



THE NATIONAL
RESEARCH INSTITUTE
PAPUA NEW GUINEA

RESEARCH REPORT

OPTIONS FOR BOUGAINVILLE'S AUTONOMY ARRANGEMENT:

A STUDY FROM A GLOBAL
COMPARATIVE PERSPECTIVE

Karl Kössler
Francesco Palermo
Jens Woelk

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Table of Contents

Executive summary	vii
1. What is autonomy? A working definition	1
2. Why do countries establish autonomy arrangements (or not)?	3
Underlying rationales for establishing autonomy	3
Why autonomy comes into being (or not)	4
3. Types of autonomy? A comparative overview	7
Mainland and island autonomies: The issue of geography and self-government	7
Asymmetrical and symmetrical autonomy: The question of special status	11
Owned and shared autonomy: The crucial issue of constitutional design in diverse societies	13
4. Assessing Bougainville's current autonomy arrangement from an international perspective	17
Entrenchment and implementation of autonomy: Putting Bougainville's autonomy into practice	17
Autonomous powers: The special status of Bougainville	20
Intergovernmental relations and conflict management	22
5. Alternative options between the existing arrangement and full independence: A range of choices for key elements	25
Entrenchment and implementation of autonomy	25
Autonomous powers	28
Intergovernmental cooperation and conflict management	32
6. Concluding remarks	37
Bibliography	41

List of Charts, Figures and Tables

List of Chart

Chart 1: Degree of formal self-rule of selected island autonomies

40

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<http://www.eurac.edu/en/research/autonomies/sfereg/staff/pages/staffdetails.aspx?persId=8303>

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Abbreviations & Acronyms

- IACFS International Association of Centers for Federal Studies
- PNG NRI Papua New Guinea National Research Institute
- PNG Papua New Guinea

Executive Summary

The aim of this report is to provide insights regarding the substance of autonomy regimes worldwide with a view to identifying and illustrating options for the status of Bougainville within Papua New Guinea. While we acknowledge that specific autonomy arrangements are usually pragmatic package deals between the main stakeholders and thus escape easy generalisations, we still deem it worthwhile to draw certain comparative lessons from the experience in other cases, especially that of other island autonomies. While the contingency and context-dependence of autonomy regimes preclude the simple transfer of entire “models”, they do not exclude useful external inputs from a comparative analysis regarding specific key elements, provided that differences in context are taken into account. These inputs are what our report seeks to provide.

We acknowledge that autonomy remains a contested concept, which entails considerable confusion among academics and policy-makers alike. Thus, the report starts with a working definition. We define as (territorial) autonomy in a broad sense the granting of internal self-government to a region. This also includes federacies and associated states, as these are specific labels for particular kinds of autonomy arrangements that were established due to historical reasons or local peculiarities of the political or academic vocabulary.

Based on this working definition, we explore the underlying rationales for establishing autonomy and why such arrangements come into being (or not). The report cites considerations of geography, history and the management of ethno-cultural diversity which often prompt national governments and regions to settle on some form of autonomy as a compromise solution, as a “middle way” between a centralised unitary state and own statehood. We then place emphasis on very important factors that may be conducive for an autonomy arrangement to be concluded and implemented, such as a (positive) role of international actors, as well as a context informed by democracy and the rule of law. On the other hand, we address typical arguments of national governments against autonomy like the claims that territorial self-government will be a stepping stone to secession or trigger a domino effect resulting in autonomy demands from ever more regions.

This section of the report is followed by a comparative overview of the manifold types of autonomy and of how Bougainville relates to these types. The distinction of mainland and island autonomies demonstrates the many ways in which the geographical remoteness has an impact on territorial self-government. The differentiation between asymmetrical and symmetrical autonomy explores the quest of some regions for special status, while that between owned and shared autonomy shows the different conceptions of the relations between diverse groups within an autonomous territory. Being aware of the defining characteristics and constraints of these types of self-government seems crucial for any discussion of Bougainville’s current and future status.

On this basis, we provide a brief assessment of the current autonomy arrangement within Papua New Guinea from a comparative perspective. The report thereby focuses on three issues of crucial importance: the entrenchment and implementation of self-government for Bougainville, the autonomous powers of the island region, as well as mechanisms of intergovernmental relations with the national government and conflict management.

This assessment then provides the basis for us to highlight, from a comparative perspective, alternative options between status quo and full independence. As we regard the transfer of any “model” arrangement as a whole as unfeasible, we focus on specific key elements pertaining to the three above-mentioned issues. With regard to the entrenchment and implementation of self-government, we explore the interplay between international and domestic legal guarantees, as well as the delicate task of balancing local ownership and facilitation by international actors. As to assignment of autonomous powers, the backbone of any autonomy arrangement, the report draws attention to what is important for potential self-government, always within the limits of the national constitutional framework, in five major areas: constitution-making, legislation, administration, judiciary and external relations. Concerning mechanisms of intergovernmental relations and conflict management, we identify

various options for the entrenchment of principles, institutions and instruments of intergovernmental relations, regional participation at the level of the national government and, finally, judicial adjudication as a complement to intergovernmental conflict resolution by political means.

The concluding remarks of our report put particular emphasis on the fact that any functioning autonomy arrangement does not only need a balancing of interests of the main stakeholders at the time of its conclusion. It also requires constant rebalancing over time in order to stay in tune with changing circumstances and maintain legitimacy. Such adaptability may be ensured by formal amendments, but also by intergovernmental agreements and constitutional adjudication. Even if adaptability enhances the prospects for an arrangement to enjoy long-term acceptance and thus legitimacy, both nationwide and within an autonomous region, there have been autonomy regimes that proved to be merely transitional. Whether this holds true in the case of Bougainville will be decided by referendum in 2019. This will be the ultimate test for an autonomy arrangement that actually grants a high degree of formal self-rule, but suffers, not least due to scarce financial and administrative resources, from its only limited implementation.

Ch. 1 What is autonomy? A working definition

“No solid theory underpins autonomy, because autonomy arrangements are often very pragmatic ad hoc solutions that escape generalizations” (Suksi, 2013, p. 2). This comment accurately reflects persistent difficulties in dealing, from a comparative perspective, with the enormous variety of arrangements of self-government and echoes earlier findings that “no clear account of the concept of autonomy is available” (Wiberg, 1998, p. 43). While this might be seen, at first glance, as only affecting academic circles, it also has important implications for policy-makers and other practitioners.

In fact, the lack of clarity and consensus around the concept of ‘autonomy’¹ including the term itself has sometimes created a lot of confusion among conflict parties attempting to find a mutually acceptable arrangement. In contrast, this confusion or even the deliberate obscuration of interrelated and not neatly separable concepts and labels like ‘autonomy’, ‘devolution’, ‘decentralisation’ and ‘federalism’ has had the opposite effect of facilitating negotiations and of enabling their success. In Spain, for example, the term ‘federalism’ had been equated, due to historical experiences, with fragmentation and chaos. Thus, the drafters of the country’s new constitution in 1978 could only settle on creating what was called a ‘state of autonomies’ (Solozábal, 1996, p. 245ff), even if this state eventually amounted to a ‘federation in disguise’ (Moreno, 2007, p. 88). For practitioners, a lesson to be learned from this episode is that pragmatism frequently offers clear benefits and that substance is more important than labels.

This report aims to provide insights into the substance of autonomy regimes worldwide with a view to offering options for the status of Bougainville within Papua New Guinea. It is certainly true, as already mentioned, that “autonomy arrangements are often very pragmatic ad hoc solutions that escape generalizations”. But the character of such arrangements as pragmatic package deals between political stakeholders at a specific point in time only precludes the simple transplantation of *entire arrangements*, considered as ‘models’, in other contexts. However, it does not mean that there is nothing to learn from a comparative analysis of autonomies about *specific key elements*, provided that due regard is paid to substantial differences in the respective cultural, social, economic, political and legal context. This context always has to be borne in mind by any study of the texts, spirit and effects of autonomy arrangements, including this report.

Against this backdrop, the remainder of the report will be structured into the following sections. First, we will examine the question why and how autonomy arrangements come into being (Section 2). This requires a discussion of the arguments that national governments commonly use in favour or against establishing autonomy regimes, as well as an assessment of the strengths and weaknesses of such regimes. This will be followed by a comparative overview of the manifold types of autonomy: mainland and island autonomies, asymmetrical and symmetrical autonomy, and owned and shared autonomy (Section 3). Being aware of the defining characteristics and constraints of these types seems crucial for any discussion of Bougainville’s status. On this basis, we will then assess its current autonomy arrangement within Papua New Guinea from a comparative perspective (Section 4). This assessment will provide a basis for us to highlight alternative options between this status quo and full independence (Section 5). As already mentioned, we do not believe that a transplantation of any ‘model’ arrangement as a whole is feasible. Therefore, this section is structured into three sub-sections that deal from a comparative perspective with key elements of autonomy that appear to be relevant for Bougainville: entrenchment and implementation of autonomy, autonomous powers, and intergovernmental cooperation and conflict management. We will then offer some final considerations on the options for Bougainville’s future status in the concluding remarks (Section 6).

Before moving on to the next sections, we need to provide, despite the above-mentioned lack of clarity on the concept and term, a working definition of autonomy. In the absence of a generally accepted definition, what we mean by ‘autonomy’ in this report, and what we do not, has to be clarified for the following comparative study. Firstly, we need to stress that we only deal in the following sections with *territorial* autonomy. Even though there has been an increased interest in forms of *non-territorial* autonomy in some parts of the world over the last two

¹ In this report, we use the terms ‘self-government’ and ‘autonomy’ synonymously.

decades (Kössler, 2015, p. 245), these forms² do not appear to be of relevance in the case of Bougainville. For the purpose of this report, we consider (territorial) autonomy (of a territorial entity) as “granting internal self-government to a region ... thus recognising a partial independence from the influence of the national or central government” (Heintze, 1998, p. 7).

Secondly, we need to clarify the relationship between this notion of territorial autonomy and similar terms like federacy and associated states. Federacies are usually defined as political arrangements between a larger unit and one or more smaller unit(s), with Puerto Rico often being cited as a leading example. Smaller units thereby retain considerable autonomy, participate at least at a minimum level in decision-making at the national government level and the relationship can be dissolved only by mutual agreement. Associated states are another form of combining a larger entity with one or more smaller entities with significant differences in territorial and demographic size, economic and political weight and so on. While being seen as very similar to federacies, such an arrangement of association, like that between New Zealand and the Cook Islands, is different insofar as it “can be dissolved by either of the units acting alone on prearranged terms” (Watts, 1996, p. 4). In our view, both federacies and associated states are comprised by the above-mentioned working definition of territorial autonomy in a broad sense. After all, these are specific labels for arrangements of autonomy for territorial entities that are used for historical reasons or because of local peculiarities of the political or academic vocabulary. Quite often, therefore, categorisation is very subjective. What some observers qualify as ‘federacies’ or ‘associated states’ is called ‘autonomies’ by others.³ Adopting a pragmatic approach, as we do, there is thus no point in making such a differentiation. Puerto Rico and the Cook Islands and arrangements of similar kinds fall within our working definition of autonomy and so are covered in this report’s comparative analysis.

Thirdly, we need to make clear how our understanding of autonomy relates to the similarly broad and ill-defined notion of power-sharing. Traditionally, autonomy was seen as one of four main institutional elements of power-sharing arrangements. On the other hand, it has rightly been pointed out that the three remaining elements concern specific instruments of power-sharing at the national level,⁴ which aim at fostering cooperation among political elites, and are thus different from autonomy (Bauböck, 2005, p. 97ff). Still, there are important interrelations between them, as power-sharing is often a supplement to autonomy with such mechanisms being established at the national level, but increasingly also within autonomous territories (Kössler, 2016). This touches on the issue of shared autonomy, treated in Section 3.3 of this report, which seems to be as crucial for Bougainville as for any other autonomy in a context of ethno-cultural diversity.

² According to Markku Suksi, these forms include institutional forms of civil law turning into functional autonomy, functional autonomy within line administration and national cultural autonomy (for an overview, see Suksi, 2015, p. 85ff).

³ For example, Greenland, the Åland Islands, Madeira and the Azores are seen by some (mostly Europeans) as autonomies (see Wiberg, 1998) and by others (especially from outside Europe) as federacies (see Watts, 1996, p. 5).

⁴ These elements are a grand coalition government, proportionality in all critical areas of the public sector (legislature, judiciary and higher levels of public administration including police and military) as well as the instrument of a minority veto (see Lijphart, 1977, pp. 25–52). For similar, but slightly differing elements of power-sharing arrangements see, more recently, McGarry et al, 2008, pp. 58–60.

Ch. 2 Why do countries establish autonomy arrangements (or not)?

Underlying rationales for establishing autonomy

The reasons why autonomy arrangements come into being are manifold. Among the most relevant driving forces are, above all, geographical factors, historical grounds and, increasingly, the need to accommodate ethno-cultural diversity. Geography plays a vital role in the establishment of many autonomy arrangements, as such arrangements often “involve the idea of periphery: the accommodation of the unusual, the recalcitrant, almost the outsider” (Ghai, 2013, p. 5). Autonomy is granted in some cases to peripheral territories along the borders with neighboring countries (e.g. South Tyrol within Italy, the Basque Country within Spain) and in others even to more or less distant islands (e.g. Hong Kong and Macau, Greenland, Puerto Rico and the Cook Islands) (see Section 3.1). Throughout history, the geographical element of a territory’s remoteness has often favoured the establishment of autonomy because national governments have found it impossible to transform their claim to ultimate authority over their territory into effective direct control and were thus forced to allow for diverse forms of self-government (Kössler, 2016, pp. 252–55).

A second main driving force of autonomy is certain historical circumstances that make arrangements of self-government feasible, desirable or sometimes almost inevitable. Key among such historical circumstances have been processes of decolonisation, which also provided the ground for the autonomous status of Bougainville in newly independent Papua New Guinea (see Section 4). One purpose of autonomy was then to preserve the territorial integrity of the colonies-turned-independent countries because such arrangements were supposed to quell secessionist tendencies in these new and often instable countries (e.g. Kenya and Uganda). In other cases, forms of post-colonial autonomy followed from a process of joining certain territories together (e.g. Eritrea and Ethiopia). In still other cases, arrangements of self-government served the purpose of redefining the relationship between the colonial power and its colony short of full independence (e.g. Cook Islands and New Zealand, New Caledonia and France) (Ghai, 2013, pp. 8–9).

