under the full control of the main government (Foldvary, 2011). Worldwide, there are various countries which have claimed an autonomous status. Examples include: the Basque region in Spain, Hong Kong from China and Greenland from Denmark.

In the Indian Ocean, an example of an autonomous territory is Rodrigues Island. In 2002, Rodrigues gained its autonomy from Mauritius. This autonomous status allows Rodrigues to set up its own system of governance. Parallel to the three branches of government which exist in Mauritius, namely: legislative, executive and judiciary, Rodrigues has set up its own institutions which govern and regulate the administration of the country. These institutions are: the Rodrigues Regional Assembly (which is the legislative branch), the Commissions (which are equivalent to the executive) and the Courts of Rodrigues which forms part of the judiciary.

Celebrating the 20th anniversary of its autonomy this year, Rodrigues can be considered as a model of political autonomy in the African and Indian Ocean region. From a peaceful transition from being a district of Mauritius to become an autonomous territory, Rodrigues has adopted and

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implemented measures that address the specific needs of the country. For example, as Rodrigues relies heavily on its fishing industry, measures to empower local fishing communities are constantly being implemented. These measures can range from grants being given to local fishing communities to trainings offered. Other measures involve: encouraging the development of small and medium enterprises and working in collaboration with the government of Mauritius on national matters.

The aim of this research is to elaborate on the autonomous status of Rodrigues. The paper will be divided into three parts. Part I will examine some international law principles such as the principle of self-determination and the concept of autonomy to better understand why countries opt to become autonomous. Part II will investigate the steps taken by Rodrigues to become autonomous. The governance structure and administrative system of the island will be explored as well as the current state of affairs in the country 20 years after its autonomy. Part III will examine the Moroccan initiative and will elaborate on the importance of the devolution of legislative powers. Part IV will provide for lessons to be learnt from the Rodrigues experience and will conclude the paper.

Part I: International Law Principles

The right to Self-Determination

Public international law provides for a panoply of principles and regulations which help countries regulate their interactions with each other and also provides guidelines to assist them in shaping their internal policies and affairs. Self-determination is an example of an international law principle which guides countries in cases where they are seeking independence or political autonomy.

First referenced to in Article 1(2) of the United Nations Charter 1945, self-determination has been defined by Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) 1966 and Article 1 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 as:

> *'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.*

The concept of self-determination emerged as a right during the decolonisation period post World War II (Saul, 2011). The United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples 1960 provides that peoples who have been subject to 'alien subjugation, domination and exploitation' (Article 1) have the right to self-determination.

Article 2 of the Declaration states that through self-determination, the people can 'freely determine their political status and freely pursue their economic, social and cultural development'.

Through the definition of self-determination provided by the UN Charter 1945, the ICCPR 1966, the ICESCR 1966 and the United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples 1960, two important elements of international law can be identified. Firstly, that the people can freely choose their political status and secondly their liberty to determine their economic, social, and cultural development.

People freely choosing their political status involves two elements: (i) the people and the state having the ability to choose their status (either as an independent state or an autonomous territory) and (ii) their territorial integrity.

(i) The choice of status

Through national consultations or referendums, people can choose the status of their country. For example, the latest country to have gained independence is South Sudan. In 2011, after a referendum, the people of South Sudan voted to become an independent state, thus separating them from Sudan. In other cases, territories or regions may choose to become autonomous. For instance, in 2019 in Ethiopia, by a percentage of 98.5% of votes, the Sidama ethnic group through a referendum voted to have their own self-governing autonomous region. These examples illustrate the will of the people to freely chose the status of their country or region.

(ii) Territorial integrity

The second element to be considered for political status is territorial integrity. As regions or countries are seeking either independence or autonomy, it is important to ascertain their geographical morphology. The past decades have witnessed conflicts among several regions of the world when it came to defining their geographical boundaries and limits. One current example is the conflict between India and Pakistan over the Kashmir region.

