

CHAPTER 7

REFLECTING AND BUILDING ASYMMETRIES: THE ROLE OF (SUB-)CONSTITUTIONAL STATUTES IN SPAIN AND THE UK

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Abstract

The Spanish and the UK constitutional orders are asymmetrical as to the level of autonomy that the various regional governments enjoy but also as to the kind of relationship each and every one of them develops with the metropolitan State. The paper provides for a comparative analysis of the role that the (sub-)constitutional statutes play in Spain and the UK in reflecting political asymmetries and creating constitutional ones. It argues that the processes that led to the drafting of the relevant documents have taken into account those very different political aspirations that certain ethnic and political communities had in those countries. At the same time, the distribution of competences between the various tiers as regulated by those statutes has translated the *de facto* political asymmetries into *de jure* constitutional asymmetries.

1. Introduction

There are two kinds of asymmetry between sub-state entities that may affect the operation of the relevant State. The first might be described as political asymmetry.¹ It 'arises from the impact of cultural, economic, social and political conditions affecting the relative power, influence and relations of different regional units with each other and with the federal government.'² For instance, the very different historical trajectories of the Spanish and UK regions have led them to very different political aspirations.

The Spanish and UK constitutional orders have attempted to accommodate those political asymmetries by creating constitutional structures that are more 'open' and flexible than the ones of mature federations such as the USA, Germany and Switzerland. In the case of the UK, this is rather unsurprising given the idiosyncratic nature of its uncodified constitution. In Spain, although there is a codified constitution, it is particularly laconic with regard to its territorial aspect. So, in both cases, one has to look at the relevant (sub-)constitutional statutes in order to understand the specific constitutional relation that exists between the respective region and the metropolitan state.

The Spanish *Estatutos* and the UK Devolution Acts try to reflect the political asymmetries that exist within those multinational States by allowing for a second type of asymmetry: constitutional asymmetry. This refers 'specifically to the degree to which powers assigned to regional units by the constitution are not uniform.'³ Both the UK and the Spanish orders are characterised by such asymmetries. Those asymmetries are described in both the *Estatutos* and the Devolution Acts whose role in the distribution of competences is central.

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¹ Charles D Tarlton, 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation', (1965) 27 *Journal of Politics*, 861.

² Ronald L Watts, *Comparing Federal Systems* (3rd ed., Montreal & Kingston, McGill-Queen's University Press 2008) 125.

³ *Ibid.*

The current paper focuses on the role of the Spanish and the UK (sub-)constitutional statutes within the respective constitutional orders. It does so in order to understand how those texts reflect the political asymmetries that exist within those States. More importantly, it analyses how those political asymmetries are translated into constitutional asymmetries as to the level of autonomy that the various regional governments enjoy. The existence of such constitutional asymmetries is rather unavoidable if one takes into account the very diverse processes that led to the adoption of the respective *Estatutos* and Devolution Acts and how they regulate the distribution of competences and responsibilities between the various levels.

Section 2 revisits the various routes to autonomy that aimed at accommodating the demands of the *comunidades históricas* and the other communities in Spain as well as the very different historical and political necessities that led to the devolution in Northern Ireland, Scotland and Wales. It shows how the drafting processes reflect such differentiation. Section 3 explains how the (sub-)constitutional documents may account for the difference in the level of legislative autonomy that the different regional governments enjoy by analysing their pivotal role in the internal distribution of competences and responsibilities. As a final point, the paper suggests that the constitutional asymmetries that exist in those systems lead to the crystallisation if not the exacerbation of the political asymmetries.

2. Drafting the (sub-)constitutional documents

2.1 The birth of the Estado de las Autonomías

‘Historically, Spain emerged from a process that involved the unification of different kingdoms and territories [...] Its constituent units [...] had and continue to have strong cultural identities, including different languages.’⁴ Especially, the Euskadi (Basque country) and Catalunya have had a tradition of nationalist movements that fought for political autonomy.⁵ This is why the Second Spanish Republic (1931–1936) tried to accommodate the territorial problem by the enactment of regional Statutes guaranteeing a certain degree of political autonomy.⁶ In fact, Catalunya in 1932 and the Euskadi (Basque country) four years later ‘were granted self-government, after referenda [sic] were held in those regions.’⁷

However, Franco’s dictatorship put a violent end to this ‘regionalist spring.’ Franco imposed an unbending and repressive policy of state centralism in Spain for almost four decades. So, as part of post-Franco democratisation and as a means of balancing powerful regional interests fostered by the revived Basque and Catalan nationalisms, Spain pursued anew a process of regionalisation. The result of it has been a negotiated settlement that is known as the *Estado de las Autonomías*.⁸ This hybrid formula has been described by academics as a ‘unitary State that is decentralised in regions,’⁹ as a ‘regional State,’¹⁰ as a ‘federation in all but name,’¹¹ as a ‘federal system in

⁴ Julio López-Laborda, Jorge Martínez and Carlos Monasterio, ‘Kingdom of Spain’ in Anwar Shah (ed.) *The Practice of Fiscal Federalism: Comparative Perspectives* (McGill-Queen’s University Press 2007) 288.

⁵ Victor Ferreres Comella, *The Constitution of Spain: A Contextual Analysis* (Hart Publishing 2013) 162.

⁶ *Ibid.*

⁷ *Ibid.*, 163. A regional statute was also discussed in Galicia. However, the referendum took place just a few weeks before the Civil War started and Franco’s forces occupied Galicia.

⁸ See *inter alia* Spanish Constitutional Court, *sentencia* no. 32/1981.

⁹ Manuel García Pelayo, *Derecho constitucional comparado* (Alianza Universidad Textos 1984) 242–44.