A third main factor for establishing autonomy, probably the most important one these days, is to accommodate ethno-cultural diversity. In many cases, this pluralism has given rise to divided societies, which are not only characterised by the pure fact of ethno-cultural differences but by their political salience (Choudhry, 2008, p. 4ff). These differences then form the basis of political identity and political mobilisation in the context of nation-building projects. Many states have been confronted over recent decades with such projects in certain regions of their territory. The competition of national and regional nation-building has followed from the fact that nation-states have pursued, following colonialism all over the world (Parekh, 1997), a similar agenda. They have sought to *produce ex post* a common national identity, which the rationale of the nation-state would actually *presuppose*. However, certain groups within these states have opposed this because they perceived themselves as a distinct nation and, as a consequence, started their own nation-building project with claims to some portions of the state territory. The result has then typically been a clash between majority nationalism justifying the established order and minority nationalism challenging it (Lecours & Nootens, 2011, p. 3ff). Such minority nationalism often develops in response to efforts of assimilating minorities into a uniform national identity. This identity is typically constructed by ‘extending’ the identity of the politically dominant group which is often, but not always, the majority population. This occurred in a number of countries worldwide, especially in the process of decolonisation and during the so-called ‘third wave’ of democratisation, especially in the 1990s (Huntington, 1993). An illustrative example is Nepal where a uniform national identity was forged during the times of monarchic rule until 1990 with a focus on one language (Nepali) and one religion (Hindu). In the process of democratisation, formerly suppressed minority identities resurfaced, and they were nurtured and exploited by the Maoists in their struggle against the established order and for autonomy.

While challenges of the constitutional and political status quo have sometimes aimed from the outset ‘only’ at

the establishment of autonomy, they have in other instances aspired towards full independence. In the latter cases, secessionists have often settled on some form of autonomy arrangement as a compromise solution between a centralised unitary state and own statehood. This character as something between two extremes is obvious, for example, from the Tibetan view of autonomy as ‘the middle way’ (see Ghai, 2017, p. 67 for an explanation of this approach). For this reason, it is usually not the initial ideal and primary goal of neither party in negotiations, but it is in a spirit of compromise “most often only reluctantly granted, and usually ungratefully received” (Dinstein, 1981, p. 302). Sometimes, of course, it is not granted at all and claims for self-government remain unrecognised. A key question is therefore, why are autonomy arrangements concluded in some cases and not in others?

Why autonomy comes into being (or not)

Very often autonomy arrangements, or at least the readiness to negotiate such arrangements, follow a long history of conflict, sometimes even involving a civil war. This means that the stakes are high for all parties in the conflict. In some instances, like the Sudan or Sri Lanka, it is the offer to negotiate self-government that decisively contributed to suspending a period of war. Especially as, in such cases of violent conflict, typically having strong geopolitical repercussions on neighboring countries or even beyond, international intervention is the norm. This leads us to the question of which factors are conducive and which ones detrimental to establishing autonomy in countries riddled by (violent) conflict?

A first factor is the engagement of international actors who often have, for better or worse, a significant impact. Such actors do not only include kin-states, if they exist, which may intervene in support of a national minority abroad, but also other states and international organisations. The fact, for example, that Puerto Rico was listed as a colonial territory in the early days of the United Nations, with the consequence of the United States being obliged as a colonial power to submit annual reports to the organisation, created some pressure that facilitated the granting of a certain extent of self-government under the constitution of 1952. (Rivera-Ramos, 2013, p. 104f) (on Puerto Rico and its 1952 Constitution, see also Section 3.1). Overall, the record of the role of international engagement is mixed at best. To be sure, the United States is usually credited for brokering the 1998 Belfast Agreement over the conflict in Northern Ireland (see also Section 5.1.3).

Turning to domestic factors, the system of government of the state, to which the autonomous territory belongs, has considerable influence on its prospects. In any event, a system based on democracy and the rule of law is, in general, more likely to foster a political culture of pluralism. Moreover, it entails, through popular elections, enhanced democratic legitimacy of the political actors involved, not only of the autonomous government, but of the national government as well (for example, see Nordquist, 1998, p. 69ff). In a number of cases, autonomy is not established in a stable democracy but during a process of democratic transition, as illustrated by the heyday of new self-government arrangement precisely during decolonisation (e.g. India, Kenya or also Papua New Guinea) and the above-mentioned ‘third wave’ of democratisation. However, in many young and still unstable democracies enthusiasm and solemn declarations have soon given way either to very weak autonomy regimes or even to an outright failure of implementation.

Times of democratic transition and other kinds of regime change provide fertile ground for the introduction of autonomy because in such periods the whole constitutional and political architecture is usually scrutinised and challenged by the new rulers. The latter might form a united front against the centralisation of the deposed old regime. The Ethiopian People’s Revolutionary Democratic Front, which took power in 1991 after the overthrow of the Derg regime, has campaigned for decades on a platform that included the creation of autonomies territories in the country (Fessha, 2010, p. 169ff). In practice, of course, the degree of self-government is today limited by this coalition’s all-embracing political hegemony. In other cases, there might not be consensus within the new regime on the value of autonomy, but it still follows in the end from a necessary compromise between national and regional actors who need to find political allies for the sake of consolidating their hold on power. The compromise on autonomy within the ideologically very diverse parties negotiating Spain’s Constitution of 1978 after the fall General Franco’s dictatorship are as much an example of such dynamics as what happened in the early years of post-Soviet Russia. The formation of the Russian Federation under President Yeltsin was

characterised by the need to consolidate his powers and to accommodate secessionist trends, culminating in his now famous offer to subnational entities “to take as much sovereignty as they can stomach”, as long as they remain within the federal state (Yeltsin in 1990, quoted in J. Hughes, 2002, p. 55).

Precisely the issue of sovereignty has been an extremely contentious issue in many cases. This is due to an understanding of this concept that sees sovereignty over a certain territory as something absolute and indivisible. If a certain territory is seen, according to the different historical and political narratives promoted by the national and subnational governments, as a ‘homeland’ for its people (see Section 3.3), the question of sovereign power over this territory is seen by each side as exclusive and becomes, almost inevitably, a zero-sum game. However, while it is indeed often claimed that absolute and indivisible sovereignty is an attribute of the nation-state,⁵ several constitutional systems consider sovereignty as something that can be divided and shared.⁶ Today, it is important to recognise that sovereignty is in any event constrained by legal integration at the supranational and international levels and by globalisation more generally. Prospects for an autonomy arrangement to be sustainable seem to be indeed better if (often) symbolic debates over sovereignty do not take centre stage and thereby prevent pragmatic compromises on single issues (see Woodman & Ghai, 2013, p 459). As a leading scholar in the field put it about Europe, “the successful transcendence of the sovereign state and state sovereignty is greatly to be welcomed. It has been and will be a condition for the security of peace and prosperity among us” (MacCormick, 1999, p. 129).

Struggles over sovereignty are closely linked to another important issue, that of ‘autonomy-phobia’ (Palermo, 2012, p. 82), that is the widespread fear of states that autonomy will be a stepping stone to secession. Thus, it would threaten not only the state’s sovereignty and territorial integrity, but due to the often-violent character of separatism also national security. That states typically view secession with utmost suspicion hardly comes as a surprise. After all, they are guided by the inherent interest of self-preservation. But the fear of secession has profound repercussions on the perception of autonomy which is often identified with disintegration and evokes responses almost as negative as secession itself. National governments frequently deny autonomy, in particular, if they not only expect it to lead to the separation of one territory, but fear a domino effect giving rise to claims for independence by other territories. Interestingly, this fear has triggered in some cases a reaction different from the denial of self-government. To avoid such a domino effect, President Habibie of Indonesia preferred an independent East Timor to it having autonomy in Indonesia so that the territory achieved statehood in 2002 (Martin, 2001). In other cases, national governments are not very much concerned with preventing secession primarily because the territory in question is seen rather as a burden or at least not as vitally important. It is sometimes claimed, for instance, that New Zealand would not be upset if the Cook Islands opted to become fully independent instead of maintaining its current arrangement of associated statehood (Woodman & Ghai, 2013) (on the Cook Islands and associated statehood, see Section 3.1).

It is certainly true that there may be a domino effect around regional claims for autonomy. A good example is Spain where the establishment in 1979 of the autonomous communities with historical nationalities, primarily Catalonia and the Basque Country, was soon followed by the creation of autonomous communities in other parts of the country. Regional political socialisation had led to the emergence of regional identities and parties advancing claims for self-government: “Irrespective of their relative artificiality or historical depth, all of the autonomous communities embarked on a process of boundary building, which included the invention of symbols as well as the rediscovery and rewriting of regional cultures ...” (Conversi, 2000, p. 130). A further question is then whether such a domino effect does not only concern claims for autonomy but also those for secession and what can be done about it. It seems true that while autonomy often “provides national minorities with a workable alternative to secession, it also helps to make secession a more realistic alternative.” (Kymlicka, 1998, p. 142) Put differently, autonomy’s paradox is that it may *increase the capacity* to secede, but, at the same time, it is supposed to *decrease the will* of minority groups to do so. While one element to prevent a secessionist

⁵ The Spanish Constitutional Court, for example, sees only the state as the holder of sovereignty, while the autonomous communities enjoy political autonomy within the state (see STC 32/1981).

⁶ See, for instance, the US Supreme Court’s ruling in *Chisholm v Georgia*: 2 Dall. 419 (1793), Art. 3 of the Swiss Constitution and the judgement of Germany’s Federal Constitutional Court in BVerfGE 34, 9 (20) and BVerfGE 36, 342 (360f).

domino effect is an institutional design that reflects a concept of shared autonomy rather than owned autonomy (see Sections 3.3 and 3.6), secessionism in one region and an ensuing chain reaction can never be fully excluded just by means of such design. This also requires a political culture that is based on mutual consideration, loyalty, negotiations in good faith and compromise. Even if these crucial elements may be entrenched as principles in constitutional provisions (e.g. Belgium) or in constitutional jurisprudence (e.g. Spain),⁷ such a favourable political culture remains something that institutional design largely presupposes. As one scholar put it, “[o]nce the central government is actually in operation, however, what maintains or destroys local autonomy is ... the more profound characteristics of the political culture” (Riker, 1969, pp. 135, 142 and 146).

A final factor that impacts on whether autonomy comes into being or not is related to the question of whether the territory concerned is seen as an essential part of the state in geographical, economic and political terms. Understandably, national governments have found it easier to settle on a self-government arrangement if this affects a peripheral and/or small area. By contrast, larger territories that are vital to the economic fate and political dynamics of the country as a whole have faced difficulties in achieving autonomy in the first place or at least in extending it. Territories as different as South Sudan and Catalonia are cases in point. Coming from prosperous parts of a country, calls for (more) self-government are often viewed as illustrating a lack of solidarity. This holds true, in particular, for wealth from natural resources which is typically distributed unevenly across a country. This raises the crucial question of whether the proceeds from these resources should primarily accrue to the subnational entities where they are located or to the national government (Brosio, 2006; Anderson, 2012). This question is even more critical when considering that these proceeds account in some countries for a very high share of the total revenue of all government levels (e.g. Nigeria, Iraq and Russia) and that they have often amplified conflicts in ethno-culturally diverse societies (e.g. the Kurdistan region in Iraq).

⁷ See, for instance, Art. 143 of the Belgian Constitution: “In the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for federal loyalty, in order to prevent conflicts of interest.” By contrast, in Spain it was the Constitutional Court, which recognised (STC 18/1982; STC 11/1986) duties of cooperation and loyalty to the constitution (*fidelidad a la constitución*). On these and similar principles, see Palermo & Kössler, 2017, pp. 249–53.

Ch. 3 Types of autonomy? A comparative overview

Mainland and island autonomies: The issue of geography and self-government

Islands and their diverse legal and political status

As mentioned earlier (Section 2.1), geography sometimes plays a vital role in granting autonomy, which is often linked to the idea of accommodating the periphery being far away from a state's political and economic centre. Autonomous island regions evidently constitute a particular form of periphery, as they may be defined as "a water-bound territorial entity situated at an intermediate level between local and state-wide levels" (Hepburn, 2012, p. 122). Indeed, the condition of 'islandness'⁸ seems to make such regions particular in many respects, which do not merely relate to the physical boundedness of a territory surrounded by water and separated from the mainland (Baldacchino, 2004, p. 272). In addition to this geographic characteristic, there are typically social and economic elements of a specific identity: the demographic dimension of large-scale emigration and brain drain (or, conversely, high immigration rates in the case of natural resources), the economic dimension of limited economies of scale and high transportation costs and, importantly for our purposes, the political dimension of strong aspirations towards self-government. Surprisingly then, in view of their particular conditions in so many respects, islands have not been the object of many empirical studies by political scientists or comparative analyses by constitutional lawyers, as they have research by anthropologists, historians and economists (Hepburn, 2012, pp. 121–22). This holds true in spite of the condition of islandness inspiring political theorists throughout history as spaces for innovative social and political experiments, ranging from Plato's Atlantis and Thomas More's Utopia to Jean-Jacques Rousseau's 'Constitutional Project for Corsica'. But what about today's global practice around the legal and political status of islands?

It is soon obvious to any observer that these statuses vary tremendously. Some islands in very different parts of the world enjoy independent statehood with Haiti being arguably the oldest still existing island state (since 1804). Several others achieved independence during the process of decolonisation in the aftermath of World War II. Jamaica (1962), Malta (1964) and Fiji (1970) are cases in point and East Timor (2002) is a very recent addition to this list. On the other end of the spectrum are islands fully incorporated into the state which they form part of, without any meaningful autonomy. Sometimes these are, like in the case of Greek islands, governed by delegates nominated by the national government. It is therefore neither self-evident nor natural that islands enjoy self-government. Nonetheless, a number of islands around the world have an autonomous status, albeit with enormously varying degree, even if attempts have been made, for instance, to categorise these special relationships between island regions and the national government on the mainland as following a logic of assimilation, adaptation or exception (Fazi, 2012, pp. 138–42).