In order to avoid further territorial conflicts, one principle of international law which can be used is the principle of *uti possidetis juris.* This principle confers upon the people and the state rights and obligations as they gain independence or autonomy. Along with this, the boundaries of the state should be determined according to how the territory was prior to independence or autonomy (Castellino, 2008). Although this may bring controversy in some cases, the principle of *uti possidetis juris* provides a solution in determining the territory after independence or autonomy. Countries or regions have afterwards a moral obligation to determine, in a peaceful manner, the extent of their territory.

Along with choosing their political status, when abiding by the right to self-determination, there should be the respect of the liberty of the people to freely choose their economic, social, and cultural development. Link to this are two important branches of international law, namely: the right to development and human rights.

Article 1 (2) of the Declaration of the Right to Development reiterates the concept of self-determination. It emphasises the right of the people of a state to 'exercise their inalienable right to full sovereignty over all their natural wealth and resources'. The right to development, described as an inalienable human right in Article 1 (1), provides that every person is entitle to 'participate in, contribute to and enjoy economic, social, cultural and political development'. The right to development supports the self-determination of the people as it makes it a right for the people to participate and contribute to the economic, social, and cultural development of their autonomous or independent state.

From a human rights perspective, the ICCPR 1966 and the ICESCR 1966, two main international human rights instruments, highlight the importance of self-determination. Both covenants reiterate the ability of the people to freely dispose of their wealth and resources without prejudice.

The economic, social, and cultural development aspect of self-determination is important when a country is becoming independent or autonomous. It allows the country, through a democratically elected government, to take measure that will work in the best economic, social, and cultural interests of the people.

The right to self-determination is an important element to take into consideration when seeking independence or autonomy. It allows the people to freely choose their political status and their economic, social, and cultural development. As the International Court of Justice mentioned in the East Timor Case, the principle of self-determination is an essential principle of international law (East Timor [Portugal v Australia] ICJ Reports 1995).

The Concept of Autonomy

Political autonomy, being the capacity of a particular group to establish its own system of governance outside the power of a central government (Neufeld, 2019), is a phenomenon which is growing internationally. One example of political autonomy is regional autonomy.

Regional autonomy can be described as governance power vested to a minority group or inhabitants of a particular region. The minority group or inhabitants of this region have the power to administer and manage their internal affairs.

An important feature of regional autonomy is its constitutional entrenchment. For political autonomy to become a reality, many countries have amended their Constitution to include it. One example is the Constitution of Ethiopia. Ethiopia can be considered as an *avant-garde* from a constitutional law perspective. The country is one of the first African countries to grant minority group the constitutional right to self-government in their territory.

Article 39 (3) of the Ethiopian Constitution provides for the rights of Nation, Nationalities and People in Ethiopia to exercise a full measure of self-government and to establish institutions of government in their territory. Article 39 (3) reads as follow:

Article 39. Rights of Nations, Nationalities, and Peoples

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.

3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.

4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:

a. When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned;

b. When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;

c. When the demand for secession is supported by a majority vote in the referendum;

d. When the Federal Government will have transferred its powers to the Council of the Nation, Nationality or People who has voted to secede; and

e. When the division of assets is effected in a manner prescribed by law.

5. A "Nation, Nationality or People" for the purpose of this Constitution, is a group

of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

Seeking autonomy represents various advantages for minority groups and inhabitants of a particular region. More than a mere representation in Parliament, political autonomy allows groups to make legislative, executive, judicial and even fiscal policies that would be applicable to them solely. For example, in many Canadian and United States autonomous Indian reserved territories, certain form of taxes are not applicable. These taxes are applicable in other areas of the provinces but not in the autonomous regions.

Political autonomy enhances the preservation of culture and traditions. Minority or indigenous groups have the ability to enact legislations or take the necessary measures to preserve their traditions and culture. Examples of regions where autonomy was granted based on cultural and linguistic specificities are the Basque and Catalan regions of Spain.

Another positive aspect of autonomy is its ability to be a compromise between the creation of a separate state and staying as an integral part of a unitary state. Autonomy allows groups to have their own identity and make rules and laws that will benefit their intrinsic characteristics.

Autonomy may face some challenges in its implementation. Some nationalists are of the view that autonomy can be a threat to national solidarity and territorial unity. As pointed out in *Autonomy as a Strategy for Diffusing Conflicts* (2000), some groups willing to dissociate themselves with the main population of a country might create division and disharmony in a society.

