LEGISLATIVE DEVOLUTION IN SPAIN: THE CASE OF THE CANARY ISLANDS

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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).

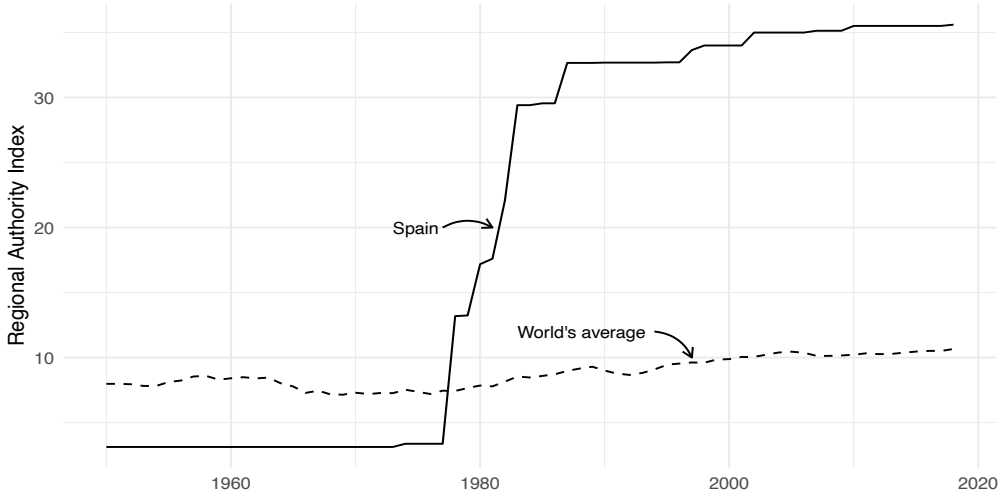

Figure 1. Evolution of Spain's level of regional authority.

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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.

References

Aja, E. 2003. *El estado autonómico: federalismo y hechos diferenciales*. Madrid: Alianza.

Alaez-Corral, Benito, and Abel Arias-Castaño. 2009. "The Role of the Spanish Constitutional Court in the Judicial Review of Parliamentary Legislation." *European Public Law* 15 (4): 597–613.

Amat, Francesc, and Toni Rodon. 2021. "Institutional Commitment Problems and Regional Autonomy: The Catalan Case." *Politics and Governance* 9 (4): 439–52.

Aragón Reyes, Manuel. 2006. "La Construcción Del Estado Autonómico." *Cuadernos Constitucionales de La Cátedra Fadrique Furió Ceriol*, no. 1: 75–95.

Aroney, N., and J. Kincaid. 2017. *Courts in Federal Countries: Federalists or Unitarists?* Toronto: University of Toronto Press.

Bäck, H., and M. Debus. 2019. "When Do Women Speak? A Comparative Analysis of the Role of Gender in Legislative Debates." *Political Studies* 67 (3): 576–96.

Blais, A. 2000. *To vote or not to vote: The merits and limits of rational choice theory*. Pittsburgh, PA: University of Pittsburgh Press.

Colomer, Josep M. 1990. *El Arte de La Manipulación Política. Votaciones y Teoría de Juegos En La Política Española*. Barcelona: Anagrama.

Delaney, E. F., and R. Dixon, eds. 2018. *Comparative Judicial Review*. Edward Elgar Pub.

Field, B., and K. Hamman. 2008. *Democracy and Institutional Development: Spain in Comparative Theoretical Perspective*. Basingstoke England; New York: Palgrave Macmillan.

Garoupa, Nuno, Fernando Gómez-Pomar, and Veronica Grembi. 2013. "Judging under political pressure: an empirical analysis of constitutional review voting in the Spanish constitutional court." *The Journal of Law, Economics, and Organization* 29 (3): 513–34.

Garoupa, Nuno, and Pedro C. Magalhães. 2020. "Judicial Politics: The Constitutional Court." In *The Oxford Handbook of Spanish Politics*, edited by Diego Muro and Ignacio Lago, 258–75. Oxford, UK: Oxford University Press.

Hanretty, Chris. 2012. "Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals." *European Journal of Political Research* 51 (5): 671–92.

Harguindéguy, Jean-Baptiste, Gonzalo Sola-Rodríguez, and José Cruz-Díaz. 2020. "Between Justice and Politics: The Role of the Spanish Constitutional Court in the State of Autonomies." *Territory, Politics, Governance* 8 (2): 222–40.