In fact, they do not only differ from each other in the extent of self-government, but also concerning their names. Autonomous island regions in the above-mentioned sense are denominated as 'overseas department' (Guadeloupe/France), 'overseas territory' (Virgin Islands/United Kingdom (UK)), 'commonwealth territory' (Cocos Islands/Australia), 'special region' (Sicily and Sardinia/Italy), 'autonomous region' (Azores/Portugal), 'autonomous province' (Åland Islands/Finland), and so on. Even if these specific denominations typically reflect unique self-government arrangements of these islands, which resulted from power constellations and bargaining for a status within a larger state instead of full independence, there have been valuable attempts of systematisation to shed some light on these extremely different arrangements.

Autonomous island regions may form part of federal systems, which also bestow a certain degree of self-government

⁸ As the older term 'insularity' has increasingly assumed a pejorative connotation of relating to closure and narrow-mindedness, the term 'islandness' has become more and more common.

to regions on the mainland or other island regions. Hawaii within the United States, after receiving statehood in 1959, is an example, as are the constituent units of island federations such as the Comoros, Micronesia or St. Kitts and Nevis. While the whole island usually forms a subnational entity, this is not necessarily so. For historical reasons, for example, Northern Ireland is a territory with a devolved government belonging to the UK, whereas the Republic of Ireland in the Southern part of the island is a fully independent state.

Federacies and associated states ... and hybrids

Irrespective of whether island regions form part of a federal or unitary state, they may have a rather loose special arrangement with the state that implies a lesser degree of integration than the status of a fully-fledged subnational entity within a federal system, especially in terms of participation in the adoption of ordinary law and constitutional law at the national government level. In other words, if federalism is taken to mean, in line with a classical formula, as “self-rule and shared rule” (Elazar, 1987, p. 5), then it is the shared rule element that is weak or absent altogether. Even though territories with such a status may exist in federal states alongside fully-fledged constituent units (e.g. Puerto Rico), such special arrangements are also typical of unitary states having to accommodate specific cases of ethno-cultural and/or territorial diversity. Notable examples of such arrangements in otherwise unitary states are the Åland Islands in Finland, the Faroe Islands and Greenland in Denmark or New Caledonia in France.

These special arrangements are typically subsumed under two similar categories, that is federacies and associated states (Watts, 2000, p. 21ff⁹). Federacies are characterised by the island region having jurisdiction over practically all domestic affairs, whereas issues such as external relations, defence and monetary policies fall within the powers of the national government. Importantly, a dissolution of the relationship may only occur on mutual agreement, which adds an element of continuity and (potential) stability. Several of the above-mentioned island regions belonging to European countries such as the Åland Islands or the Faroe Islands are cases in point.

Another well-known example of a federacy is Puerto Rico. On the one hand, Puerto Ricans have certain rights and obligations granted by United States citizenship, including service in the US military and the right to move freely between the island and the mainland. On the other hand, they do not pay federal income tax and do not have franchise at the national level, neither concerning presidential elections nor elections to Congress. While Puerto Rico is represented in the US House of Representatives by a non-voting member, called resident commissioner, Congress has the authority to determine the island's governance arrangements. The Puerto Rico Federal Relations Act of 1950 is the basic legal act that grants the people of Puerto Rico the right to have an autonomous government under its own constitution. Thus, the Constitution of the Commonwealth of Puerto Rico was ratified after a referendum vote in favour of it in 1952. Today, there is, however, a certain discontent with the status quo so that several alternative options are pursued. These are full independence, statehood in the United States and various proposals aiming at a non-subordinate form of autonomy labelled as ‘Enhanced Commonwealth’ proposals (for an overview, see Lluch, 2014). In the 2012 referendum on the political status of Puerto Rico, 54% of those voting rejected the present status. In another referendum in 2017, three options were put to the vote, namely ‘statehood’ (within the United States), ‘independence/free association’ and the ‘current territorial status’. An overwhelming majority of 97 percent was in favour of the ‘statehood’ option, albeit with an extremely low voter turnout of merely 23 percent.

The second category of relatively loose arrangements is that of associated states. Similar to federacies, there is usually a highly asymmetrical relationship between a rather small island and a much larger and, in both political and economic terms, more powerful state on the mainland. They differ, however, in certain important respects from federacies. First, associated states are typically recognised under international law and entitled to be represented in international organisations. Both the Marshall Islands and Palau are, for example, UN member states even though they are sovereign states in free association with the United States. The US Government concluded an international agreement, called the Compact of Free Association, with the Marshall Islands and the Federated States of Micronesia in 1986 and with Palau in 1994. Secondly, in case of an associated state a dissolution of the current relationship may be effected, unlike for federacies, by means of a unilateral declaration.

⁹ Watts builds on earlier work of Elazar, 1994, pp. 349ff.

This holds true at least from a legal point of view, while there are, of course, significant practical constraints resulting from the already-mentioned asymmetrical relationship. In the case of the three states associated with the United States, this asymmetry also results from history, as all of them before formed part of the Trust Territory of the Pacific Islands, a UN trusteeship under US administration. The fact that compacts of association are typically concluded between a large developed nation and small developing island territories adds economic and political dimensions to the enormous imbalance in the relations between partners that are not on an equal footing. Even if there were associations between developed territories, some degree of economic and political asymmetry would probably persist due to the geographical conditions of islands and resulting problems such as high transport costs and lacking economies of scale.

Classical examples of associated states are those linked to New Zealand: Niue since 1974 and the Cook Islands since 1965. Especially the latter case has attracted considerable attention and offers in terms of its longevity valuable insights (Levine, 2012, p. 439). The Cook Islands Constitution Act, adopted by the Parliament of New Zealand in 1964, amended in 1965 and approved in a referendum the same year, established a free association arrangement. This entailed comprehensive executive power for the government of the islands and legislative power insofar as the New Zealand Parliament is not authorised to pass legislation about the islands. Moreover, Cook Islanders are New Zealand citizens without obtaining additionally a Cook Islands citizenship. In line with the above-mentioned definition of associated states, the special relationship has two characteristics. First, the people of the Cook Islands can achieve full independence, or any other status considered preferable through a unilateral declaration that may not be vetoed by New Zealand (Art. 41 of the Constitution). Secondly, the government of the islands has powers of external relations. The 2001 Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand explicitly guaranteed the power of the islands government to conduct its foreign affairs and to interact with actors under international law as a sovereign state. Given this relationship with New Zealand, the Cook Islands would therefore fit the definition of micro-states, described as “modern protected states, i.e. sovereign states that have been able to unilaterally depute certain attributes of sovereignty to larger powers in exchange for benign protection of their political and economic viability against their geographic or demographic constraints” (Dumienski, 2014, p. 22). The nature and spirit of the relationship is probably best expressed in an exchange of letters between the Prime Minister of New Zealand and the Premier of the Cook Islands less than a month after the Cook Islands and New Zealand signed their first treaty in 1973. In this exchange, then-New Zealand Prime Minister Kirk described the arrangement as follows: “The free association ... should not be regarded as restricting the Cook Islands’ powers of self-government ... there are no legal fetters of any kind on the freedom of the Cook Islands, which make their own laws and control their own constitution ... the relationship has been simply one of partnership, freely entered into and freely maintained ... a voluntary arrangement which depends upon shared interests and shared sympathies” (quoted in Henderson, 1994, p. 102).

To be sure, the distinction of federacies and associated states, which basically refers to the unilateralism or not of ending the special relationship and jurisdiction over external relations, helps to systematise and shed light on a plethora of individual arrangements. Yet not all of them easily fit into one or the other of these two categories and some oscillate between them over time. A case in point is Greenland. Traditionally, this autonomous island region in the Kingdom of Denmark was seen as a prime example of a federacy (Watts, 2000, p. 31). Over time, however, Greenland has been granted considerable leeway in managing its foreign and security policy (Ackrén & Jakobsen, 2015, p. 404). According to the so-called Itilleq Declaration of 2003, a joint agreement between the Danish and Greenlandic governments, both governments complement each other in terms of Greenland’s external relations as an area of shared competences. Even if the declaration was initially considered as a vehicle for involving the autonomous island government in decisions concerning the Thule Airbase of the United States, which is located in the north of the island, its principles have been applied ever since to external relations more generally. Today, Greenland’s presence in the international arena is illustrated by its representative offices, for examples, in Brussels and Washington D.C., seats in several international organisations (e.g. the Nordic Council) and a Department of Foreign Affairs that handles relations with foreign countries and, interestingly, with Denmark. Beyond that, the Greenlandic Government also has the right to sign international agreements concerning areas of particular

interest for the island region (Ackrén, 2014, p. 42ff). This international status seems quite far from the position of a classical federacy like Puerto Rico and is in some respects rather reminiscent of the foreign policy role played by associated states. In conclusion, there is a lot of fluidity and dynamism in relationships between autonomous island governments and the national government on the mainland and hybrid arrangements, resulting from bargains in each individual case, are the rule rather than the exception.

Why do island regions strive for autonomy or independent statehood?

A question is then what determines the degree of autonomy sought by island regions and why do they often eschew secession in favour of a special relationship short of full independence? (Hepburn & Detterbeck, 2013). As to the latter question, especially historical and/or economic factors seem to have an impact. In history, island regions have often been vulnerable to conquest by imperial powers taking advantage of them for geopolitical purposes. Beyond mere domination in political and military terms, this also entailed a certain entanglement through integration into the economic systems of the occupying power (Royle, 2001). These links in various respects may facilitate a certain path to dependence that favours the preservation of certain links rather than running the risk of full independence. Risk is also a keyword in another consideration against outright secession – the one focusing on economic viability. Due to their peripheral location, island regions often suffer from inherent disadvantages like limited economies of scale and high transportation costs that are sometimes aggravated by brain drain and a lack of natural resources (Baldacchino, 2006, p. 91). In dire economic circumstances, access to a larger market on the mainland, advantages from economies of scale and financial transfers may be important incentives against full separation, even more so if an island region depends highly on only few sources of income and is thus economically vulnerable.

A case in point is the Greenlandic economy, which apart from the exploitation of one ruby mine depends a lot on fisheries, which account for about 90 percent of all exports. The autonomous island government therefore relies to a considerable extent, especially in times of fluctuating prices for fish, on an annual block grant from the Danish Government. This recurrent subsidy is since the 2009 Self-Government Act fixed at 3.4 billion Danish Kroners (around 693 million Australian dollars) with a yearly inflation-related adjustment. It does not surprise therefore that the desire to achieve independent statehood is strongly linked to economic well-being. Surveys in 2002 and 2017 measured the support for independence, provided that living standards would not change, and the share of people in favour of separation in these circumstances was 61 percent and 44 percent, respectively (Ackrén, 2017, p. 17f). Similarly in Scotland, economic well-being was a key issue for voters in the Scottish independence referendum, 2014. Moreover, the case also demonstrates the inherent unreliability of all such mid- and long-term predictions and scenarios. While fiscal redistribution under the so-called ‘Barnett formula’¹⁰ currently ensures higher public spending being higher per head of population in Scotland than England, a central question was whether own revenues from the production of North Sea oil¹¹ would in case of independence make up for the loss of the transfer payments from London. Together with the inherent uncertainty around credit ratings and an independence settlement still to be negotiated, especially the division of assets and liabilities, the volatility of prices for oil and its nature as a finite resource made any predictions little more than a guess. The cases of both Greenland and Scotland demonstrate that there is much uncertainty in the economic implications of secession, even more so if natural resources are a main source of income for the breakaway state. Moreover, it is interesting that even (proposed) separation does not always mean cutting economic ties altogether. The 1995 Quebec referendum asked whether the province should become a sovereign state, but at the same time envisaged a “new economic and political partnership” with Canada, including the Canadian dollar as common currency and continuing North American Free Trade Agreement (NAFTA) membership.

As to our first question, that when considering different degrees of autonomy sought by island regions, various factors seem to be at play (Fazi, 2012, p.142ff; Hepburn, 2012, p. 129ff). Calls for self-government are stronger in cases of a regionalised party system with one or more parties (or movements) pressing ahead with the specific

¹⁰ See https://en.wikipedia.org/wiki/Barnett_formula

¹¹ See https://en.wikipedia.org/wiki/North_Sea_oil

claims of an island region.¹² Very distinctive regional identities also contribute to stronger demands of autonomy, as does the relative economic wealth of the island within the larger state, great distance to the mainland, the region's chances to access supra- and international organisations and, finally, the national government's reluctance to accommodate autonomy claims of the island region. Even though some of these factors are distinctive of island regions, most of them apply to other regions as well. Bearing in mind the particularities of island autonomies outlined in this section, it is therefore possible for them, with some caution, to learn from comparative evidence from mainland autonomies as well.

Asymmetrical and symmetrical autonomy: The question of special status

Asymmetry and regions with special status

Regions with special status represent particular forms of subnational territorial authorities, that is, between the national government and local authorities. They are established with a view to responding to particular needs of certain territories due to history, geographical position, culture or linguistic characteristics and enjoy different powers as compared with other subnational entities of the same state. While the reasons for granting special status to specific parts of a state's territory may vary, asymmetric distribution of powers enables tailor-made solutions.

Special status arrangements for subnational units are not only consistent with the overarching public international law principle of territorial integrity of states: they also help preserve such integrity by addressing specific claims without challenging the unity of the state. Where special status is established to accommodate ethno-cultural minority groups, it is considered to be a genuine expression of the internal self-determination of peoples (although this term is hardly used in legal acts, but rather a political concept) (Palermo, 2013, paras 1–6).

The scope of special status

Special status entails the legal guarantee of more powers (legislative and/or administrative and/or financial), at least quantitatively in terms of legislation, and normally privileged forms of representation and negotiation – often by means of bilateral channels with the state – for specific territorial authorities. Such authorities always enjoy political and administrative autonomy, while formal legislative autonomy depends on the constitutional setting of each country. For example, Madeira and the Azores enjoy political autonomy and wide competences, even though they cannot pass formal laws. Similarly, the Collectivité territoriale of Corsica has overall a broader autonomy as compared with other regions in France although formal law-making is pre-empted. Political autonomy of the concerned territory is usually expressed by an own elected assembly and an accountable government (Palermo, 2013, paras 9–10).