Those who are against autonomy also argue that autonomy is an additional economic cost for the central government. There is the duplication of institutions and administrative duties which the central government will have to sustain. Furthermore, there is also the assumption that autonomous states might not be willing to share natural resources and benefits with the central government.

Despite its challenges, seeking autonomous status has been a success story in many cases. Autonomy has allowed to ease tensions in many situations and has uphold the right of self-determination of the people. An example of how autonomy has been a success story in the Indian Ocean is the case of Rodrigues island.

Part II: The Autonomy of Rodrigues

Background of Rodrigues

Located in the Indian Ocean, Rodrigues is a volcanic island 650km off the east coast of Mauritius. The island has a surface area of 108 km² and is 8 km wide and 18 km long. According to Statistics

Mauritius 2019, the total population of the country is 43,538 divided between 21,349 males and 22,189 females. The main economic activities and sources of income in Rodrigues are fishing, tourism, and agriculture.

When Mauritius gained its independence in 1968, Rodrigues became part of Mauritius. Section 111 of the 1968 Constitution of Mauritius provides for the outer islands which forms part of the Republic of Mauritius. Section 111 reads as follow:

> *"Mauritius" includes –*
>
> *(a) the Islands of Mauritius, Rodrigues, Agalega, Tromelin, Cargados Carajos, and the Chagos Archipelago, including Diego Garcia and any other island comprised in the State of Mauritius;*
>
> *(b) the territorial sea and the air space above the territorial sea and the islands specified in paragraph (a);*
>
> *(c) the continental shelf; and (d) such places or areas as may be designated by regulations made by the Prime Minister, rights over which are or may become exercisable by Mauritius.*

Hence Rodrigues, forms part of the Republic of Mauritius.

The movement towards autonomy

Shortly after Mauritius gained its independence in 1968, the people of Rodrigues started to express their will to become autonomous. Consultations were done with non-governmental organisations (NGOs) and local groups and the general feedback received was that the people of Rodrigues were in favour of their autonomy. Moreover, Mauritius granting autonomy to Rodrigues would have been beneficial to both. This would allow for a more decentralized system whereby Rodrigues would have been able to make decisions tailored for the needs and specificities of the island (Toulouse and Vithilingem, 2007)

In 1976, a Ministry of Rodrigues was created in Mauritius to look after and manage the internal affairs and matters of Rodrigues. In 1982 Mr Serge Clair, a Rodriguan citizen, became the first Minister for Rodrigues. By 1991, the Parliament of Mauritius voted for the Rodrigues (Local Council) Act 1991. The Act established a local Council for Rodrigues whose purpose was to advice the Minister for Rodrigues and promote development in the island.

In view of accelerating the procedures towards the autonomy of Rodrigues, in 2002, a delegation from Mauritius and Rodrigues went to Trinidad and Tobago. The purpose of this trip was to examine how Tobago was able to self-rule and administer their local affairs. The aim of the trip

was mainly to learn from the Tobagonian experience and implement some of the steps undertaken by Tobago in the Rodriguan context.

In 2001, the Government of Mauritius took the necessary measures to make the autonomy of Rodrigues a reality. The Rodrigues Regional Assembly Bill was presented in Parliament in Mauritius. After a unanimous vote, the Rodrigues Regional Assembly (RRA) Act 2001 was enacted. Through the Rodrigues Regional Assembly Act 2001, Rodrigues was granted its autonomy.

The RRA Act 2001 states at its Section 3 the establishment of the Rodrigues Regional Assembly, which shall be a body corporate and shall exercise its functions on behalf of the Government of Mauritius. Furthermore, section 26 of the Act provides for the responsibility of the Rodrigues Regional Assembly. Section 26 states that the Assembly is responsible for the formulation and implementation of policies for Rodrigues. These policies can range from agriculture to youth and sports (Fourth Schedule of the Rodrigues Regional Assembly (RRA) Act 2001).