¹⁰ *Ibid.*

¹¹ Daniel Elazar, *Federal Systems of the World* (Longman 1994) 222.

practice,¹² as an order that exhibits ‘virtual federalism,’¹³ ‘federalism in the making’¹⁴ and ‘unfulfilled federalism.’¹⁵

This ambivalence with regard to the classification of the constitutional system reflects the fact that the ‘Spanish constitution of 1978 omits any reference to the form of the state.’¹⁶ Article 2 of Constitution proclaims that it ‘is based on the indissoluble unity of the Spanish nation’ but also ‘recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them.’ However, neither the term ‘nationalities’ nor the term ‘regions’ are defined anywhere in the Constitution.¹⁷ Instead, the constitution provides for an ‘optional autonomy system’, the so-called *principio dispositivo*. According to it, certain groups of ‘bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status’ had the right to become self-governing Communities (*Comunidades Autónomas*).¹⁸ If they decided to do so, they could assume the competence to legislate over a list of areas that are enumerated in Articles 148 and 149 of the Constitution. In fact, the Constitutional Court has held that the political autonomy of the Spanish regions is reflected precisely in the fact that they may have the necessary competences to manage their own interests.¹⁹

In order to assume this legislative autonomy, the Autonomous Communities had to adopt a Statute of Autonomy (*Estatuto de Autonomía*). To this effect, the Constitution provided for two ways to achieve autonomy: the ‘normal route’ (*vía normal*) (regulated in Article 143) and the ‘rapid route’ (*vía rápida*) (regulated in Article 151). The ‘normal route’ meant that the relevant Autonomous Community that would opt for it would first assume a relatively small set of competences enumerated in Article 148 of the Constitution. It could only assume further competences and thus achieve a ‘higher level’ autonomy at a later stage (at least five years afterwards) by actually amending its *Estatuto*. On the other hand, an Autonomous Community that followed the ‘rapid route’, could reach the highest level of self-government immediately.

In order to achieve the highest level of autonomy, the relevant region had to surpass a number of procedural hurdles. Most importantly, according to Article 151, the citizens in the region had to support in a referendum the initiative to follow the ‘rapid route.’ If the initiative received the necessary support, the voters would also have to ratify the Statute of Autonomy in a second subsequent referendum. However, this cumbersome procedure did not apply to the three regions that had enjoyed self-government during the Second Republic. By virtue of a special transitional rule in the

¹² Michael Burgess, *In Search of the Federal Spirit. New Theoretical and Empirical Perspectives in Comparative Federalism* (Oxford University Press 2012) 19.

¹³ Esther Seijas Villadanos, ‘Answers to Centrifugal Federalism: Asymmetrical Federalism versus Coercive Federalism’ (2014) 6 *Perspectives on Federalism*, E-164.

¹⁴ Luis Moreno, ‘Federalisation in the Making’ in Robert Agranoff (ed.) *Accommodating Diversity: Asymmetry in Federal States* (Nomos 1999) 149.

¹⁵ Pablo Bermendi and Ramon Máiz, ‘Spain: Unfulfilled Federalism (1978–1996)’ in Ugo M Amoretti and Nancy Bermeo (eds) *Federalism and Territorial Cleavages* (John Hopkins University Press 2004) 123.

¹⁶ Violeta Ruiz Almendral, ‘Asymmetrical Federalism in Spain: The Challenges of Financing the Autonomous Communities’ in Violeta Ruiz Almendral and François Vaillancourt (eds) *Autonomy in Subnational Income Taxes: Evolving Powers, Existing Practices in Seven Countries* (McGill-Queen’s University Press 2013) 13, 14.

¹⁷ Eduardo J Ruiz Vieytez, ‘Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Spain’ in George A Tarr and others (eds) *Federalism, Subnational Constitutional Arrangements and the Protection of Minority Rights* (Praeger Publishers 2004) 133, 136.

¹⁸ Spanish Constitution, Art 143(1).

¹⁹ Spanish Constitutional Court, *sentencia* no. 4/1981.

constitution (*Disposición Transitoria 2a*), the regions that had already approved a regional statute during the Second Republic, i.e. Catalunya, Euskadi (Basque Country) and Galicia could achieve the highest level of autonomy by a simplified procedure that just required the approval of the *Estatuto* in a referendum. Unsurprisingly, those three regions opted for this procedure.

Despite the fact that this was only an 'optional autonomy system', it actually led to the division of the whole Spanish territory into 17 Autonomous Communities (*Comunidades Autónomas*)²⁰ and 2 'autonomous cities.'²¹ Apart from the three *nacionalidades históricas* that followed the exceptional transitional procedure, Andalucía opted for the cumbersome 'rapid route' of Article 151 as well. Finally, Navarra had access to autonomy through a special organic law adopted by the Spanish Parliament (*Cortes Generales*), 'after negotiation with the *Diputación foral* of that province.'²²

Despite the procedural differences that every route entailed, the approval of the Spanish Parliament (*Cortes Generales*) through the enactment of an 'organic law'²³ was a necessary requirement for the establishment of a certain *Comunidad Autónoma*.²⁴ The approval of the *Cortes Generales* is also necessary for the amendment of an *Estatuto*,²⁵ although the initiative for the procedure to start lies with the regions. The requirement for approval from the *Cortes* is in accordance with the view that the drafting of a given *Estatuto* is an act emanating from the wills of both the State and the respective region. The *Tribunal Constitucional* has underlined that an *Estatuto* is an act that cannot be disposed of by the sole will of the national State or of the respective *Comunidad Autónoma*.²⁶ So, within the Spanish constitutional order, the Statutes of Autonomy are both the 'highest norm of the region'²⁷ and a government law subject to the constitution.²⁸ They are an integral part of what has been called as the '*bloque de constitucionalidad*' (constitutional bloc).²⁹

In that sense, the *Estatutos* as the 'basic institutional rule of each Self-governing Community'³⁰ may include additional contents but they still have to comply with the provisions of the Constitution.³¹ In its famous decision on the 2006 Catalan *Estatut*,³² the Constitutional Court made clear that

statutes of Autonomy are rules subordinated to the Constitution, as it [sic] corresponds to normative provisions that are not an expression of a sovereign power, but of a devolved autonomy based on the

²⁰ They are: Andalucía, Aragón, Asturias, Baleares, Canarias, Cantabria, Castilla-La Mancha, Castilla y León, Catalunya, Comunidad Valenciana, Euskadi (the Basque Country), Extremadura, Galicia, La Rioja, Madrid, Murcia and Navarra.