Special status only affects specific territories (regions) of a state, while there is no wish or need to introduce a fully-fledged federal system. In effect, extending special status to all territories of the state would contradict the very rationale of a special treatment.

Legal guarantees and entrenchment of special status

Special status must be based in law. Normally the entrenchment has constitutional nature and is further specified in legislative and administrative acts. Constitutional guarantee is an essential condition for legal certainty; constitutional entrenchment is necessary since special status impacts on the principle of equality among the citizens of the same state.

Occasionally, special status regimes originate from and are based on international agreements. This is the case of, among others, South Tyrol in Italy (so-called Gruber–De Gasperi Agreement, 1946), Nakhchivan in Azerbaijan (Moscow and Kars Treaties, 1921) and (although not strictly in a formal sense) the Åland Islands in Finland (so-called Åland Settlement, 1921). International anchoring provides an additional layer of legal guarantee to special status regions, as the infringement of existential elements of their autonomy can be challenged in international

¹² Maria Ackrén sees the presence and interplay of 'regional movements', 'separatist movements' and 'national parties' as critical determining factors (see Ackrén, 2009, p. 74ff).

forums including in the International Court of Justice. More recent special status arrangements, such as Gagauzia in Moldova or the 1992 arrangement for Crimea in Ukraine, have been adopted with significant international participation, although no formal international guarantee is provided.

While the existence of a general right to autonomy under public international law is disputed and mostly denied, such a right is sometimes explicitly recognised by domestic provisions. The right to autonomy can be defined as a constitutional right for all ‘nationalities and regions’ of the state, as provided by Art. 2 of the Spanish Constitution, or as a specific right of the population of a special status territory, as is provided by Art. 4 of the statute of the autonomous province of Vojvodina. In most cases, the state constitution provides for the overall framework of special status regions, only; normally with ad hoc provision for specific territories. More detailed provisions on the functioning of special status regions are usually included in legal acts subordinated to the constitution. These are often constitutional or quasi-constitutional acts (organic laws and the like) enacted by the state parliament, normally after adoption by the regional assembly – and sometimes after confirmation by the regional population in a referendum. In some cases, the affected regions adopt their own statute or basic law (normally by qualified majority and sometimes by involving the local population through a referendum) within the limits of the state constitution (Palermo, 2013, paras 19–24).

Such legal acts (basic laws) are usually entrenched and cannot be modified by simple majority. The essence of special status lies in it not being alterable, in its fundamental elements, by the arbitrary will of state law-makers. To the contrary, amendments to the essential elements of special status require, as a rule, negotiated procedures.

The adoption by referendum of the legal act establishing and regulating the special status normally gives additional legitimacy to such status, like in the case of the devolution acts of 1998 for Scotland, Wales and Northern Ireland.¹³ However, popular votes might be particularly controversial in case of tensions, internationally driven processes or post-conflict situations.

Asymmetrical autonomy and the issue of secession

Claims for independence and secession still have followers (not only) in Europe, as demonstrated in several (even recent) cases. This raises the important question of whether subnational autonomy fuels or dampens those claims. That states view separatist demands with great suspicion is hardly surprising. After all, they are guided by an inherent interest of self-preservation and protected through the international principle of territorial integrity. The vast majority of constitutions therefore explicitly discourage secession by emphasising ‘territorial integrity’, ‘indissoluble unity’ or the ‘indestructible state’, thus (at least implicitly) prohibiting any strife for secession. A second category of constitutions remains silent on this issue, but this also means that they do not provide any internal legal basis for separation. In other cases, the constitution recognises a right to negotiate separation or the territorial status rather than guaranteeing a right to secession itself. Only few constitutions explicitly guarantee a right to secession including a procedure to enforce it (Palermo & Kössler, 2017, p. 105ff).

Examples for an explicit guarantee of the right to external self-determination are the Faroe Islands and Greenland: for both, the perspective of independence and the right of external self-determination play an important role. Thus, they are expressly mentioned in the respective subnational legal acts: “In 2005, the Government of the Faroe and the Government of the Kingdom of Denmark agreed on a new negotiated settlement that is composed of two new arrangements, which in concert establish full internal self-government as well as a certain degree of external self-government. This settlement is not seen or understood to be an exercise or replacement of the right of full self-determination.” Nevertheless, the Act on the Home Government of the Faroe provides in Section 1 that the islands are part of the Danish state: “The Faroe are a self-governing nation within the Danish state, in accordance with this Act. With due respect to the state boundaries the People of the Faroes, through its elected representatives, the Parliament (*Løgtingið*), and an executive established by it, the Government (*Landsstjórn*), shall assume the powers of Faroese Special Affairs as stated in this Act.” The Self-Government Act of Greenland recognises the right of self-determination of the people of Greenland under international law;

¹³ The status of the latter was remarkable in that it was settled in part through an international agreement between the Republic of Ireland and the UK, which constitutes part of the 1988 Good Friday Agreement, and involved referendums on both sides of the border.

Chapter 8 (Section 21) provides guidelines for the process leading to independence: consultation of the people of Greenland, subsequent negotiations with the Danish Government and a referendum as well as consent of the Danish Parliament (*Folketing*). In 2008, a referendum on greater autonomy was held in Greenland: 75 percent of voters supported a new arrangement (Takeover Act/Act on Greenland self-government). As to Gagauzia, Art. 1(4) of the Law on the Special Legal Status of Gagauzia limits the right to external self-determination to the case of loss of independent statehood by Moldova. In a referendum held in 2014, whose validity was contested by the Moldovan authorities, an overwhelming majority of voters of the autonomous territorial unit opted for independence of Gagauzia should Moldova become a member of the European Union (Palermo et al., 2016, para 77). In Crimea, a referendum on seceding from Ukraine and becoming a constituent territory of the Russian Federation was held in March 2014: while illegal,¹⁴ it nevertheless produced the annexation of the peninsula by the Russian Federation (Bilková, 2016, p. 194ff).

Owned and shared autonomy: The crucial issue of the constitutional design in diverse societies

The framework

While reasons for establishing special/asymmetrical autonomy regimes are manifold, population diversity in terms of ethnic, cultural, linguistic or religious characteristics is by far the most frequent. This combined with other factors – such as geographical remoteness (islands) or economic backwardness – makes population diversity even more critical.

Nearly all the federal or regional states established over the last century, after World War I, have not been created by coming together of previously sovereign entities as before, but rather by means of successive devolution of powers from (unitary) states to their subnational entities (Palermo & Kössler, 2017, p. 38ff). Such phenomenon was steered almost exclusively by the need to address and accommodate population diversity and claims for self-government of the involved regional population. Examples are countless: Belgium, UK, Spain, Italy, Bosnia and Herzegovina, Serbia in Europe; Nigeria, Ethiopia, South Africa, South Sudan, partly Kenya, to some extent Cameroon in Africa; India, Pakistan, Malaysia in Asia; plus the peculiar case of former communist proto-federalism based on the idea (much less on the practice) of ethnic self-government, such as in the former Soviet Union, in the former Yugoslavia and even in present-day China with its ‘regional national autonomies’.

In literature and even more in political practice, opinions diverge and oscillate between two main poles. On one hand, it is argued that granting autonomy to territories inhabited by national minorities helps to accommodate such groups by making them feel at home in the state they belong to, and contributing to establish peace and awareness of the different needs of different population groups. The opposite view contends that autonomy, especially in areas predominantly populated by persons belonging to national minorities, fosters claims of self-determination and even secession, as it establishes the institutional framework for own state-structures that can be used when political conditions allow for separation. Several examples of special autonomies based on population diversity can be mentioned both as success stories of integration of diversity into a peaceful unity and as slippery slopes towards secession, often also in violent ways.

To avoid that such debate is carried out following ideological and political lines, a fundamental question must be addressed and clarified before entering into details of a possible autonomy agreement. The question of what and whom the autonomy regime should be for. Is autonomy for a territory for the predominant group living in it? Is it aimed at solving a problem of accommodation through institutional, thus peaceful means or is it just the

¹⁴ See the two relevant opinions of the European Commission for Democracy Through Law (Venice Commission): Opinion on “Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organize a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is Compatible with Constitutional Principles”, Opinion no. 762/2014 (21 March 2014) CDL-AD(2014)002; and Opinion on “Whether Draft Federal Constitutional Law No. 462741-6 on Amending the Federal Constitutional Law of the Russian Federation on the Procedure of Admission to the Russian Federation And Creation of a New Subject within the Russian Federation is Compatible with International Law”, Opinion no. 763/2014 (21 March 2014) CDL-AD(2014)004.

first step a minority group accepts in the hope to transform it into something 'more' and eventually into an own state? In other words: is autonomy seen as a tool for better governance or as an instrument for ownership? Is it a tool that allows a minority to isolate themselves or to integrate into a broader state framework? What is the right balance between self-government of a group (the right to be let alone in certain matters) and shared government of a territory (the duty to be part of a broader community)?

Beyond owned autonomy: Power-sharing and the recognition of territorial minorities

The link between people and territory is still mostly framed in terms of ownership: who 'owns' a territory? Such an approach basically replicates the state pattern at a lower level: from nation-state to nation-region. In fact, the ultimate rationale of territorial solutions based on autonomy for groups is to transform national minorities into territorial majorities, able to decide by themselves and impose their rule over minorities, precisely as the state does with its minorities. Accordingly, the will of the autonomous body is (forcibly) coincident with that of the (territorial) majority of the (national) minority.

Admittedly, such a view might help solve long-lasting conflicts. It allows minorities to accept autonomy as the 'second-best' option and thus at least temporarily set aside secession claims, and it allows the state to affirm 'ownership' to the territory with this territory remaining a part of the state and thus constitutionally ruling out secession. While the settlement of conflicts might in fact require solutions that precisely avoid making incompatible views explicit, when the delicate balance between unexpressed underpinnings is upset, the lack of clarity as to how the link between ethnicity and territory is understood by the different parties involved might turn into the most explosive root for conflicts and needs to be addressed more explicitly.

In fact, these two views are less incompatible than they may seem. In recent times, at least two factors have been contributing to making minority issues much more complex than a purely territorial approach suggests. These are the emergence of power-sharing as a counter-majority mechanism, and the increasing attention being paid to the rights of groups sharing a territory regardless of their status. In addition, the decreasing importance of the state as the exclusive point of reference for determining minority positions is to be considered, although this seems to be still a predominantly European phenomenon due to the presence of significant international organisations active in the field (such as the European Union, the Council of Europe and the Organization for Security and Co-operation in Europe) that are still missing in other continents.

Power-sharing or ethnic consociational democracy is a governmental technique aimed at overcoming majority-minority spillover by obliging all involved groups through institutional cooperation beyond their numerical ratio (McEvoy & O'Leary, 2013). It can be paritarian (i.e. groups have the same number of representatives in power-sharing institutions) or proportional (i.e. groups' representation is proportional to their population size, but nonetheless guaranteed regardless of their size). Power-sharing follows a different pattern than does territorial autonomy. Although applied to a territory, it does not try to turn minorities into majorities; rather, it develops a form of government that is based on a different rationale than majoritarian democracy. Power-sharing makes it possible to go beyond the classical democratic paradigm (based on majority rule) by enforcing a more sophisticated form of decision-making (based on the rule of law) in a way that none of the groups may be outnumbered (at least not without having been effectively involved) in the institutions of the state or subnational unit. The recent proliferation of power-sharing agreements (Noel, 2005) testifies to the insufficiency of a 'pure' territorial model to exclusively address minority issues by simply 'majoritarising' them.

The second critical element that shows the limits of territorial solutions in terms of explicit or implicit ownership clearly emerges from these same considerations. Territories are (and will be more and more) all but homogeneous in ethnic terms. Aiming to transform national minorities into regional majorities (or at least into more consistent minorities), territorial autonomy does not address the fundamental issue of the rights of regional minorities or majorities within minorities. That is, of persons belonging to national majorities which are numerically inferior in the autonomous territory, or of smaller minorities in that same territory (so-called minorities within minorities) (Eisenberg & Spinner-Halev, 2005), or of the overall integration of ever more plural societies. Scholars and international organisations have recently been paying increasing attention to this phenomenon,

starting from a substantive approach to rights. According to this approach, minorities are not a stable artefact, but rather a dynamic, relational factor whose very nature as minority groups largely depends on the applicable law. In sum, belonging to majorities and minorities resembles a revolving door rather than being a permanent factor. For example, English speakers in Quebec cannot be considered a national or ethnic minority in the traditional sense,¹⁵ nor are they with respect to subjects decided by the federal government, but they are a functional minority when it comes to subjects decided at the provincial level, where they are minoritised in the decision-making process.

Increasing attention is being paid in literature and in law to groups labelled as 'regionally, non-dominant titular peoples' (Potier, 2001). This term describes groups that are part of the (local) population and, although locally inferior, constitute the 'majority' group at the national level. Such a concept reveals the deficits arising from the combination of territoriality and majority rule and forces the development of more accurate devices to deal with ethnic complexity as such regardless of the specific territorial dimension in which it might be observed. In simple terms, at least where the basic conditions for the survival of groups are given, a qualitative leap is required where the instruments of diversity management are concerned. In these contexts, today's complexity requires instruments that are able to protect groups that can occasionally be in a minority position, that are dynamic and not static, and whose members have the right to freely identify according to criteria and preferences that might well change over time. Modern instruments for diversity management should address diversity issues in general and should not only focus on the protection of predefined minority groups. A more comprehensive approach to group rights and to integration of complex multi-ethnic societies is thus required.

Autonomy as condominium

Notwithstanding theoretical and practical developments towards a more sophisticated and inclusive approach to territory, much of the debate surrounding it is still – often involuntarily – trapped in the ownership discourse, in the Westphalian nation-state approach. Territory is still seen as something 'belonging' to groups competing for ownership and, where territorial autonomy is concerned, as one (majority) group accommodating another (minority), thus as an instrument for mitigating the deficits of minority participation by replicating the nation-state on a smaller scale.