In line with granting Rodrigues its autonomy, the Constitution of Mauritius was also amended to recognize the existence of the Rodrigues Regional Assembly. The Constitution provides for the powers of the Regional Assembly. Article 75B reads as follow:

> *75B Powers of the Regional Assembly*
>
> *(1) Subject to this Constitution, the Regional Assembly –*
>
> *(a) shall have such powers and functions as may be prescribed and, in particular, the power to propose and adopt Bills in relation to the matters for which it shall be responsible, which Bills, when adopted by Parliament in such manner as may be prescribed, shall be known as Regional Assembly Laws and shall be so designated in the Short Title;*
>
> *(b) may make regulations which shall be known as Regional Assembly Regulations and shall be so designated in the Heading.*
>
> *(2) Regional Assembly Laws and Regional Assembly Regulations shall apply only to Rodrigues.*

On 29 September 2002, the first local elections were held in Rodrigues. The aim of the election was to set up the first Rodriguan local government. After the election, the first local government was made up of: 10 elected members from the 'Organisation du Peuple Rodriguais' (OPR) and 8 elected members from the 'Mouvement Rodriguais' party who formed the opposition. Mr Jean Danial Speville became the first elected Chief Commissioner of Rodrigues.

How Rodrigues functions as an autonomous region of Mauritius?

As an autonomous region, Rodrigues administers it local affairs through its three branches of local government. These branches are: (i) The Rodrigues Regional Assembly (legislative), (ii) the Commissions (executive) and (iii) the Court of Rodrigues (judiciary).

(i) The Rodrigues Regional Assembly (legislative)

The Rodrigues Regional Assembly is the equivalent to a Parliament for Rodrigues. The Regional Assembly which was enacted under the auspices of the RRA Act 2001, allows for the elected members to pass new laws and regulations for Rodrigues (Section 26 RRA Act 2001). It is to be noted that these laws and regulations are only applicable in Rodrigues.

Any citizen, whether Mauritius or from Rodrigues, is eligible to stand as candidate in a local election in Rodrigues. The conditions imposed however are the following: (i) the person should be 18 years old or above and (ii) the person should have resided in Rodrigues for at least two years prior to the elections. The last elections in Rodrigues were held on 27th February 2022.

The Regional Assembly shall consist of 18 members. At the head of the Regional Assembly is the Chief Commissioner who is also the Head of Government. The Head of State for the autonomous island of Rodrigues is the President of Mauritius.

It is to be noted that during the general elections in Mauritius, two candidates from Rodrigues are elected. These two candidates are not involved in the affairs of the Rodrigues Regional Assembly. The two elected members from Rodrigues for the Mauritian general elections, become members of the Parliament of Mauritius. The role of these two elected members from Rodrigues is to join other elected members from Mauritius and act as legislators for the Republic of Mauritius. Their role is to participate in the law-making process for the Republic of Mauritius.

(ii) The Commissions (executive)

The executive branch for Rodrigues is under the aegis of the Chief Commissioner. There are seven commissions in Rodrigues, namely:

- Chief Commissioner's Office,
- Deputy Chief Commissioner's Office,
- Commission for Public Infrastructure, Housing, Transport and Water Resources,

- Commission for Social Security and Others,
- Commission for Health (Administration) and Sports,
- Commission for Environment, Forestry, Tourism, Marine parks and Fisheries and
- Commission for Youth, Community Development, Library Services, Archives and Museum.

The Commissioners at the head of these Commissions along with the Deputy Chief Commissioner and Chief Commissioner form the Executive Council of Rodrigues. The duties and powers of the Executive Council are mentioned at Section 35 of the RRA Act 2001. The section reads as follow:

35. Duties and powers of the Executive Council:

(1) The Executive Council shall be responsible for the carrying out of the functions of the Regional Assembly and the Chairperson, acting on the advice of the Chief Commissioner, may, for that purpose assign to a Commissioner the responsibility for one or more Departments of the Regional Assembly.

(2) In the exercise of their powers, the Members of the Executive Council shall be individually and collectively responsible to the Regional Assembly.

(3) Subject to subsection (2), decisions of the Executive Council may be implemented without the prior approval of the Regional Assembly.

(4) The Executive Council shall continue to discharge its functions during any period that the Regional Assembly stands dissolved.