²¹ The two Spanish enclaves in Africa are Ceuta and Melilla.

²² Ferreres Comella (n 5).

²³ According to Spanish Constitution, Art 81 organic laws can be passed by an absolute majority of the Congress of Deputies. They are 'related to the development of fundamental rights and public liberties, those that approve Statutes of Autonomy and the general electoral regime, and others foreseen in the Constitution.'

²⁴ Spanish Constitution, Art 144.

²⁵ Spanish Constitution, Art 147(3).

²⁶ Spanish Constitutional Court, *sentencia* no. 247/2007.

²⁷ Spanish Constitution, Art 147.

²⁸ Ruiz Almendral (n 16).

²⁹ See, for instance, Spanish Constitutional Court, *sentencia* no. 76/83.

³⁰ Spanish Constitution, Art 147(1).

³¹ Spanish Constitutional Court, *sentencia* no. 31/2010.

³² *Ibid.*

Constitution, and guaranteed by it, for the exercise of legislative powers within the framework of the Constitution itself.³³

And although the *Estatut* had obtained the support of the people in a regional referendum,³⁴ the *Tribunal Constitucional* 'rejected 14 and read down 27 out of the 114 articles.'³⁵

2.2 The UK devolution acts

The UK constitution has gradually evolved over centuries without having ever been codified in one single document. 'It represents a cluster of statutes, treaties, common law and constitutional conventions.'³⁶ It consists of 'the set of laws, rules and practices that create the basic institutions of the State, and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.'³⁷ Within this rather fluid constitutional landscape it is important to note that the UK judiciary has recognised the 'fundamental constitutional nature' of the UK Devolution Acts,³⁸ which are the foundational documents of the three devolved legislatures and executives of the UK. Having said that, the demands and the processes that led to the establishment of those devolved administrations are very different. As in the case of Spain, this explains -at least partially- the asymmetrical nature of the arrangement.

2.2.1 Scotland

Scotland and England were 'united into One Kingdom by the Name of Great Britain'³⁹ by virtue of two legislative acts: the Union with Scotland Act 1706 passed by Westminster and the Union with England Act 1707 passed by the Parliament of Scotland. Since then, and until the end of the 20th century the UK was governed as a centralist State. Notwithstanding, the region managed to retain its own legal system and different system of education. And because Scotland's distinct system of law, education and church have been 'allied to a tradition of nationalism, with a minority seeking independence',⁴⁰ the devolution process was particularly welcomed there. In fact, in the Scottish devolution referendum of 1979 3 out of 4 voters voted in favour of the establishment of a Scottish Parliament.

The Scottish Parliament and the Scottish Government in their modern form were founded by the Scotland Act 1978. Unlike, the Spanish case, where the regions had a very significant role in the drafting of the Statutes of Autonomy, this Act has been the product of a rather top-down process. This was changed during the first major amendment of the statute. Westminster took into account the suggestions of the

³³ Dirk Hanschel, 'The Role of Subnational Constitutions in Accommodating Centrifugal Tendencies within European States: Flanders, Catalonia and Scotland Compared', (2014) 6 Perspectives on Federalism, E-244, E-252.

³⁴ Ferreres Comella (n 5).

³⁵ Hanschel (n 33) E-252.

³⁶ Ibid, E-254.

³⁷ House of Lords Constitutional Committee, <www.publications.parliament.uk/pa/ld200102/ldselect/ldconst/11/1103.htm> accessed December 1, 2017.

³⁸ See *H v Lord Advocate* [2012] UKSC 24; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32.

³⁹ Treaty of Union 1706, Art I.

⁴⁰ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (2nd ed., Hart Publishing 2012) 246.

Commission on Scottish Devolution also referred to as the Calman Commission when it adopted the Scotland Act 2012.

The Scottish political community became even more involved during the process that led to the drafting and adoption of the Scotland Act 2016. In the wake of the Scottish independence referendum of 2014, the UK Prime Minister announced the establishment of the Smith Commission. The establishment was part of the process of fulfilling 'The Vow' made by the three main unionist parties promising more powers for Scotland in the event of a No vote. Following the rejection of independence, the Smith Commission that comprised of representatives of all five parties represented in the Scottish Parliament was asked to produce recommendations for further devolution, which were published in November 2014. Most of the recommendations of the Commission have been adopted in the Scotland Act 2016 underlining the fact that the revision of the Scottish constitutional act is not a top-down process any more. In fact, the Scotland Act 2016 goes a step further in allowing the regional legislature to have a more active role with regard to amending provisions of its own constitutional charter that relate to its operation including the control of its electoral system.⁴¹

What is more interesting is that before the enactment of both the Scotland Acts 2012 and 2016, the Scottish Parliament passed legislative consent motions with regard to the passage of the Bills. This was in agreement with the so-called 'Sewel convention.' According to it, the Westminster 'would not normally legislate in areas devolved to Scotland without the consent of the Scottish Parliament.'⁴² Since its inception, 'the scope of the convention has evolved so as to require the consent of the Scottish Parliament not only where the UK Parliament seeks to legislate in devolved policy areas, but beyond that where a UK bill seeks to vary the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.'⁴³ The consent motion concerning the passage of the Scotland Bill in 2011 was 'worded in *conditional* terms, inviting the UK Government first to consider the amendments and proposals made by the Scotland Bill Committee at Holyrood and then later to return with an amended bill for further debate in a second legislative consent motion.'⁴⁴ The result was a new bill which sought conciliation between the two positions and which led to the successful grant of a consent motion.

The new Scotland Act sets the 'Sewel convention' into statutory footing⁴⁵ and declares that the Scottish Government and Parliament are 'a permanent part of the United Kingdom's constitutional arrangement.'⁴⁶ With regard to the former, there was a question whether the codification of the convention meant that the Westminster was constitutionally obliged to ask for the consent of the Scottish Parliament in order to trigger Article 50 of the Treaty on European Union, which will lead to UK's withdrawal from the EU. The eleven judges of the UK Supreme Court unanimously decided in *Miller* that the statutory footing of the convention does not change its legal nature. It is still a political convention. As such, judges 'cannot give rulings on its operation or scope, because those matters are determined within the political world.'⁴⁷

⁴¹ Scotland Act 1998, Sections 12 and 12A.