This view, however, reveals the same flaws that are found in the nation-state approach, which pretended that territories were homogeneous and dominated by one titular group (the nation), in some cases granting some rights (up to a certain degree of control to 'their own' territory) to other groups. Not only is such a view far too narrow and simplistic in today's world, but it is often the reason why fragile democracies reject it and why vocal minorities invoke it. The fear of autonomy on the part of states and its frequent overestimation on the part of some minority groups are inversely proportional to the stability of democracies: a strong democracy is not afraid of autonomy, and a democratic minority usually does not see it as the first step towards independence. But the more autonomy is presented as an instrument for ethnic self-governance, the more it becomes a self-realising prophecy.

Territorial autonomy also has, however, an indirect and perhaps even more important meaning, including for minorities, provided it is divorced from the idea of group ownership. It is first and foremost an instrument of governance, which implies targeting a territory as a whole rather than the groups living in it. Autonomy was actually devised for governance purposes, and this function becomes even more relevant the more complex societies are. This is the main reason why the number of federal or quasi-federal countries more than tripled during the 20th century, and most of the world's population now lives under federal or quasi-federal rule (Hueglin & Fenna, 2006, p. 3).

Territorial autonomy is an instrument for managing complexity. And as all countries are increasingly diverse and complex with respect to the governance functions to be performed, autonomy has benefits that go far beyond minority self-government or the protection of ethno-cultural differences. If a territory, regardless of its

¹⁵ As stated also by the UN Human Rights Committee's decision in the case of Ballantyne, Davidson, McIntyre v. Canada, Communications nos. 359/1989 and 385/1989, Ballantyne/Davidson v. Canada and McIntyre v. Canada, A/48/40(PARTII), p. 103, para. 11.5).

ethnic composition, can autonomously decide on certain issues (alone or in cooperation with other territories, belonging to the same or to a different country, sharing the same problems), it is likely that decisions will be qualitatively better and the territory will develop more harmoniously with benefits extending to all communities settled there.

Furthermore, autonomy is a mechanism for enhancing democracy; it is about shared and thus de-concentrated powers. Therefore, it proves particularly helpful in contexts in democratic transition but also in more consolidated areas in preventing drawbacks in conflict settlements based on territorial autonomy. This might indirectly but significantly benefit minorities as well, as minority issues are embedded in larger contexts and cannot be disconnected from them. Thus, the more efficient overall governance is, the less likely it is that minority rights will be neglected and even less likely that minority issues will develop into conflicts. In fact, the bigger the problems are in terms of territorial, democratic and economic development, the more likely ethnic conflicts will be. In turn, the efficiency of the state structure – to which autonomy can effectively contribute if properly used and understood – is a powerful tool for providing the appropriate conditions for minority rights to be respected and for accommodating diversity issues.

In sum, the possible drawbacks of autonomy can be prevented if the focus is firstly on territorial governance and just secondarily on group self-governance. Furthermore, when it comes to group relations, while some aspects have to be decided by the territorial majority, others should require more entrenched majorities, to make territorial autonomy a condominium rather than an ownership, at least when it comes to fundamental and existential issues.

Ch.4 Assessing Bougainville's current autonomy arrangement from an international perspective

This section aims to scrutinise Bougainville's regime of self-government from an international perspective, which implies two things. Firstly, we will mention for the sake of comparison certain similar or dissimilar examples from other autonomous regions in this section and, more in detail, in Section 5. Secondly, due to our international perspective as outsiders, who are not specialised in this particular case but in comparative autonomy research, our objective is not a comprehensive treatment of the current arrangement and its implementation. This is done in a separate report (forthcoming report under the PNG NRI Bougainville Referendum Research Project). Instead, we seek to focus on three issues that seem particularly salient, from a comparative perspective and in the specific case of Bougainville, and which therefore should be taken into account in any attempt of reform. These three issues are entrenchment and implementation, autonomous powers, and intergovernmental relations and conflict management. We do not address here the equally crucial, for all autonomy arrangements, topic of financial arrangements, as this matter is explored in detail in a separate report (Chand, 2018). Exploring these three issues builds on our discussion of the types of autonomy in Section 3 and is inextricably linked to Section 5, which takes up the same three issues and addresses them with a view to global practice of autonomy.

Entrenchment and implementation of autonomy: Putting Bougainville's autonomy into practice

The current status of autonomy is rooted in the Bougainville Peace Agreement from August 2001 (hereinafter, the 2001 Agreement) (for an overview, see Wolfers, 2002) that aimed to end both the war of secession lasting from 1988 to 1997 and, internally within the island's population, the conflict on the issue of independence (on the peace process that was initiated in 1997 by moderate figures of rivalling Bougainville factions and within the PNG government, see Regan, 2010, p. 27ff). The accord was signed by the government of Papua New Guinea (PNG) and ex-combatants and implemented in the following years through the enactment of constitutional laws. To put it briefly, the three pillars of the 2001 Agreement are asymmetrical autonomy for Bougainville (see Section 3.2), a deferred referendum on the island's independence, as well as a plan for the disposal of weapons held by combatant groups.

In terms of the entrenchment of self-government, which forms the basis for a subsequent proper implementation, three things seem to stand out.

First, the negotiators from Bougainville sought and finally achieved a very high degree of constitutionalisation of the 2001 Agreement, which was supposed to serve as legal protection of the compromise. Even if some particularly sensitive issues such as restrictions on PNG defence powers, especially concerning their deployment on the island (Art. 62-67 of the 2001 Agreement), were not laid down in constitutional law, such entrenchment was agreed on for large parts of the 2001 Agreement. This entails that the autonomy compromise is protected against unilateral change, as constitutional amendment rules require approval by the PNG Parliament with special majorities and in two separate votes (Art. 345–46 PNG Constitution). The amendment procedure even introduced an additional layer of legal protection by stipulating that any change to constitutional laws implementing the 2001 Agreement may gain legal effect without the approval of the legislature of Bougainville.¹⁶

¹⁶ On this procedure, see Art. 217–18 of Bougainville's Constitution.

A second notable point is, from a legal perspective, the strong linkages of the 2001 Agreement with national law, both constitutional laws¹⁷ and ordinary laws of PNG. Over certain subject matters like defence, the national government only has jurisdiction “subject to ... the agreement” (Art. 289 PNG Constitution). More generally, it is explicitly stated that the 2001 Agreement shall assist the courts in interpreting national law that gives it legal effect and that, in doing so, this agreement “is intended to be interpreted liberally, by reference to its intentions” (Art. 3 of the 2001 Agreement).¹⁸

Thirdly, it is important to acknowledge that the constitutional framework that gives effects to the compromise of 2001 comprises both the national and subnational constitution. Rather than the autonomous powers of Bougainville,¹⁹ the island’s constitution’s main focus is to provide “for the organisation and structures of the government for Bougainville under the autonomy arrangements.” (Art. 280 PNG Constitution) This contrasts, for example, with the statutes of Spain’s autonomous communities, which are quasi-constitutional documents and have a broader scope. These basic laws at the subnational level may regulate further matters as optional additional contents²⁰ beyond the obligatory institutional and procedural self-organisation of each autonomous community (Art. 147(2) Spanish Constitution). These include, for instance, the determination of a co-official regional language (Art. 3(2) Spanish Constitution) or a regional flag and other symbols (Art. 4(2)). As far as amendments of Bougainville’s Constitution are concerned, the PNG Government must be informed and may require consultation, but does not have effective influence on the process of subnational constitutional change (Art. 287 PNG Constitution). The adoption of Bougainville’s new Constitution of 2004 necessitated, unlike further amendments, the express endorsement of the national government. But even in this case a denial could only be based on the failure of the subnational constitution to stick to requirements set out in the 2001 Agreement (Art. 285 PNG Constitution) so that the influence of the national government was very limited.

Thus, entrenchment of autonomy, even to a very high degree in comparative terms (see Section 5), was a special focus of Bougainville’s negotiators in 2001. Alarmed by negative experiences with the incomplete implementation of the agreement of 1976 and expecting resistance from the PNG bureaucracy against putting autonomy into practice, they placed much emphasis on implementation as well. This is particularly interesting from a comparative perspective, as this crucial part in the wake of concluding an autonomy arrangement has been neglected in other cases or has at least remained an underestimated challenge (Boltjes, 2007, p. 6ff).

A necessary precondition for any successful implementation in the case of Bougainville was decisive steps towards ending the violent conflict. A three-stage process under supervision of the United Nations Observer Mission in Bougainville linked in a very effective manner disarmament and the disbandment of combatant groups, on the one hand, and the withdrawal of PNG security forces, an amnesty arrangement and the passing of the constitutional laws implementing the 2001 Agreement, on the other hand (Regan, 2010, p. 92f).

Then, the implementation issue was tackled with a set of quite different instruments and on different levels – the principles, actors involved in the implementation process, and mechanisms to address unresolved issues. First, at the level of principles it is interesting that consultation and cooperation are stipulated as general constitutional precepts for putting the autonomy arrangements into practice (Art. 331 PNG Constitution). This is reminiscent of South Africa where certain principles of cooperative government and intergovernmental relations are similarly entrenched in the national constitution. These entail some very specific duties for the national, provincial and local spheres of government (Art. 41(1) of the South African Constitution) and require, in addition, national ordinary legislation to further regulate institutions and procedures of intergovernmental relations (Art. 41(2)).

¹⁷ Art. 12 of the PNG Constitution provides for organic laws that are authorised to specify certain matters and more protected against amendments than ordinary legislation. Together with the codified Constitution itself, they form PNG’s ‘constitutional laws’.

¹⁸ For further entrenchment of this idea, Art. 278(3) of the PNG Constitution states similarly that the “Agreement may be used, so far as it is relevant, as an aid to interpretation”.

¹⁹ This matter is mostly regulated in national constitutional law (see Section 4.2).

²⁰ STC 89/1984.

Secondly, the governments of both PNG and Bougainville are seen as critical actors in the implementation process, as this process was seen as a joint responsibility. In the early stages, a joint PNG–Bougainville working group was supervising drafting of the necessary national constitutional laws and Bougainville was in control, as outlined above, of making its own subnational constitution. Furthermore, the main institution created for overseeing implementation, the Joint Supervisory Body, comprises equal numbers of representatives from PNG and Bougainville. The idea of joint responsibility for giving effect to the compromise of 2001 is also epitomised by PNG not having the authority to withdraw or suspend Bougainville’s autonomy, with the only effective leverage being the withholding of grants to the autonomous government in case of systematic financial abuse (Art. 329 PNG Constitution). This lack of tools for intervention contrasts, for instance, with provisions like Art. 155 of the Spanish Constitution, invoked regarding Catalonia in 2017. This enables the national executive together with an overall majority of the Senate to take all measures necessary to compel an autonomous community to meet its legal obligations or to protect the general interest of Spain. A final particularity concerning the implementation of the 2001 Agreement is that provisions were even made in relation to issues that went unresolved at that time such as criminal law (Art. 291 PNG Constitution) and Bougainville’s participation in negotiating international agreements (Art. 293(7) PNG Constitution). The establishment of specific mechanisms was supposed to facilitate the further discussion of these delicate matters.

The fact that Bougainville’s Government has not effectively used these mechanisms appears to be just one example reflecting the broader problem of a significant gap between elaborated rules for implementation and its practice (Regan, 2013, p. 427ff). Also, the above-mentioned Joint Supervisory Body, which would be obliged to meet at least twice a year (Art. 332 PNG Constitution), has not met that frequently, especially in more recent periods of implementation. And there certainly would have been issues worthy of being raised in such mechanisms of dispute resolution. A case in point seems to be the repeated denial of the right of Bougainville’s government to nominate the head of its police service, to be then appointed by the PNG Police Commissioner ((Art. 26(1) Organic Law on Peace-Building in Bougainville), which was repeatedly ignored. Another example is the long controversy around the appointment of the most senior public servant of the autonomous government, a power vested in Bougainville’s authorities with consultation of the head of the relevant agency at the national level (Art. 14 Organic Law on Peace-Building in Bougainville). This power was contested by the PNG Government, which led to a failure of appointment between 2007 and 2010. A third major issue is the rather slow process of transferring powers to the autonomous government regarding the 59 subject matters listed in Art. 290(2) of the PNG Constitution (see Section 4.2 for details). As one observer aptly pointed out, “[i]t is one thing to formulate an agreement, and then to turn what has been agreed into law. But translating what might be described as implementing laws into practical actions can present yet further challenges” (Wolfers, 2007, p. 100).

A key question is then what are the reasons behind these problems of putting self-government into practice: the reluctance of the PNG Government to give effect more to all aspects of the autonomy arrangement and/or the failure of Bougainville’s Government to use more proactively the above-mentioned institutional safeguards for proper implementation? There seem to be reasons contributing to these problems on both sides. As for the PNG Government, it has been claimed that critical factors are the replacement of key figures, both in politics and public administration, since the 2001 Agreement; the view of some segments that autonomy is a stepping stone to secession (see Section 2.2) and therefore does not merit active support; as well as unwillingness to direct too much of PNG’s resources to Bougainville instead of other parts of the country. With regard to the autonomous government, reference is made to political links between Bougainville leaders and national politicians and, above all, capacity constraints in terms of both finances and personnel (Regan, 2013, p. 442f). All those factors enable the PNG Government to maintain institutions and powers in relation to Bougainville to a greater extent than a cursory glance at the legal sources of the island’s autonomy would imply.