The Chief Commissioner, as the chief executive for Rodrigues, is responsible for managing and administering the national affairs of Rodrigues. He is assisted in his duties by the Deputy Chief Commissioner.

The Chief Commissioner needs to submit an annual report for Rodrigues to the Prime Minister of Mauritius. The Prime Minister is the current Minister for Rodrigues. This annual report is the presented to the President of the Republic. The purpose of this exercise is to provide for an annual update on the status of affairs in Rodrigues.

(iii) The Court of Rodrigues (judiciary)

In Rodrigues, there is the Court of Rodrigues which is regulated by the Court of Rodrigues Jurisdiction Act 1913. The Court has the jurisdiction to hear civil and criminal cases in Rodrigues. The Court of Rodrigues is considered as a district court of Mauritius. Any appeal to a decision of

the Court of Rodrigues shall be made to the intermediate court in Mauritius (Section 11 Court of Rodrigues Jurisdiction Act 1913).

Mauritius has delegated legislative, executive, and even a degree of judicial power to Rodrigues. By doing so, Rodrigues has been able to take and implement decisions which were specific to the inherent needs of the country. Since 2002, there has been a smooth collaboration between the central government of Mauritius and the local government of Rodrigues concerning the administration of the island. An example of such collaboration can be found in the latest national budget of Mauritius. On 7 June 2022, the Minister of Finance announced that an amount of MRU 6.8 billion (ca USD 0.15 billion) has been allocated to Rodrigues and the outer islands for their development. The Prime Minister of Mauritius conducts frequent visits to Rodrigues to take note of the issues and progress made by the country.

The autonomy of Rodrigues shows the principle of self-determination and autonomy in action. Rodrigues having a fixed territory and permanent population has voiced out its will to become autonomous since Mauritius got its independence. The various governments heading Mauritius have always supported Rodrigues in its claim for autonomy. The wish of the people of Rodrigues was heard and prompt and responsive actions were taken by Mauritius to grant Rodrigues its autonomy.

Part III: The Moroccan Initiative and the importance of the devolution of legislative powers

To find a solution to the situation in the Sahara region, on 11 April 2007, the kingdom of Morocco submitted to the United Nations its initiative for negotiating an autonomy statute for the region. This autonomy statute shall grant the people of the Sahara region the possibility to self-govern their internal affairs. Legislative, executive, and judicial powers will be granted to the different competent authorities to ensure the democratic governance of the region.

By having the power of managing their own internal affairs, citizens of the Sahara region will be able to: enact their own taxes, duties, and regional levies; exploit their natural resources; determine their local administration, police force and jurisdiction and take other economic, social and cultural decisions that will be beneficial for the region.

An important aspect of autonomy statute of the Sahara region is the devolution of legislative powers to the region. Devolution of legislative power means that the central government of Morocco will grant the autonomous region the right to set up their own Parliament. The newly established parliament will have the capacity to make laws, rules, and regulations applicable to the region.

The elected members of the Sahara region's Parliament shall be representatives of the various Sahrawi tribes and other members elected by universal suffrage. Furthermore, an adequate representation of women in Parliament is also encouraged.

The composition of the Parliament, with people from the different cultural and regional backgrounds, ensures representation and fairness in parliament. This diversity will promote objectivity, transparency, and inclusive decision-making. All these principles are essential to perform parliamentary duties in a democratic autonomous entity.

Devolution of legislative power allows Parliament to make laws and regulations which are adapted to the needs of the region. With the different tribes and ethnicities present in the Sahara region, and by ensuring the representation and participation of the different stakeholders in their Parliament, this will result in laws being enacted that will respect and uphold the needs and traditions of the different groups.

In cases of devolution of legislative powers, some conditions need to be respected. For example, laws made by the region's Parliament should be in line with the sovereign State or kingdom's Constitution. This is one important condition of constitutional supremacy. Moreover, the region's Parliament should abide by international law and principles. For instance, Parliament should abide by the principle of *jus cogens* and not make laws which are contrary to the State or contrary to international law.

Another condition of devolution of legislative powers relates to the duties and obligations of members of Parliament. The elected members of Parliament have a duty to work in the best interest of the population. Furthermore, they should not use their privilege as members of Parliament for their own self-interest and put at stake the interest of the country and the region.