⁴² Leyland (n 40) 250.

⁴³ Chris McCorkindale, 'Echo Chamber: The 2015 General Election at Holyrood – A Word on Sewel' <goo.gl/XpNKw8> accessed December 1, 2017.

⁴⁴ *Ibid.*

⁴⁵ Scotland Act 1998, s 28.

⁴⁶ Scotland Act 1998, s 62A.

⁴⁷ *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para. 146.

Be that as it may, still, those developments can be seen as ‘significant cracks in what has traditionally been a monolithic acceptance [...] of Westminster’s untrammelled legislative power.’⁴⁸ In fact, one might wonder whether those new provisions challenge somehow the traditional Diceyan view expressed by the Supreme Court according to which ‘[s]overeignty remains with the United Kingdom Parliament.’⁴⁹

2.2.2 Wales

‘Wales has been closely integrated with England for the purposes of law and administration since the late Middle Ages.⁵⁰ This explains to a certain extent why there has never been an equivalent level of popular demand for devolution as existed in Scotland. In fact, the initial attempt to establish a devolved legislature in the 70s failed. Nearly 80% of the Welsh voters that voted in the referendum voted against that prospect. Notwithstanding, the Labour Party prior to the May 1997 election committed itself to meeting the demand for decentralisation of power not only to Scotland but also to Wales. In the subsequent referendum, only 50% of Welsh voters turned out. Out of them only 50.3% voted in support of the establishment of a Welsh legislature.

The drafting of the Government of Wales Act 1998 was largely a top-down process. The main difference was that the little demand for significant political autonomy was reflected in the very limited competences of this devolved legislature as we shall see in the next section. Four years after the creation of the National Assembly of Wales, the then First Minister Ivor Richard created a Commission to consider whether the powers of the Assembly were adequate to the people of Wales. The Richard Commission was partly comprised of independent Commissioners and partly of appointees from the four elected parties to the Assembly. Westminster took into account the report of the Commission when it decided to enhance the Assembly’s powers by enacting the Government of Wales Act 2006. In order the Assembly to obtain an enhanced level of autonomy, two-thirds of its members had to pass a resolution requesting that primary-law making powers are transferred to it. In addition, this proposal had to gain the support of the Welsh voters in a referendum.⁵¹ Indeed, in February 2010 the Assembly passed such resolution and one year later the Welsh voters supported such initiative by 63.5%.

The regional political community became even more involved in the next amendment of the Welsh arrangement. The coalition government of Conservatives – Liberal Democrats suggested the establishment of yet another Commission, which would look at the case for devolution of fiscal powers and whether there was support for further modifications to the then constitutional arrangements. The Silk Commission, much like the Smith Commission in Scotland comprised of representatives of the elected parties to the National Assembly. It produced two reports: one on finance published in November 2012 and one on legislative matters published in March 2014. The former led to the adoption of Wales Act 2014, which contains very similar provisions to the Scotland Act 2012. The latter led to the St David’s Day process and the Wales Act 2017. That cross-party debate put forward a number of recommendations. Those include ‘the devolution to the National Assembly of the power to determine its own size electoral

⁴⁸ Stephen Tierney, ‘Quiet Devolution: Sub-State Autonomy and the Gradual Reconstitution of the United Kingdom’ in George A Tarr and Michael Burgess (eds) *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (McGill-Queen’s University Press 2012) 195, 205.

⁴⁹ *AXA General Insurance Limited and Others* [2011] UKSC 46, para. 46.

⁵⁰ Leyland (n 40) 253.

⁵¹ Government of Wales Act 2006, ss 103–106.

arrangement [...] along with putting the Sewel convention into statute and recognising the Assembly's permanence (as in Scotland).⁵²

From a modest top-down initiative, the Welsh devolution has become a constitutional arrangement that encompasses mechanisms for the enhancement of its own constitutional space. In 2011, such enhancement took place through a referendum while the latest Wales Act includes a number of provisions similar to the Scotland Act 2016.

2.2.3 Northern Ireland

Unlike Scotland and Wales, the devolution in Northern Ireland was not a free-standing policy coming out of a political party's manifesto. It is one facet of the 'Good Friday Agreement' (also known as 'Belfast Agreement'), a peace settlement intended to bring an end to an era of political violence also known as 'The Troubles.' Neither does it signify the first time that devolution has been used in this troubled part of the world. In fact, the Government of Ireland Act 1920 set up the Stormont Parliamentary system of devolved government that functioned until March 1972. Having failed to effectively address the needs of the nationalist community, it was suspended by Westminster during the first years of 'The Troubles' and Northern Ireland was directly governed by London since then.

So, one of the goals of the 'Belfast Agreement' was to restore devolved government.⁵³ However, this new devolution arrangement had 'to ensure that all sections of the community [could] participate and work together successfully in the operation of these institutions and that all sections of the community are protected.'⁵⁴ This meant that the Northern Irish devolution would function very differently from the other similar arrangements in the UK. As Lord Bingham has recognised:

The 1998 Act ... was passed to implement the Belfast Agreement, which was itself reached, after much travail, in an attempt to end decades of bloodshed and centuries of antagonism. The solution was seen to lie in participation by the unionist and nationalist communities in shared political institutions, without precluding ... a popular decision at some time in the future on the ultimate political status of Northern Ireland.⁵⁵

Starting from the latter, it is important to point out that 'Westminster has formally conceded that Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this.'⁵⁶ Section 1 of the Northern Ireland Act 1998 is a rare example of a provision of a constitutional statute explicitly recognising the right of secession of a region. It was the only Devolution Act that contained such a provision underlining the very distinctive character of the Northern Irish arrangement. In contrast, the absence of an analogous provision in the Scotland Act meant that the 'two governments of Scotland' had to reach a political agreement (the *Edinburgh Agreement*), in order an independence referendum

⁵² Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (British Institute of International and Comparative Law 2015) 6.