The extent to which some of the difficulties of putting autonomy into practice might be ameliorated by a more active role of the international community remains in doubt. Bougainville’s Government has found it important to seek its continued involvement in the implementation process, which occasionally created disputes about the limits of its autonomous powers over external relations (see Section 4.2). Even though the autonomy arrangement is entrenched, as described earlier, domestically in multiple sources of law, international engagement was arguably

instrumental in devising this arrangement. First, on invitation of both conflict parties an unarmed regional military group led by Australia and New Zealand, as well as a United Nations observer mission, contributed to the secure environment needed to enter into the negotiations resulting in the 2001 Agreement. Secondly, the international community was engaged in mediation and the provision of legal advice, most visibly illustrated by the compromise on the deferred referendum brokered by Australia. Moreover, the role played by the United Nations in the early stages after 2001, especially concerning the adoption of the specifying constitutional laws and the setting up of the autonomous government, seems to have facilitated implementation. The question of whether long-term international involvement is beneficial does not have a simple answer. International evidence from countries like Bosnia and Herzegovina and Lebanon suggests that such engagement may be a double-edged sword (on these countries, see Section 5.1). On the one hand, it may certainly promote progress in putting self-government into practice. On the other hand, it may also suffocate the necessary sense of local ownership, as it tends to exempt national and regional actors from their own responsibility to ensure proper implementation.

Autonomous powers: The special status of Bougainville

Much of the new distribution of powers ushered in through the 2001 Agreement appears to reflect the historical contingency of the compromise at that time. Indeed, it is both the result of the power constellation after the Bougainville Civil War from 1988 to 1997 and of Bougainville's (negative) historical experience with arrangements of (symmetrical) autonomy (see Section 3.2). Already on the eve of PNG's independence from Australia (Griffin, 2005, p. 72ff), there had been support on Bougainville for autonomy by some and for independence by others. In 1975, the failure to establish provincial governments had contributed, among other things, to an eventually unsuccessful unilateral declaration of independence of Bougainville just days before PNG's internationally recognised declaration (on the event surrounding this, see Londey, 2004, p. 215f). This competition for sovereign statehood at the founding of PNG seems to have had the major longer-term impact of making national leaders "conscious of the risk of other areas in the fragile new nation following Bougainville's example" (Ghai & Regan, 2006, pp. 590, 593).

In this light, those leaders adamantly refused any Bougainville claims for special status and merely agreed in 1976 to symmetrical autonomy on a par with 18 other provinces. At that time, a uniform regime of self-government was primarily a pragmatic choice, as it was seen as being easier to manage than asymmetry (Wolfers, 2007). During the Bougainville Civil War, however, self-government for all provinces was curbed through reforms in 1995 involving the abolishment of subnational constitutions, a reduction of provincial powers and an increase in PNG control. Even if these reforms applied to Bougainville merely partially and only after 1999, they are claimed to have had a lasting impact because "the reduced autonomy involved was resented and became one of the 'benchmarks' the Bougainville parties used when negotiating increased autonomy under the 2001 Agreement" (Regan, 2013, p. 418).

The preamble of the 2001 Agreement emphasises that the accord is "a joint creation" of the PNG Government and the "Leaders representing the people of Bougainville", reflecting the bilateralism of the process through which the current asymmetrical arrangement of increased self-government was established. To limit the perceived risk of a spread of autonomy claims to other provinces, the national government was very anxious to stress the uniqueness of this arrangement with Bougainville as a necessary package deal comprising the three pillars: asymmetrical autonomy, a deferred referendum and weapons disposal (on autonomy's pragmatic nature as a negotiated compromise solution, see Section 2.1). There was willingness to accept the 2001 Agreement as a necessary means to pacify and accommodate Bougainville, as illustrated by the name of the implementing Organic Law on Peace-Building, but there was no readiness to see it as a template for emulation by other provinces. Yet, even if certain prosperous provinces have since 2001 demanded the extension of some aspects of Bougainville's autonomy to them, this does not seem to be rooted in a desire for emulation, as recognition of Bougainville as being a particular case is arguably widespread. Instead, such claims are rather attributed to discontent with the already-mentioned limited character of symmetrical self-government for the remaining provinces (Regan, 2013, p. 422f).

Fortunately, PNG seems therefore less affected by tendencies in other countries of strong claims for the extension of asymmetrical autonomy to other subnational entities (thus, making it symmetrical) or of a strong penchant of the national government itself for such generalisation. In Spain, for instance, the national government attempted, only a few years after establishing autonomous communities, to introduce more symmetry with the 1982 Organic Law on the Harmonisation of the Autonomy Process. Even though the Spanish Constitutional Court struck down in a seminal ruling²¹ significant parts of this law recognised (a certain degree of) asymmetry as characteristic of the ‘state of autonomies’ under the 1978 Constitution, the parts remaining in force nonetheless gave rise to more symmetry than many expected. This was then despised by autonomous communities perceiving themselves as distinct to the others as ‘café para todos’ (coffee for all) (Requejo, 2001, p. 124f). So why is there this emphasis that some subnational entities are different and thus deserve asymmetrical autonomy? After all, “[t]he conversion of asymmetry into symmetry is not necessarily against the interests of the original claimants of autonomy. They would cease to be the object of envy and resentment. A greater number of beneficiaries would produce a more balanced state. It would also increase the capacity of regions to negotiate with the centre and extract higher benefits. But for many groups the exact amount of devolved power is less important than that they alone should enjoy some special powers, as a way to mark their status” (Ghai, 2000, p. 14). Thus, there is a strong psychological element in calls for legal recognition of a special status.

What are then toady from a legal perspective the key elements of Bougainville’s asymmetrical autonomy? During the negotiations that led to the 2001 Agreement, the representatives from Bougainville strongly demanded from the beginning that the national government should have few residual powers. Currently, 17 competences are assigned to the national government most of which concern international relations, the preservation of economic unity and infrastructure of national concern: defence and foreign affairs; currency, central banking, customs and international trade; and international civil aviation, international shipping and telecommunications (Art. 289(2) PNG Constitution). The same provision stipulates that even the exercise of these powers is subject to what is determined in the part of the constitution regulating the division of functions and powers (Art. 288–299) and in the 2001 Agreement. By comparison, the Bougainville Government may assume, according to the constitution, many more powers. It does have competences, which are vested in all other provinces as well, such as those in healthcare, education and agriculture. But beyond that they also have jurisdiction over subjects like local government and part of policing which were delegated to Bougainville in 2003. The island’s special status in terms of powers is further strengthened by substantial constitutional autonomy, as Bougainville’s Constitution may address – beyond institutional self-organisation of its government – parts of such critical issues as criminal law and human rights. The most critical set of competences, however, concerns a long list of subjects that are not immediately allocated to the autonomous government but in need of being transferred (Art. 290(2) PNG Constitution). Leaving the existing national legislation on issues such as mining and environment temporarily in force, was supposed to enable Bougainville’s administration to build up capacities with respect to these completely new fields of action. Therefore, a transfer procedure requires that certain conditions are met, including budget arrangements and joint plans for capacity development (Art. 295 and 297 PNG Constitution). The quite slow process of transferring powers listed in Art. 290(2) of the PNG Constitution appears to be one of the major difficulties of the implementation process (see Section 4.1).

A particular bone of contention is jurisdiction of Bougainville’s government concerning external relations which are relatively far-reaching in comparative terms (see Section 5.2.5). The autonomous government may send representatives to regional organisations and negotiate international treaties even if both are subject to approval by the national government. Importantly, Bougainville may also request the authorisation of the national government “to participate in the negotiation of international agreements of particular relevance to Bougainville” or “to negotiate international agreements on its own account” (Art. 293(7) PNG Constitution). Conversely, the national government must consult the autonomous government in case of international obligations likely to affect the exercise of Bougainville’s powers and needs to obtain its consent for “international agreements with a purpose of altering the autonomy arrangements” (Art. 293(3-4) PNG Constitution).

²¹ STC 76/1983.

In practice, however, coordinating powers regarding external relations has not been without friction, partly because it has been important for Bougainville's government to further involve the international community in the process of safeguarding the implementation of the 2001 Agreement. On some occasions, the PNG Department of Foreign Affairs and Trade therefore objected to Bougainville receiving foreign politicians or organising events related to the agreement (Regan, 2013, p. 443f).

With respect to judicial autonomy of Bougainville, the situation is – similarly to legislative and administrative powers – highly asymmetrical. The autonomous government is authorised to set up courts and tribunals and regulate their functioning through subnational legislation (Art. 306 PNG Constitution). Thus, the island may either be partly under such subnational courts and national courts or entirely under subnational courts. Even in the latter case, however, an appeal to the PNG Supreme Court is provided for, as Bougainville may only establish courts with jurisdiction equivalent to that of the second-highest court in PNG – the National Court. Compared with other autonomy arrangements (see Section 5.2.4), the PNG Constitution thus potentially grants significant judicial autonomy, as it enables the creation of a largely dual national and subnational court system. The minimum of integration between them that is constitutionally guaranteed appears to make sense in view of Bougainville's small size and limited capacities and given the need for basic legal unity throughout the country.

Intergovernmental relations and conflict management

For any self-government arrangement to function, autonomous powers need to be sufficiently complemented by mechanisms of intergovernmental relations and conflict management. If there is no balance between and interaction of “self-rule and shared rule” (Elazar, 1987, p. 5), autonomy runs the risk of turning into isolation. Initially, Bougainville's negotiators had aimed at keeping the complementary shared rule element as limited as possible, proposing, for example, to have only one delegate appointed by the autonomous government in the national parliament instead of elected representatives (Regan, 2013, p. 439). This proposal was neither included, however, in the 2001 Agreement nor in constitutional provisions concerning the composition of the single-chamber legislature (Art. 101 PNG Constitution). In fact, there is a certain degree of integration in various respects, as Bougainvilleans also continue to be represented in other national institutions. Moreover, national institutions still play a crucial role because the setting up of some autonomous institutions has been prevented by limited financial capacities or intergovernmental disputes (on these and other problems of implementation, see Section 4.1).

In terms of managing such disputes, two dimensions are usually important, that of preventing conflicts and that of resolving them. As for the first dimension, Bougainville's autonomy arrangement seems to have attempted to avert intergovernmental disputes mainly through two instruments that were already mentioned (see Section 4.1). Firstly, the constitutionalisation of large parts of the 2001 Agreement because it clarified certain contentious issues and legally entrenched the solution to them; and secondly, the definition of consultation and cooperation as constitutional principles for implementation (Art. 331 PNG Constitution).

Concerning the second dimension, that of resolving intergovernmental disputes, there is a highly interesting multi-level mechanism that foresees consultation between the government bodies involved and then within the above-mentioned Joint Supervisory Body, followed by efforts of mediation and arbitration and, eventually, reference of the dispute to the courts (Art. 333–336 PNG Constitution). However, a judicial decision is not necessarily the last resort, as it may already be sought, on agreement by the conflict parties, before the final stage of this procedure. So it is important to note that some other constitutions explicitly prefer consensual intergovernmental dispute resolution to litigation in court. In Switzerland, for instance, such disputes “shall wherever possible be resolved by negotiation or mediation” (Art. 44(3) of the Constitution). In South Africa, conflict parties are even obliged to make “every reasonable effort to settle the dispute” and “must exhaust all other remedies before it approaches a court to resolve the dispute” because otherwise the Constitutional Court may refer the conflict back to the institutions involved (Art. 41(3–4) of the Constitution).²²

²² For such a referral, see *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* (CCT7/02) [2002] ZACC 11; 2002 (11) BCLR 1220; 2003 (1) SA 678 (CC) (12 June 2002), para 13.

This idea and corresponding mechanisms are not only rooted in the national constitution, but also extensively regulated in South Africa's 2005 Intergovernmental Relations Framework Act and numerous sectoral laws. If a country cannot rely, unlike, for example, the UK, on an existing "dispute resolution machinery of a political kind" (Hazell, 2007, pp. 578, 581), this South African approach of detailed regulation in ordinary legislation may certainly be helpful. But even in the case of elaborate legal regulation everything hinges, of course, on the willingness of making use of conflict resolution procedures. The above-mentioned multi-level mechanism (Art. 333–336 PNG Constitution) does not seem to have been used very frequently, apart from the issue of the transfer of powers, and thus could arguably play a more central role.

Disputes that revolve around the interpretation of the national constitution, of course, need to be decided by the Supreme Court; and Bougainville's Government is, like those of other provinces, entitled to refer such issues to the court (Art. 18–19 PNG Constitution). In fact, many other provinces have a long record of making use of the instrument of referral and the Supreme Court is credited with having adopted on the whole a quite balanced approach (Ghai & Regan, 1992). Bougainville's government, by contrast, has so far refrained from bringing constitutional issues that have emerged over the years before the highest national court.

Alternative options between the existing arrangement and full independence: A range of choices for key elements

Entrenchment and implementation of autonomy

International legal guarantees

Legal guarantees for self-governing regions may be included in various sources of domestic law and, not always, international law and may vary considerably in their degree of protection. Sometimes international agreements add an additional layer of legal protection for such regions by providing an external foundation and/or guarantee for their status of autonomy. This holds true, for instance, for the Åland Islands Settlement, concluded by Sweden and Finland in 1921, which confirmed and complemented the existing autonomy arrangement under the Autonomy Act adopted a year before (Barros, 1968, p. 276). Even if this settlement is not, formally speaking, a genuine treaty under international law, it still meant that self-government of the islands became internationally recognised, most importantly, by the state to which the autonomous territory belonged (Finland) and the kin-state involved (Sweden). The interplay between international and domestic sources of normative guarantees is illustrated by the fact that the 1922 Guarantee Act transposed the Åland Islands Settlement into Finnish law, finally leading the people of the island to fully accept and use the institutions established under the Autonomy Act of 1920. Another example is South Tyrol whose self-government also goes back to an international accord. The 1946 Gruber–De Gasperi Agreement, which became Annex IV of the Paris Peace Treaty, guaranteed the German-speaking population special provisions to ensure its “complete equality of rights with the Italian speaking inhabitants” (Art. 1) and acknowledged Austria’s official role as protecting power. Still today, this agreement entails that violations of the present autonomy agreement, later enshrined in domestic law by the Autonomy Statute of 1972, may be brought before international forums, including the International Court of Justice. Finally, a more recent example of (additional) normative guarantees at the international level concerns Bosnia and Herzegovina (Woelk, 2012, p. 110f). In this case, even the national constitution itself, and thus the legal framework for the self-government of the subnational entities, forms part of an international treaty, as Annex IV to the Dayton Peace Agreement signed in 1995 by the Federal Republic of Yugoslavia, Bosnia and Herzegovina and Croatia to put an end to the Bosnian War.