One of the main features of autonomy is the ability for the autonomous region to make its own laws and regulations. Autonomy would not be fully granted if a region or territory was still under the legislative power of the main State. The Moroccan Initiative embraces this philosophy for granting the Sahara region the capacity to create its own system of governance through its legislative, executive, and judicial structures.

Part IV: Lessons to be learnt from the Rodrigues experience

Since 2007, Morocco has taken the necessary steps to provide a solution to the dispute over the Sahara Region. One appropriate solution is to grant autonomy to region. Granting autonomy represents various advantages both for Morocco and constituents of the Sahara Region.

As autonomy is granted to the Sahara Region, it will give the region greater power and capabilities to conduct its own internal affairs. As submitted by Morocco to the United Nations Security Council, the powers granted to the autonomous Sahara Region would include, *inter alia*, legislative, executive, and judicial powers, the three basic powers needed for the good governance and administration of any state.

The advantages for the region to have these powers is that it will enable them to make laws that would suit their own specificities and needs. For example, laws can be made to ensure the protection of the rights of the various indigenous tribes which live in the region. For an executive power perspective, institutions can be set up to ensure the smooth running and administrative of the internal affairs of the region. From a judicial perspective, autonomy would allow for the creation of courts that could take into consideration national laws as well as customary laws to ensure fairness and justice.

Autonomy also provides for a good compromise between becoming an independent state or to stay as a unitary state. Autonomy gives the possibility to the citizens of the autonomous state to compare the situation between being politically and administratively attached to a State and the capacity to make their own tailor-made decisions while having the support of a central government. The people of the autonomous Sahara Region would be able to assess the benefits of having the capacity to create their own system of governance while benefitting from the support of a central government.

The right to self-determination of the people is not realized only in cases of secession or independence. The right to self-determination is also realized in cases of autonomy. When a region or territory becomes autonomous, as it was the case for Rodrigues, it is able to create its own system of governance. Through frequent elections and national consultations, citizens of the autonomous region are able to make their voice heard and express what they want for their country. In order to ensure the right to self-determination and the right to the people to participate in the affairs of the state, consultations and national debates should be carried out in the region.

The model of autonomy proposed by the Government of Morocco for the Sahara Region is similar to that of Mauritius and Rodrigues. The Sahara Region will be given the power to govern its legislative, executive, and judicial institutions. Some recommendations will be made, based on the Rodrigues and Mauritian experience, to ensure a smooth and effective administration of the autonomy of the Sahara Region.

i. On-going collaboration between the two governments

In the case of Mauritius and Rodrigues, there is an on-going communication and collaboration between the Mauritian central government and the Regional Assembly of Rodrigues. The purpose of the on-going collaboration and communication is to ensure that both countries are working

together towards realizing their respective socio-economic and development rights and to avoid tensions and conflicts.

ii. Representation of the elected members for Rodrigues in Parliament

The two elected members from Rodrigues, who are present in the Mauritian Parliament, illustrate the importance that Rodrigues plays in the legislative duties of Mauritius. Along with their fellow Mauritian citizens, they contribute to the law-making process in the Republic of Mauritius. This creates more visibility for Rodrigues and a sense of belonging to the Republic of Mauritius.

iii. Support culture and traditions

Just like there is a variety of culture and tradition among the people of Morocco and the Sahara Region, there are cultural differences between Mauritius and Rodrigues. In order to sustain and promote the Rodriguan culture, the government of Mauritius has assisted Rodrigues in inscribing the Rodrigues' 'sega tambour' on the UNESCO list of Intangible Cultural Heritage of Humanity. By recognizing the culture and traditions of the autonomous territory and helping the region or territory to preserve this culture, the central government is assisting the people in realizing their right to self-determination. As the Sahara region becomes autonomous, it should be confident in having the support of the government of Morocco in protecting the cultures and rights of its tribes and indigenous people.

Conclusion

This research illustrates the different features and steps to be taken when a territory or region is seeking autonomy. Around the world and throughout history, many countries have either become independent or autonomous regions. To ensure autonomy and to uphold the principles of international law, it is important to ensure that the right to self-determination of the people is respected. Through the principle of self-determination, the people are able to voice out whether they want to be in an independent state or become autonomous.