⁵³ Christopher McCrudden, 'Northern Ireland, The Belfast Agreement and the British Constitution' in Jeffrey Jowell and Dawn Oliver (eds) *The Changing Constitution* (6th ed., Oxford University Press 2007) 227.

⁵⁴ HM Government, *Agreement Reached in Multiparty Talks* (London, HMSO 1998) Strand One, para. 5.

⁵⁵ *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, para. 10.

⁵⁶ John McGarry, 'Asymmetrical Autonomy in the United Kingdom' in Marc Weller and Katherine Nobbs (eds) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press 2010) 148, 156.

to be lawfully organised on September 18, 2014. According to it, Westminster conferred the power to Holyrood to organise an independence referendum in 2014.

The most striking difference, however, between the Northern Irish arrangement and its counterparts has to do with its consociational characteristics.⁵⁷ The requirements for cooperation between the two ethno-religious segments is evident *inter alia* in the government formation provisions⁵⁸ and in the special arrangements that govern how legislation is made. 'Various measures, such as financial legislation⁵⁹ (and, indeed, any legislation which 30 or more [Members of the Assembly] express concern over),⁶⁰ can only be passed if they gain "cross-community support."⁶¹

2.3 Comparative remarks

Both the Spanish and the UK (sub-)national constitutional statutes consist of an integral part of the territorial constitution of those States. In Spain, the *Tribunal Constitucional* has recognised them as part of the '*bloque de constitucionalidad*' (constitutional bloc),⁶² while in the UK, the Supreme Court has spoken about their 'fundamental constitutional nature.'⁶³ Having said that, one has also to appreciate that their autonomy is not unconstrained. In its famous decision on the Catalan *Estatut*, the *Tribunal Constitucional* reinstated that the statutes of Autonomy have to conform with the provisions of the constitution.⁶⁴ Given the idiosyncratic character of the uncodified UK constitution, there is no constitutional text that the Devolution Acts have to comply with as such. If one follows, however, a traditional Diceyan view of parliamentary sovereignty, then s/he might say that – in theory at least- Westminster can intervene in all areas and even abolish the devolved institutions. Politically speaking, this would be unthinkable given the democratic legitimacy with which those arrangements have been endowed. But even constitutionally speaking, this position has become somewhat untenable given that the new Scotland Act provides for the permanence of the Scottish institutions. However, the recent decision in *Miller* casts some doubt as to what is the added value of the legal codification of those political conventions.

Be that as it may, those (sub-)constitutional statutes play also a pivotal role in accommodating the different political aspirations of the various ethnic, religious, political, linguistic communities that live in those pluri-national States. They reflect a *de facto* political asymmetry that exists. Especially, the drafting processes that have been used for the constitutional statutes of the various Spanish and UK regions have taken into account the particular set of conditions that have led to the quest for legislative autonomy of those regions.

In Spain, this has taken place through a rather more systematic process that is provided by the constitution itself. The drafters of the constitution were mindful of the different historical and political trajectories that the *comunidades históricas* have followed in comparison to the rest of the regions. In the case of the UK, the political

⁵⁷ For an analysis, see among else Arend Lijphart, *Democracy in Plural Societies* (Yale University Press 1977); Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999).

⁵⁸ See Northern Ireland Act 1998, Part III.

⁵⁹ Northern Ireland Act 1998, s 63(3).

⁶⁰ *Ibid*, s 42(1).

⁶¹ Roger Masterman and Colin Murray, *Exploring Constitutional and Administrative Law* (Pearson 2014) 358.

⁶² See, for instance, Spanish Constitutional Court, *sentencia* no. 76/83.

⁶³ See *H v Lord Advocate* (n 38).

⁶⁴ Spanish Constitutional Court, *sentencia* no. 31/2010.

asymmetry is primarily reflected in the fact that not all the UK regions enjoy autonomy. England that possesses 85% of the population has neither a parliament nor an assembly. More importantly, the very different political realities that led to each and every constitutional arrangement is reflected in the drafting process and the contest of the Devolution Acts. The Northern Ireland Act is part of a peace settlement plan that was negotiated between the political parties of the two main ethno-religious segments, the UK and the Republic of Ireland. The initial Devolution Acts for Scotland and Wales were a political by-product of the landslide victory of New Labour. But even between those two constitutional arrangements there were important differences. The Scotland Act 1998 provided, as we shall in the next section, for a much higher level of autonomy than the Government of Wales Acts 1998 and 2006.

What is common for all three UK arrangements is that devolution is ‘a process not an event.’⁶⁵ This is reflected in the fact that the initial constitutional statutes for Scotland and Wales have been amended in order to further respond to the needs and demands of the Scottish and Welsh political communities. But also, in the case of Northern Ireland, although, the Act itself has not been significantly amended, it contained flexibility mechanisms that have allowed it to adapt to the dynamic processes of the peace settlement.

What remains to be analysed is how those political asymmetries that led to the differentiated approaches in the drafting of the various (sub-)constitutional statutes are reflected in the distribution of competences and thus have been translated into constitutional asymmetries.

3. Distribution of powers and responsibilities

3.1 The role of the Estatutos de Autonomía

While in a number of States with legislative regions, the Constitution provides for the distribution of competences between the various tiers,⁶⁶ in Spain, ‘the constitutional design is neither exact nor complete.’⁶⁷ The Constitution lists three sets of competences: those that exclusively belong to the central government;⁶⁸ those that may be assumed by the Autonomous Communities through their Statutes of Autonomy;⁶⁹ and those that may be devolved from the central government to the Autonomous Communities through organic laws.⁷⁰ In addition, the *Comunidades Autónomas* may also assume all those powers that are not explicitly allocated to the State.⁷¹ Finally, ‘[j]urisdiction on matters not claimed by Statutes of Autonomy fall with the State.’⁷²

Clearly, because of the ‘open’ nature of the Spanish system of competences, the Statutes of Autonomy are necessary to complement the Constitution. ‘As provided in Article 147(2)(d) of the Constitution, the Statutes of Autonomy are the rules whose role it is to establish “the competences assumed within the framework established in the Constitution”, articulating in this manner a system of competences based on the

⁶⁵ Ron Davies MP, HC Debs, vol.304, col. 1108 (January 21, 1998).