Domestic legal guarantees

While international normative guarantees only exist in some cases, autonomous regions typically rely on domestic legal safeguards. These may be enshrined at various government levels and in quite diverse sources of law, thereby also implying different degrees of legal protection. In many cases, autonomy itself is ensured in the national constitution and then further specified in less entrenched law. Cases in point are Gagauzia (Art. 111 of the Moldovan Constitution), Vojvodina (Art. 182–183 of the Serbian Constitution), the Åland Islands (Art. 120 of the Finnish constitution) and the Jammu and Kashmir (Art. 370 of the Indian Constitution).²³ There are very few cases in which national constitutional guarantees are completely absent. Examples are self-government under the devolution acts of the UK, which are ordinary statutes adopted by the Westminster parliament (Scotland Act, Government of Wales Act and Northern Ireland Act), and the autonomy of the island of Corsica within France. Lacking constitutional entrenchment, the island was granted autonomy as a territorial collectivity (*collectivité territoriale*) through an ordinary law of 1982, which also established the elected Corsican Assembly (Henders, 2010).

²³ Self-government of Jammu and Kashmir is, of course, significantly eroded through national government interventions (see Constantin & Kössler, 2014, p. 113ff).

The sources of domestic law that further specify the usual guarantees in national constitutions may take many forms. Compared with ordinary legislation, relatively strong entrenchment is mostly provided by three legal sources: special legislation adopted by the national parliament with particular procedural requirements, bilaterally negotiated statutes, and subnational constitutions.

A good example of the importance and extensive scope of special legislation is the self-government of Belgium's subnational entities, that is regions and communities. Concerning their autonomous powers, for example, the national constitution only lays down basic principles and leaves detailed regulation to special laws that need the cooperation of the language groups (Dutch and French) into which the members of parliament are divided. Such laws must be "passed by a majority of the votes cast in each linguistic group in each House [of the national parliament], on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast" (Art. 4(3) of the Belgian Constitution). Also, in Spain, a form of special legislation is extremely important for regulating many aspects of autonomy, that is organic laws requiring consent by the overall majority of the members of the national parliament's first chamber (Congress of Deputies) (Art. 81 of the Spanish Constitution). For example, there are few general provisions in the national constitution for the highly controversial financial arrangements (Art. 156-58), while their details are laid down in the Organic Law on the Financing of the Autonomous Communities (*Ley Orgánica de Financiación de las Comunidades Autónomas*).

Formally speaking, the quasi-constitutional statutes of the Spanish autonomous communities are also organic laws. But their adoption by the national parliament is preceded by a special procedure of bilateral negotiations. This partial postponement and deconstitutionalisation followed from disagreement at the time of the adoption of the national constitution in 1978 on the status of the autonomous communities and their powers. According to the Constitutional Court, the statutes are, together with the Spanish Constitution and certain ordinary laws with relevance to the distribution of powers, part of the 'constitutional block' (*bloque de constitucionalidad*), which is superior to all remaining national and regional law.²⁴ Similarly, the status of the special regions of Italy are bilaterally negotiated and thus particularly entrenched so that self-government is protected against interference through national ordinary laws and unilateral change. While ordinary regions adopt their statutes, as their own entrenched laws (Art. 123 of the Italian Constitution), the bilaterally negotiated statutes of the special regions are finally adopted as national constitutional laws (Art. 116). Yet, the seemingly broader autonomy of the ordinary regions, as they may enact their statutes on their own, does not correspond overall to broader but rather to more limited self-government in practice.

Subnational constitutions are yet another domestic source of law that may entrench autonomy (Palermo & Kössler, 2017, p. 126ff). Such constitutions often do not only fulfil the more technical task of institutional and procedural self-organisation that structures governance in the autonomous region by regulating, for example, the system of government, the regional legislature and executive and local government. They may also define the political identity of the region by enshrining additional fundamental rights (often not legally enforceable), directive principles or goals of regional policy, among others. If such constitutional matters are addressed and a qualified procedure of enactment is in place, fundamental documents called statutes and basic laws may also be qualified as subnational constitutions regardless of their denomination.

Yet, the entrenchment of autonomy in subnational constitutions is always restricted (Tarr, 2007), to a greater or lesser extent, by provisions of the national constitution in order to ensure legal unity throughout the country (see Section 5.2.1). To this end, many constitutional systems contain supremacy clauses that ensure the precedence of national law over conflicting law of subnational entities, including their constitutions. This holds true even for cases in which autonomy is as strong as that of the cantons of Switzerland (Art. 49 of the Swiss Constitution). Another instrument that affects the entrenchment of self-government in subnational constitutions are homogeneity clauses. Such clauses often establish that subnational constitutions must comply not only with the text but also with the foundational principles and with the overall 'spirit' of the national constitution. Sometimes compliance with the national constitution is not only based on such clauses and their judicial enforcement ex post, but also

²⁴ STC 66/1985.

on procedures to certify this conformity before a subnational constitution may even enter into force. This holds true, for example, for the entrenchment of autonomy in the constitutions of South Africa's provinces. A ruling by the Constitutional Court needs to certify whether a provincial constitution is consistent with the detailed requirements set out in its national equivalent of both the adoption procedure and content (Art. 142–144 of the South African Constitution). Often, subnational constitutions themselves expressly recognise their usual role as a document that specifies the more rudimentary provisions in the national constitution. In India, for example, Jammu and Kashmir is the only state entitled to have a constitution (Art. 370 of the Indian Constitution) and this explicitly states its purpose is “to further define the existing relationship of the state with the Union of India as an integral part thereof” (Preamble of the Constitution of Jammu and Kashmir). Put briefly, the national constitution is typically a highly relevant source of autonomy's entrenchment, but complemented by other forms of domestic law.

The fact that normative guarantees may be found in such diverse sources also implies that the change of these guarantees is subject to an enormous variety of different procedures. To protect self-government against unilateral or precipitous change, autonomous regions need to be involved in these procedures. Their participation may thereby range from mere consultation to an effective veto right. As the entrenchment of autonomy is frequently based on the interplay between different legal sources, its effective long-term protection ideally requires participation in different amendment procedures. In practice, however, there is often a trade-off of involvement in some of them but not in others. For instance, Spanish autonomous communities and Italian special regions are not involved in changing the respective national constitutions, but they play a very strong role in the bilateral processes of amending their autonomy statutes, even if reforms need to be finally passed by the national parliament. In certain cases, mostly those of highly asymmetrical autonomy (see Section 3.2), amendments often require the approval of the autonomous region concerned. For example, changes to the special status of the Åland Islands, as outlined by the Autonomy Act, need to be effected by concurrent action of the Finnish Parliament and the Åland legislature (Art. 75 of the Finnish Constitution and Section 69 of the Autonomy Act).

Local ownership and the role of the international community

Any successful entrenchment and implementation of an autonomy arrangement needs to be based on its continued acceptance and adaptation by the main stakeholders concerned (see Section 6). However, this necessary sense of local ownership is often sustained by significant involvement of the international community not only in brokering the initial compromise, but also in putting self-government into practice. Early academic studies tended to downplay the impact of the political context provided by international relations, above all, the role of kin-states, on the effective implementation of autonomy. Those studies that addressed this impact largely focused on the allegedly conducive effects of a common external threat on the prospects of reaching an agreement internally (Lijphart, 1969, p. 216ff).

Recently, more attention has been paid to the ambivalent function of international actors. They may play a potentially positive role of benign intervention as facilitators of both reaching an agreement first and then upholding it. As in South Tyrol, for instance, Austria played an important role in the 1960s in promoting negotiations within the ‘Commission of Nineteen’²⁵ whose proposals eventually formed the basis for the autonomy arrangement established in 1972. Similarly, Ireland and, not least, the United States were crucial in brokering the 1998 Belfast Agreement, which provided the basis for the subsequent devolution of powers to the Northern Ireland Assembly and Executive. They did so by maintaining a balance between interventionism and furthering local ownership (McGarry & O’Leary, 2008, p. 379ff).

In other cases, this balance was or still is absent. In Bosnia and Herzegovina, for example, it was often the three international judges sitting on the country's Constitutional Court who tipped the scales in crucial cases regarding the realisation of autonomy.²⁶ Moreover, in view of internal stalemate, the High Representative, appointed by

²⁵ This commission set up in 1961 by the Italian Government was composed of 12 Italian-, six German- and one Ladin-speaking representatives.

²⁶ See, for example, the ‘constituent peoples’ case, Partial Decision U 5/98 III of 1 July 2000. The Constitutional Court is composed of two Bosniac, two Croat and two Serb judges, as well as three international judges.

the Peace Implementation Council,²⁷ has repeatedly used his power to issue decisions that amended even the constitutions of the country's two autonomous entities.²⁸ Thus, the role of this High Representative has changed “from that of a supervisor of the peace implementation process to its main actor” (Woelk 2012, p. 119). Although this also served to overcome continued obstructionism and disagreement between elected representatives, such interventionism is unlikely to have positive effects in the long run. It simply exempts local actors from the need to negotiate and compromise, something that cannot be permanently substituted by international actors. This is demonstrated not only by the Bosnian example but by others as well. A case in point is Lebanon under the French mandate and even after independence (Zahar, 2005, p. 219ff.).

Even if an autonomy arrangement is internationally entrenched (see Section 5.1.1) in a bilateral treaty, implementation is a quite different issue. In fact, the leverage (and sometimes interest) of international actors in supervising the implementation of the agreement may be quite limited, not least due to geopolitical considerations. Cases in point are the bilateral treaties concluded by the People's Republic of China with the UK and Portugal concerning Hong Kong and Macau, respectively.

Autonomous powers

Autonomous powers are the backbone of any autonomy arrangement. Within the mentioned constitutional and other guarantees (see Section 5.1), autonomy can only develop if a range of powers can be (and are) exercised by the respective autonomous entity. As autonomy means the possibility to establish own rules, it implies a certain degree of differentiation: even if autonomy is granted on paper, where rules are the same in the whole territory of a state, there is no autonomy in practice.

From a comparative perspective, autonomy can be exercised in all areas of statehood: constitution-making, legislation, administration, judiciary and external relations. Autonomy can of course affect only some of these fields (an own judiciary, for example, is relatively uncommon and constitutional autonomy is often exercised jointly with the national level) and is always limited by the national constitutional framework.

Constitutional autonomy

The first and most relevant aspect of subnational autonomy relates to the constitutional sphere. Constitutional autonomy can take either the ‘pure’ form whereby subnational entities have the power to adopt their own constitutions, or the functionally equivalent guarantee of subnational autonomy by the national constitution. The former is the case in most aggregative federal countries, such as the United States or Australia, since constitutions already existed before the federation was established. Guarantee of subnational autonomy means that constituent units do not have their own written constitution, as their powers and functions are disciplined by the national one (like in Belgium or India – except Jammu and Kashmir which has its own constitution), or they do have basic laws that are, however, adopted by means of a national constitutional or special law (like the statutes of Spain's autonomous communities enacted as organic laws). Intermediate forms also exist (like in Canada).

Formally, constitutional autonomy is simply a special legislative power of the subnational unit: the power to adopt the unit's own constitution as an act of legislation. However, a constitution differs from ordinary legislation in both form and substance. As to the *form*, the constitution is adopted by means of an entrenched legislative procedure, requiring, inter alia, a qualified majority for adoption by parliament, sometimes a referendum, or even the election of special bodies in charge with the drafting of the constitution (Blokker, 2018). Constitutional autonomy normally implies that subnational constitutions themselves determine the procedure for their own amendment, although within the limits of the national constitution. As to the *contents*, a constitution regulates issues that are constitutional in nature, such as the system of government, the composition, election and function of the legislature and the executive, instruments of direct democracy, the organisation of local government

²⁷ The Council is an international forum of 55 states involved in the peace process in Bosnia and Herzegovina.

²⁸ See Decision on Constitutional Amendments in the Federation of Bosnia and Herzegovina, OHR, 19 April 2002; Decision on Constitutional Amendments in Republika Srpska, OHR, 19 April 2002.

and often further elements such as (sub)national political identity, the use of language(s) and fundamental rights, at least in addition to those guaranteed by the national level. If these elements are given, a (subnational) constitution can be considered as such regardless of its formal name such as constitution, statute or basic law.

Understandably, the practical use of constitutional autonomy varies within the same country. Especially in diverse societies, the subnational constitution of some entities is often used as a means to affirm a distinct identity. This is part of the autonomy agreement and helps create an autonomous space for autonomous entities to exert their (sometimes also symbolical) claims. The extent to which this is possible varies but must remain within the limits established and guaranteed by the national constitution. The interpretation of such margins is indeed a very delicate exercise: the example of Catalonia in 2017 shows that secessionist claims increased dramatically after the ruling of the Spanish Constitutional Court in 2010²⁹ that curtailed some (and notably most of the symbolic) provisions of the statute of autonomy negotiated in 2006, which was approved by qualified majorities in both the Catalan and the Spanish Parliament and ratified by a regional referendum.

Legislative autonomy

Legislation is the area in which autonomy is more widely and more practically exercised. In general, there are two criteria according to which the distribution of legislative powers is regulated in multi-level systems. The first is the criterion of *enumeration* of legislative powers, meaning that legislative powers of either the national level (or more rarely the autonomous units) are only those expressly listed in the constitution. The second is the connected *residual clause*: all legislative (but, in principle, also administrative and judicial) powers that are not explicitly reserved to the national level are vested with the subnational units (10th Amendment to the US Constitution, Art. 3 of the Swiss Constitution, Art. 30 of the German Basic Law, Art. 117 of the Italian Constitution, Art. 73 of the Russian Constitution and more). In some less frequent cases, the residual clause can also be framed the other way around: all powers not vested with the subnational level are reserved for the national one (Belgium, Spain, India, South Africa).