Hodder-Williams, R. 1992. "Six Notions of 'Political' and the United States Supreme Court." *British Journal of Political Science* 22 (1): 1–20.

Hueglin, Th., and A. Fenna. 2006. *Comparative Federalism: A Systematic Inquiry*. Broadview Press.

Iglesias-Machado, S. 2020. "Artículo 43. Funciones." In *Comentarios a La Ley Orgánica 1/2018, de 5 de Noviembre, de Reforma Del Estatuto de Autonomía de Canarias*, edited by A. Domínguez-Vila and J. R. Rodríguez-Drincourt. Madrid: Boletín Oficial del Estado / Parlamento de Canarias.

Lijphart, A. 1999. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven (CT): Yale University Press.

López-Aguilar, J. F. 1997. "Los Problemas de Constitucionalidad Del Sistema Electoral Canario. La Insoportable Permanencia de Una Disposición Transitoria." *Revista Española de Derecho Constitucional* 51: 95–139.

———. 2020. "Artículo 39régimen Electoral." In *Comentarios a La Ley Orgánica 1/2018, de 5 de Noviembre, de Reforma Del Estatuto de Autonomía de Canarias*, edited by A. Domínguez-Vila and J. R. Rodríguez-Drincourt, 253–59. Madrid: Boletín Oficial del Estado / Parlamento de Canarias.

Magone, José M. 2008. *Contemporary Spanish Politics*. London; New York: Routledge.

Marks, Gary, Liesbet Hooghe, and Arjan H. Schakel. 2008. "Patterns of Regional Authority." *Regional & Federal Studies* 18 (2-3): 167–81. https://doi.org/10.1080/13597560801979506.

O'Brien, Diana Z. 2015. "Rising to the Top: Gender, Political Performance, and Party Leadership in Parliamentary Democracies." *American Journal of Political Science* 59 (4): 1022–39.

Ortiz-Herrera, Silvia. 1997. "Articulación Del Tribunal Constitucional y Del Poder Judicial En La Labor Interpretativa de La Constitución. Especial Referencia a Las Sentencias Interpretativas Del Tribunal Constitucional." *Boletín de La Facultad de Derecho*, no. 12: 623–41.

Przeworski, Adam. 2005. "Democracy as an equilibrium." *Public Choice* 123 (3-4): 253–73. https://doi.org/10.1007/s11127-005-7163-4.

Ríos-Rull, Fernando. 1996. "Estado Autonómico y Procedimiento de Reforma Del Estatuto de Autonomía de Canarias." *Anales de La Facultad de Derecho. Universidad de La La Laguna*, no. 13: 149–72.

Rodríguez-Patrón, Patricia. 2016. "El Tribunal Constitucional." In *Derecho Constitucional básico*, edited by Josep M. Castellà, 207–23. Barcelona: Huygens editorial.

Sala, Gemma. 2010. "Can Courts Make Federalism Work? The Impact of the Constitutional Court on Federal Conflict in Spain." PhD Thesis (unpublished), New Haven, CT: Yale University.

Sanjaume, M., J.-J. Vallbé, and M. Muñoz-Puig. 2023. "Can Women Take the Floor in Parliament? Evidence from the Spanish Lower Chamber." *Women's Studies International Forum*.

Schertzer, R. 2017. "Federal Arbiters as Facilitators: Towards an Integrated Federal and Judicial Theory for Diverse States." *International Journal of Constitutional Law* 15 (1): 110–36.

Treisman, Daniel. 2007. *The Architecture of Government. Rethinking Political Decentralization*. Cambridge: Cambridge University Press.

Trujillo, Gumersindo. 1997. "La Reforma Del Estatuto de Canarias: Caracterización General." *Cuadernos de Derecho Público*, no. 2: 141–74.

Vallbé, J.-J., and M. Sanjaume. 2022. "Spain: A 'Cardboard Model' of MP Floor Participation." In *The Politics of Legislative Debate Around the World*, edited by H. Bäck and J. M. Debus M.; Fernandes. Oxford University Press.

Yildirim, T. Murat, Gülnur Kocapınar, and Yuksel Alper Ecevit. 2019. "Status Incongruity and Backlash Against Female Legislators: How Legislative Speechmaking Benefits Men, but Harms Women." *Political Research Quarterly* 74 (1): 35–45.