⁶⁶ See for instance Austrian Constitution Arts 10–15; Belgian Constitution Arts 105–114 and 127–140; German Basic Law, Arts 71–74; Italian Constitution, Art 117.

⁶⁷ Enric Argullol i Murgadas and Xavier Bernadí i Gil, ‘Kingdom of Spain’ in Akhtar Majeed, Ronald L Watts and Douglas M Brown (eds) *Distribution of Powers and Responsibilities in Federal Countries* (McGill-Queen’s University Press 2006) 239, 244.

⁶⁸ Spanish Constitution, Art 149.

⁶⁹ Spanish Constitution, Art 148.

⁷⁰ Spanish Constitution, Art 150.

⁷¹ Spanish Constitution, Art 149(3).

⁷² *Ibid.*

Constitution and the Statutes.⁷³ This is why they are considered together ‘with certain state laws to which the Constitution refers in order to frame the distribution of powers’⁷⁴ to form part of the so-called *bloque de constitucionalidad*. In fact, the Spanish Constitutional Court has recognised the central role of the statutes in determining jurisdiction over particular areas. According to the Court,

in order to determine if an area falls within the jurisdiction of the State or of the Autonomous Community, or whether a system of concurrent jurisdiction applies, in principle it is the text of the Statute of Autonomy of the Autonomous Community, in which competences are assumed, that shall be decisive. [...]⁷⁵

The constitutional reliance on the Statutes of Autonomy and the political asymmetries between the *nacionalidades históricas* on the one hand and the other regions on the other have led to an asymmetrical power distribution. Practically speaking, this has meant that the central State might have a competence with regard to a certain part of the Spanish territory while a *Comunidad Autónoma* might have assumed the very same competence over another part of the State. Equally, it means that not all the regions can exercise the same amount of competences.

This was particularly evident during the first years of the *Transición* given that the Autonomous Communities that followed the ‘normal route’ could only assume a relatively small set of competences enumerated in Article 148 of the Constitution. On the other hand, Catalunya, Euskadi (Basque country) and Galicia that used the *Transitional Provision* and Andalucía that used the ‘rapid route’ could also assume the powers provided by Article 149. As time went by, and after the period of five years elapsed, even the low autonomy regions have progressively assumed the vast majority of the available competences. So, the constitutional asymmetry has been reduced between those regions which assumed their powers through the ‘rapid route’ and the rest. This does not mean, however, that they are extinct.

The prime example of constitutional asymmetry in Spain relates with the financing system of the Basque Country and Navarra. The common regime for financing the *Comunidades Autónomas* does not apply to those two regions. Their special financing arrangements of those two regions are called the *Convenio* in Navarra and the *Concierto* in the Basque Country. They provide for the most extensive revenue raising powers in Spain.

Additional provision One (*disposición adicional primera*) of the Spanish Constitution of 1978, ‘protects and respects the historic rights of the territories with traditional charters (*fueros*).’ The key feature of the foral system is that it provides for a higher level of fiscal autonomy given that those two *Comunidades Autónomas* ‘regulate, manage and collect their own taxes as well as those taxes that are levied in their area by the central government.’⁷⁶ In fact, those regional governments have full powers over all personal and corporate income taxes and have also control over the administration of the main indirect taxes, the VAT and the excise duties.⁷⁷

The very extensive revenue raising autonomy of those regions and the relative affluence of their residents have historically guaranteed almost the full financing of

⁷³ Spanish Constitutional Court, *sentencia* no. 76/1983.

⁷⁴ Argullol i Murgadas and Bernadí i Gil (n 67) 244.

⁷⁵ Spanish Constitutional Court, *sentencia* no. 18/1982.

⁷⁶ Fernando Toboso and Eric Scorsone, ‘How Much Power to Tax do Regional Governments Enjoy in Spain since the 1996 and 2001 Reforms?’ (2010) 20 *Regional and Federal Studies* 157, 160.

⁷⁷ López-Laborda and others (n 4) 302.

their expenditure without any transfer from the central government. Instead, a fixed amount of the revenue that those governments collect has to be transferred to the central government as a contribution to general charges. These negative charges are called *cupo* [quota] in the case of the Basque country and *aportación* [contribution] in the case of Navarra.

On the other hand, under the so-called 'common system' which applies to the other 15 *Comunidades Autónomas*, those regional governments enjoy more limited taxation powers. Such asymmetry between the two systems that exist in Spain used to be even higher during the first years of the *Transición*. Although, the regions under the 'common system' have progressively increased their powers, they still face a number of limits to their tax raising autonomy. 'The most important limitation is the prohibition of double taxation (Sections 6.2 and 6.3) which prevents' those legislative regions to raise similar taxes as the ones created by the central government.⁷⁸

But it is not only in the area of fiscal autonomy that there is an important constitutional asymmetry. Even in the area of external relations there are asymmetries largely because of the expansive approach that has been used in some Statutes of Autonomy. According to the Spanish Constitution the central government has exclusive competences over international relations,⁷⁹ including treaty-making,⁸⁰ and the sub-state level lacks powers to sign international agreements or treaties. Notwithstanding, different Statutes of Autonomy have included special provisions on the foreign promotion of culture or vernacular languages,⁸¹ international contacts with overseas migrant communities⁸² and foreign aid.⁸³ The Basque government has gone as far as openly arguing 'for a limited understanding of the concept of international relations that reduces it to formal diplomatic representation, war and peace issues and the signing of treaties.'⁸⁴ It considers most of everything else as domestic activities and thus that it is entitled to be active. Equally, Chapters II and III of the Catalan *Estatut* that came into effect in August 2006 provide for quite an ambitious list of competences of the *Generalitat de Catalunya* in the international sphere. For instance, Article 195 foresees that the Catalan administration 'may sign collaboration agreements in areas falling within its powers.' In spite of the fact that the majority of the provisions contained in those two chapters were challenged in front of the *Tribunal Constitucional*, the judgment did not declare any of them unconstitutional.