In the Indian Ocean, the island of Rodrigues represents a good example of autonomy. Being autonomous since 2002, Rodrigues has over been able to grow economically, socially, culturally, and environmentally. As an autonomous region, Rodrigues has its own system of governance through its Regional Assembly, Commissions and Court. The island can be said to be a model of autonomy in the Indian Ocean.

As the Moroccan government is taking the steps to make the Sahara region autonomous, it can inspire itself from the Rodriguan experience. The mode of governance in the Sahara region is similar to that of Rodrigues. Lessons to be learnt from Rodrigues are that: there should be continuous communication between the central government and the local government in order to

avoid conflict, there should be the representation of the people of the autonomous territory in Parliament and finally there should be the respect of culture and traditions.

The autonomy of Rodrigues can be used an example of a peaceful transition from a dependent region of Mauritius to an autonomous one. The system of governance is transparent, allows for the participation of the people and ensure constant collaboration with the government of Mauritius. As the steps are being taken to make the Sahara region and autonomous one, the case of Rodrigues can be used as an example to showcase how an autonomous region can enjoy democratic participate of its people and the welfare of the state.

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CONCLUSION

Dr. Marc Finaud[79]

Ladies and Gentlemen,

Thank you for attending our international research seminar on "Devolution of Legislative Powers in Regimes of Territorial Autonomy", and many thanks to the speakers who have addressed several interesting cases of territorial autonomy and compared them with Morocco's Initiative for the autonomy of the Sahara Region.

Allow me to make the following concluding remarks.

1) The discussion has shown that there are historical differences in the processes of devolution of legislative powers to autonomous regions. Sometimes, there have been advances and setbacks in the extent of autonomy, as in the case of New Caledonia or Puerto Rico. Of course, processes differ from islands or archipelagos in a federal system to a continental and unitary state such as Morocco. But the basic principles of autonomy are similar.

2) In most cases, legislative powers are a decisive factor of autonomy since the elected parliament in its turn elects the head of the executive, if not the full membership of the executive as in New Caledonia. It is important that the autonomy statute allows the parliament to control the executive and maintains a balance of power between the legislative and the executive. This is the basis of a full democratic system, as provided for in the Moroccan Initiative, irrespective of the differences in electoral systems (majority vote or proportional representation). In some cases, like in New Caledonia, it can be necessary to define the electorate to avoid an imbalance between settlers and the native population or, like in Rodrigues, to ensure the representation of the autonomous region to the national parliament.

3) In all cases of autonomy, the central state retains its traditional powers such as defence, foreign affairs, currency, etc. However, there may be conflicts of competencies, particularly when the respective competencies of the central state and the autonomous region are not explicitly enumerated. It is important that the autonomy statute includes mechanisms to solve such conflicts, like *a posteriori* control of constitutionality by the constitutional court (as in the Canary Islands).

4) As is the case for the Sahara region, it is important to consider autonomy as a legitimate means of fulfilling the right to self-determination of the regional populations and ensure that any change in the autonomy statute is agreed upon by the autonomous region to avoid a weakening of autonomy such as the current one in Puerto Rico.

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As a reminder, the proceedings of this seminars will be published by Morocco and available on the dedicated website of the International Academic Network on Autonomy (www.academicautonomynetwork.com).

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Marc Finaud is a former French diplomat who has been seconded to the Geneva Centre for Security Policy (GCSP) between 2004 and 2013 and now works for this international foundation, where he trains diplomats and military officers in international and human security and conducts research in those fields. During his 36-year career as a diplomat (from 1977 to 2013), he served in several bilateral postings (in the Soviet Union, Poland, Israel, Australia) as well as in multilateral missions (to the Conference on Security and Co-operation in Europe, the Conference on Disarmament, the United Nations). He holds master's degrees in International Law and Political Science. He was also Senior Resident Fellow (WMD Programme) at the United Nations Institute for Disarmament Research (UNIDIR) between 2013 and 2015. He is now also a Swiss citizen. List of publications: www.gcsp.ch/marc-finauds-publication.

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