3.2 The UK devolution acts

If there is one constitutional order where the collaboration of other norms is required in order to operate the framework of powers is the one of the United Kingdom. According to the UK 'idiosyncratic' constitution, the allocation of powers to Northern Ireland, Scotland and Wales can be found in the respective constitutive acts.

⁷⁸ Ruiz Almendral (n 16) 20.

⁷⁹ Art 149 of the Spanish Constitution.

⁸⁰ Arts 93, 94 and 96 of the Spanish Constitution.

⁸¹ Statute of Autonomy of Andalucía, Art 68; Statute of Autonomy of Catalunya Arts 6, 50 and 127; Statute of Autonomy of Galicia, Art 1.

⁸² Statute of Autonomy of Andalucía, Art 6; Statute of Autonomy of Asturias, Art 8(3); Statute of Autonomy of Catalunya, Art 13; Statute of Autonomy of the Basque Country, Art 6(5); Statute of Autonomy of Extremadura, Art 3(3); Statute of Autonomy of Galicia, Art 7.

⁸³ Statute of Autonomy of Andalucía, Arts 220 and 245; Statute of Autonomy of Catalunya, Art 197; Statute of Autonomy of Valencia, Art 62.

⁸⁴ André Lecours, *Political Issues of Paradiplomacy: Lessons from the Developed World* (Netherlands Institute of International Relations 'Clingendael' 2008) 11.

3.2.1 Scotland

The Scottish Parliament has had the power to enact primary legislation from the very beginning. Its powers are defined negatively. According to Section 29 of Scotland Act 1998, it may legislate on areas that are not considered as ‘reserved’ competences of Westminster. Those are enlisted in Schedule 5 of Scotland Act 1998. Thus, in a way, Scotland has residual powers over the competences that are not explicitly allocated to Westminster. The latter include: international relations, energy, aspects of road, rail and marine transport. On the other hand, the Scottish legislature has competences over education, health and policing among else. Judging from the dearth of litigation reaching the Supreme Court based on the competence of Acts of Scottish Parliament with regard to reserved matters, it rather seems that the allocation of legislative authority between the different levels has been fairly unproblematic.⁸⁵

Devolution, however, is ‘a process not an event.’ So, the Scotland Act has been amended twice so far to the effect that the Scottish Parliament has increased its powers especially in the area of fiscal autonomy. The Scotland Act 2012 implemented the recommendation of the Calman Commission according to which ‘a big enough part of [the] budget [of the Scottish Parliament should] come from devolved taxation for it to be genuinely accountable.’⁸⁶ To this effect, a new Section 80C was introduced into the Scotland Act 1998, ‘which would allow [the Scottish Parliament] to set a “Scottish rate” of income tax which, above a minimum level necessary to pay for UK-wide expenditure administered by central government would not be tied to the UK rates.’⁸⁷ However, this important reform of the financing of the Scottish devolution did not go as far as providing for the power of the Scottish legislature to control of the rates and bands of the income tax.

It was the Scotland Act 2016 that introduced that reform recently. ‘Scottish Ministers will be free to decide how many bands of income tax there should be what the thresholds between them should be and at what rate should be taxed for each band.’⁸⁸ By the same Act, a number of further powers are devolved to Holyrood.⁸⁹ This transfer of powers makes the Scottish Parliament the most powerful devolved legislature in the UK and one of the most powerful in the world.

3.2.2 Wales

‘Devolution in Wales has been in a constant flux since 1998.’⁹⁰ Initially, the Welsh Assembly was not a law-making body equivalent to the Scottish Parliament. Unlike its counterpart in Scotland whose competences have been defined negatively, Schedule 2 of the Government of Wales Act 1998 enumerated the very limited powers of the Assembly. More importantly, the Assembly could not pass primary legislation, but only subordinate legislation of specific relevance to Wales.⁹¹ This changed eight years later. The Government of Wales Act 2006 ‘granted the Welsh Assembly Government the power to request permission from the UK Government (by Order in Council) to make pieces of primary legislation within specified fields of devolved competence, known as

⁸⁵ See for instance *Martin and Miller v HM Advocate* [2010] UKSC 10.

⁸⁶ Commission on Scottish Devolution, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* (2009) 9.

⁸⁷ Masterman and Murray (n 61) 348.

⁸⁸ Bingham Centre (n 52) 3.

⁸⁹ *Ibid.*, 4.

⁹⁰ *Ibid.*

⁹¹ Government of Wales Act 1998, s 22(1).

“Assembly Measures.”⁹²

The 2006 Act, however, did not just allow for a modest extension to the competences of the National Assembly. It also provided for a procedure according to which the Assembly could assume wider powers to make primary legislation in certain enumerated areas.⁹³ According to it, following a resolution passed by the Assembly requesting primary law-making powers to be devolved to Wales, the proposal had to receive the support of the electorate in a referendum. Indeed, the Assembly passed such a resolution in February 2010, and the referendum took place a year later. In March 2011, the 63.5% of the Welsh voters approved the proposal. As a result, the National Assembly for Wales was able to pass laws without first needing the agreement of the UK Parliament.

This was not the last amendment, however. As we mentioned in the previous section, the Silk Commission made a number of recommendations. Some of them were adopted in the Wales Act 2014 and some of them in the Wales Act 2017. In particular, the former parallels the tax provisions of the Scotland Act 2012 while the latter adopts a ‘reserved powers model,’ provides for the permanence of the Welsh institutions and codifies the Sewel convention.⁹⁴ This has led to the significant narrowing of the asymmetry between the Welsh and the Scottish arrangements.

3.2.3 Northern Ireland

The Northern Ireland Act 1998 is one facet of a wider peace agreement plan. In that sense, the competences devolved to Stormont reflect the tentative nature of devolution. Section 6 of the Act provides that the Assembly has power to pass primary legislation in all matters that are not expressly excluded from its powers. So, the Devolution Act is following a similar arrangement to the Scottish and Welsh ones according to which the Assembly possesses residual powers. However, while Schedule 2 enlists those ‘excepted matters’ that are considered as central state powers, in the case of Northern Ireland there is also Schedule 3 that provides for a list of ‘reserved matters’ that may be transferred to its Assembly only if cross-party support is evident.

So, the category of ‘reserved matters’ encapsulates the idea of the devolution as a ‘process not an event.’ They can be devolved if the political parties in Northern Ireland can effectively prove that they can cooperate. During the first years of the devolution that has been proved particularly difficult. In fact, the Assembly was suspended in October 2002 ‘amidst allegations that Sinn Féin party officials were using their access to Stormont to gain information useful to Provisional IRA.’⁹⁵ Devolution was restored in 2007 in the aftermath of the St Andrews Agreement in 2006. The restoration of powers led to further transfer of powers to Stormont. Following the establishment of the Department of Justice in April 2010, the ‘reserved powers’ of policing, prisons and criminal law were devolved. Despite the unstable and conflictual character of Northern Irish political system, a further Stormont Agreement in December 2014 on conflict-related legacy issues paved the way for ‘legislation to devolve the power to set the rate of corporation tax in Northern Ireland’⁹⁶ in accordance with the Corporation Tax (Northern Ireland) Act 2015.

⁹² Masterman and Murray (n 61) 355 citing Government of Wales Act 2006, ss 93–102.

⁹³ Government of Wales Act 2006, ss 103–116.

⁹⁴ Wales Act 2017 ss 1–3.

⁹⁵ Masterman and Murray (n 61) 362.

⁹⁶ Bingham Centre (n 52) 7.

3.3 Comparative remarks

In this section, we noted the significant role that the Spanish and UK (sub-)constitutional statutes play in the distribution of competences. According to Viver, there is a

failure to complete the constitutionalisation of the system of political decentralization, that is, to incorporate into the Spanish Constitution provisions pertaining to the territorial power structure. Whereas in other constitutions such provisions normally appear in the federal constitution, in Spain they are relegated above all to the statutes of autonomy and to legislation.⁹⁷

Equally, in the UK, the competences of each and every devolved administration can be found in the respective (sub-)constitutional statutes.

In both cases, this has led to constitutional asymmetries. Different regions have assumed different legislative competences. In a way, the *de facto* asymmetry which is a result of the pluri-national character of those States has led to a *de jure* asymmetry 'which implies the setting-up of legal-formal differences between the' sub-state entities.⁹⁸ To highlight this point, we have used the area of fiscal autonomy as an example. In the Spanish case, we have underlined the difference between the so-called foral Autonomous Communities and the rest. Asymmetries in this area are also evident in the UK. In the aftermath of the Scottish independence referendum, the new Scotland Act has transferred significant powers to the Scottish Parliament that are not shared by the other devolved administrations. On the other hand, the Northern Irish managed to achieve some autonomy with regard to setting the corporation tax that may make them competitive to their Southern neighbours.

4. In lieu of a conclusion

'[F]ederalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests.'⁹⁹ This is even more so in the case of States, which have not adopted a fully federal model but have opted for a system of asymmetrical devolution such as Spain and the UK. The pragmatic constitutional solutions that characterise both the Spanish and the UK systems represent an attempt to reconcile calls for regional autonomy with a desire to retain the borders of the Nation-State.

In order to achieve this important goal, the Spanish and UK constitutional orders have used the instrument of (sub-)constitutional documents to allow for some 'site-specific' decentralisation/devolution. Each and every one of the Spanish *Estatutos* and the UK Devolution Acts is a by-product of the very different set of political and historical conditions that led to its adoption. At the same time, those statutes can be also read as an attempt to accommodate the very different aspirations of their regions.

⁹⁷ Carles Viver, 'Spain's Constitution and Statutes of Autonomy: Explaining the Evolution of Political Decentralization' in George A Tarr and Michael Burgess (eds) *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (McGill-Queen's University Press 2012) 218, 220.

⁹⁸ Víctor Cuesta-López, 'Intergovernmental Relations in Spain and the United Kingdom: The Institutionalization of Multilateral Cooperation in Asymmetric Polities', (2014) *Perspectives on Federalism*, E-299, E-303.

⁹⁹ Vicki C Jackson, 'Narratives of Federalism: Of Continuities and Comparative Constitutional Experience', (2001) 51 *Duke Law Journal*, 223, 273-274.

So, the paper has shed light on how those (sub-)constitutional statutes reflect the political asymmetries and translate them into constitutional ones. Those constitutional asymmetries, however, may also lead to the crystallisation if not the exacerbation of the political asymmetries, completing a vicious circle. One may observe that in the area of intergovernmental relations for instance.

The reason being that in those States, there is a lack of robust mechanisms for the collegiate representation of the regional tier in the way that the Austrian and the German *Bundesräte* may be deemed as such. The House of Lords is by no means a territorial chamber while the *Senado* is not a mechanism for the representation of the regional interests given its composition and its very limited significance in formulating the policy of the 'central State.' The lack of such mechanisms has pushed certain regions to introduce into their constitutive documents provisions for the creation of bilateral cooperation commissions between themselves and the metropolitan State. An example of that is the *Generalitat* – State Bilateral Commission that the 2006 Catalan *Estatut* provided for. This Commission that was envisaged and designed solely by the Catalan political community had as its main purpose to provide for a forum for policy coordination and dispute resolution. Innocuous as it may sound, it could clearly also function as a lobby mechanism for the representation of the Catalan interests. The fact that it is one of the only four similar Commissions¹⁰⁰ that exist in Spain show how the establishment of such mechanism through a (sub-)constitutional statute might lead to political asymmetries. A similar suggestion was made by the St David's Day process for Wales.¹⁰¹

At the same time, one might see the aforementioned example as a 'success story' of those orders and the particular role that the (sub-)constitutional statutes play in them. Because of their 'open' and 'flexible' character, they are able to adapt to the ever-changing political necessities of a multi-national State better than if they had adopted a more 'rigid' and 'formalised' approach and accommodate such initiatives that create even further differentiation between the regions. It remains to be seen whether the political developments in Catalunya and Scotland will cast doubt over this 'optimist' reading of the Spanish and UK constitutional orders.

¹⁰⁰ The others are with Andalucía, Aragon and Castilla y León.

¹⁰¹ Bingham Centre (n 52) 6.