As a matter of practice, distribution of legislative powers can either be framed quite *broadly* or extremely *detailed*. To distribute powers based on broad areas (such as the environment, energy, commerce, trade, foreign relations and so on) is easier, but it makes it almost impossible to clearly determine in advance whether a specific action falls within one or another area. For instance, does the construction of a nuclear power plant fall in the competence area of energy, the environment, economic development, infrastructure or something else? Do the opening hours of shops affect more commerce, competition, property or the labour market? When such a general division of powers is chosen, areas are more homogeneous, but there is potential for conflicts that are normally adjudicated by the courts (unless they are resolved beforehand through intergovernmental relations). Conversely, a detailed definition and enumeration of activities may reduce the room for interpretative conflicts, but this creates fragmentation, (over)burdens the constitutions with a lot of detail and does not entirely eliminate the risk of interpretative conflicts, as the practical reality is always beyond what can be imagined in abstract terms when drafting a constitution. Examples of broadly defined competences can be found in the US Constitution (and in the federal constitutions inspired by it, such as in Mexico, Argentina, Brazil and, more recently, Bosnia and Herzegovina). It is to be noted, however, that more recently adopted constitutions tend to be more detailed as far as the distribution of powers is concerned, whereas older texts preferred a very broad definition of competences (Hueglin & Fenna, 2006, p. 43).

Another element that impacts on the practical functioning of distribution of legislative powers is the nature of the relations between the tiers of government. In some countries (mostly in Anglo-Saxon federal systems) the preferred model is attribution of exclusive powers to each level of government as if they were watertight compartments (so-called *dual* models), while in others (mostly in European systems) they are shared between them (so-called *cooperative* models).

Within this general framework, four types of legislative powers can be identified: 1) exclusive powers are those

²⁹ STC 31/2010.

attributed to one level of government only, excluding the possibility for other levels to intervene; 2) *concurrent* powers can be exercised by either one of the levels, and the legislation issued by one level pre-empts the others from adopting laws (Steytler, 2017, p. 3) *shared* powers are those in which the national level legislates as to the principles (also called 'framework legislation'), and the subnational units adopt detailed legislation; 4) *delegated* powers are those that one level of government (usually the national one) devolves to another level by retaining the function and thus always being able to withdraw them. More generally, modern times are marked by a clear predominance of cooperative elements, including in dual systems. This often happens to a degree that makes it extremely difficult to clearly attribute the responsibility for legislative action to one or another level of government despite the provisions and certainly the intention of the constitution: a phenomenon that is critically labelled as 'interlocking federalism' (Watts, 2006, p. 343) and implies a significant and growing role for interpretation and adjudication, especially by courts.

Administrative autonomy

The division of administrative power can either follow that of legislative authority or be separated from it. When the administrative powers follow legislation, the same level of government is vested with the power to legislate in a particular matter and also retains the power to implement its own legislation. When legislation and administration are separate, laws can be implemented by a different level than that which adopted the legislation, and in practice legislation is more centralised and administration rather decentralised. The first model (administration follows legislation) is known as *legislative* or *dual*, the latter (administration is largely disconnected from legislation) as administrative or executive. Like for legislation, the dual approach is typical of the Anglo-Saxon and Latin American federal systems such as in the United States, Canada, Australia, Brazil and Mexico, while administrative federalism is the rule in continental Europe (Germany, Switzerland, Austria, Spain and Italy). As usual, however, lines cannot be drawn this clearly: Belgium largely divides legislative and administrative powers according to the dual model whereas India and South Africa mostly follow the approach of administrative federalism.

The contemporary spreading of cooperative elements in legislation also affects administration. In fact, this allows a uniform legislation to be maintained at least with regard to the framework, but, at the same time, a decentralised administration allows for a tailor-made implementation, taking into account local peculiarities. Depending on the practical functioning of each system, such trends can either limit self-government to a merely administrative autonomy, or establish the right balance between unity and diversity: the determinant factor is above all the cooperative attitude and culture among the levels of government. When such culture is not really developed, a rigid, watertight compartment separation between the layers of government, with parallel and non-overlapping structures, might better guarantee the preservation of autonomy. Conversely, when cooperative culture and instruments are well developed, a differentiation in administration rather than in legislation may be better suited to address the balance between unity and difference in a time marked by an increasing number of actors and growing complexity of policy areas. For instance, in Germany most legislation is adopted by the federal parliament and executed by the subnational governments, but the subnational governments play a significant role in drafting the federal laws they are in charge of implementing due to their direct representation in the Bundesrat.

Judicial autonomy

Among the autonomous functions mentioned in this section, the judiciary is, overall, the *least autonomous*, and in several federal systems it is not even divided between the national and the subnational level: this is the case, for instance, in Austria, Belgium, Russia, South Africa and Spain. Like for administrative competences, the division of judicial powers also follows in principle two main models: dual or integrated. *Dual* systems involve parallel and basically separate judiciaries for each level of government, exercising the jurisdiction assigned to the respective level normally independently from one another (e.g. the United States and Switzerland). *Integrated* systems provide for a single judiciary and a single jurisdiction. The authority over the judicial system may either be assigned to the national government only (e.g. Austria and Belgium) or divided between the national and the subnational level (e.g. Germany). Canada has a dual administration but an integrated judiciary. In general,

integrated systems require, also and even more so in the judicial field, a high degree of good faith and judicial cooperation to function properly. This might be a reason why several countries do not divide judicial power at all.

External relations

While states retain international responsibility, the effective exercise of autonomous powers by subnational units may require that such powers can be projected at least in part outside the autonomous territory. Without a certain degree of external projection of internal powers, subnational entities risk a creeping erosion of their autonomy. This is particularly true in an increasingly interconnected world, where many issues inevitably are 'intermestic affairs' (Manning, 1977, p. 306), since the boundaries between international and domestic affairs increasingly blur. Subnational external relations are of course not all the same. Rather, there are different types of such relations and different degrees of autonomy in the respective area.

The first, quantitatively most significant and as a rule legally less problematic subnational activity abroad is the continuous maintenance of (normally informal) external relations, through a wide range of measures such as running representation offices or undertaking foreign visits. In most cases, such activities do not interfere in the general foreign policy of the state and are thus not problematic. At the same time, however, most countries have developed a practice according to which subnational entities simply communicate these activities to national governments. In this way they can establish whether the individual activity is to be considered against the general foreign policy of the country and thus should be prevented or discontinued.

A second, qualitatively rather different external activity concerns the role of subnational entities in creating international law, including the exercise of their own treaty-making power, participation in negotiating treaties concluded by their national government and in decision-making in an international or supranational organisation. Many countries explicitly provide for subnational treaty-making powers, although within the limits of the procedures established at national level and respecting the national foreign policy (e.g. Germany, Austria, Belgium, Italy, Switzerland, to some extent Spain, though limited to certain atypical accords that do not entail obligations for Spain under international law, such as joint declarations, protocols). Based on the strength of the participation mechanisms allowing subnational entities to take part in the decision-making at national level, some countries (Germany, Switzerland) involve subnational representatives in the negotiations of some treaties.

In some cases, subnational entities are granted the possibility of being represented in international bodies next to the states they belong to. This is the case, for example, of the Nordic islands autonomies (Åland Islands, Faroe Islands, Greenland) taking part as associate members in the Nordic Council, or, to some extent, of Catalonia having the opportunity to be represented in UNESCO for specific meetings and projects, separate from the Spanish delegation. After several controversies, a 2006 intergovernmental agreement also granted Quebec the right to have a permanent representative in Canada's UNESCO delegation and to be consulted before a formal position is taken. Based on their respective national provisions, some EU countries (Belgium, Germany, Austria) make it possible for a subnational unit to represent the whole country in the Council of Ministers of the EU when specific issues of subnational interest are at stake.

Finally, subnational entities can play a role in the implementation of international (and supranational) law. While the state alone is responsible for fulfilling international obligations, normally this is done in each country following the general distribution of (legislative and administrative) powers. That is, subnational units do normally adopt the legislative and administrative measures arising from international obligations when these fall under their respective power.

Balancing costs and benefits. Some suggestions on (special) autonomy

Subnational autonomy is a rather flexible instrument. It can and must be tailored to the needs of each particular case, with comparative practice presenting a very broad and rich toolkit of the possible technical instruments to be used to design the practical functioning of a particular autonomy regime. As any technical instrument, and particularly as any potentially powerful one, autonomy has enormous potential, which however is proportionate

to the possible risks associated with it. Technical instruments are per se not responsible for the use that people in charge make of them. Therefore, autonomy solutions should neither be considered a panacea nor be demonised, though this happens quite frequently in political discourses, since autonomy is often associated with (too many) emotions.

Comparative experience provides examples of great success as well as of great failure of autonomy regimes, in terms of both general autonomy (affecting the whole territory of a state) and special autonomy (affecting only specific areas of the territory). For any sophisticated instrument to function, some societal preconditions are necessary. As pointed out by political scientist Ivo Duchacek as early as in 1970, underlying political culture is needed for institutions to work (Duchacek, 1970, p. 343). This might be an intuitive consideration. However, several indicators exist to measure the presence of political culture of autonomy, such as the number of negotiated norms, the quantity and quality of the work of subnational parliaments, the importance of autonomy in the local political discourse and the presence (and behavior) of regional parties (See inter alia Detterbeck & Hepburn, 2018). Against this background, and more specifically, the following considerations should be taken into account when considering the adoption or the reform of (special) autonomy regimes.

First, since autonomy only makes sense if the choice of instrument is tailored to the needs of each specific territory, the first evidence of the existence of the necessary social and political preconditions is the capacity of the involved parties to jointly identify such needs. If negotiating parties are unable to share at least the analysis of the problems and of the needs, and if positions are maximalist, it is very unlikely that institutional instruments such as those described can produce positive results.

Second, the question arises as to whether specific legal/institutional instruments can create the necessary social and political preconditions if these are lacking. Comparative experience proves that this is possible at least to a limited extent, as such instruments and their judicial guarantees can create trust, although this needs time and requires at least an independent judiciary. Of course, the weaker the societal and political preconditions, the longer the time needed for instruments to work.

Third, any autonomy arrangement implies additional costs as compared with the absence of autonomous institutions. This might represent an initial obstacle in economically fragile environments. However, the costs of non-autonomy are normally much higher, and an ounce of prevention is typically worth a pound of cure.

Fourth, alternatives need to be considered to avoid bigger problems. While autonomy might include some risk for the territorial integrity of the state, its absence, especially in areas affected by conflicts, is often the recipe for the dissolution of such integrity. Comparative experience suggests that neglecting self-government claims very often leads to conflicts and to a de jure or de facto secession. And also when secession took place in areas that already enjoyed autonomy, this normally happens because autonomy was not taken seriously by the involved parties, or due to the intervention of external actors such as (sometimes self-proclaimed) kin-states.

Intergovernmental cooperation and conflict management

Political participation and judicial conflict resolution mechanisms are foreseen everywhere. It appears indispensable to have and to rely on both. The examples for (meaningful) political participation range from institutions, such as the parliament or others (e.g. conferences), to special procedures of consultation. Bilateral relations reflect the procedural answer in case of strong asymmetries in status and powers. Courts complete the picture as arbiters of legitimacy after decisions have been taken. The extent and degree of the availability and use of each of these elements varies in each system depending on political, cultural and historical factors. However, in recent years, the search for a judicial resolution of conflicts between levels of government has become more common and frequent in most systems, especially those where political guarantees are weak.

In fact, two orders of government in a compound state, independent from each other, create the need for resolving conflicts over their respective constitutional roles and competencies. This can occur politically through participation in parliament or intergovernmental institutions (e.g. conferences), in formal or informal procedures, bilaterally or multilaterally.

Political procedures or institutions may facilitate (negotiation for) compromise thus reducing the need for subsequent recourse to judicial remedies. The most traditional instrument for that purpose is subnational participation in national legislation through federal second chambers. However, the composition, role, weight and effectiveness of such second chambers vary considerably. Less formal institutions of intergovernmental cooperation rather than parliamentary cooperation are very frequent and increasingly so (Palermo et al, 2016, paras 60, 61 and 70).

These kinds of institutional representation of subnational interests work well in the case of symmetrical powers and status (in fact, they have their origins in federal systems), as efficiency in decision-making is made possible by the general use of the majority principle. This would not be appropriate in the case of strongly differentiated powers and/or special interests to be protected. Asymmetrical regionalism requires differentiated means of individual representation and participation and thus bilateral procedures. If a controversy cannot be prevented by political means, the role of an arbiter is usually assigned to courts (in the UK, a Supreme Court was established in 2005 within the framework of the devolution process for this reason and, more generally, the first function of constitutional courts has been adjudicating controversies between different tiers of government).

Principles, institutions and instruments of intergovernmental relations

To permit regional political and administrative autonomy, “any supervision of regional authorities by central state authorities shall normally only aim at ensuring their compliance with the law”.³⁰ Furthermore, “administrative supervision of regional authorities may be exercised only according to such procedures and in such cases as are provided for by constitutional or legislative provisions. Such supervision shall be exercised ex post facto and any measures taken must be proportionate to the importance of the interests which it is intended to protect”.³¹

As to substitution, “national or federal authorities’ power of temporary substitution to act in lieu of regional authority organs may be exercised only in exceptional cases and under the procedures provided for by the constitution or by law. This power shall be confined to specific cases where regional authorities have seriously failed to exercise the competences vested in them and shall be utilised in accordance with the principle of proportionality in the light of the interests it is designed to protect”. Furthermore, “the decision-making power resulting from a substitution measure shall be entrusted to staff acting solely in the interests of the regional authority concerned, except in the case of delegated responsibilities”.³²

Where autonomous regions with special status are part of a state that also encompasses other forms of regional autonomies (as in Spain, Italy or France – departments and overseas territories), the rules on supervision of regional acts and substitution by the state are generally the same for all types of regions. Normally, substitution is possible only in exceptional cases of persistent violations of laws or international liability of the state resulting from a regional misconduct.

Where special status regions are the only regional authorities in their respective countries, specific rules on supervision and substitution are established. These generally respect the principles mentioned here and sometimes go beyond by establishing specific guarantees. For example, all Danish laws must be submitted to the president (Lagmadur) of the Faroe Islands before they can enter into force in the autonomous territory. All the laws adopted by the Åland Parliament need to be signed by the Finnish president within four months. The president can veto the laws in case of ultra vires legislation or if the law jeopardises the internal or external security of the country, but to minimise the risk of a presidential veto, a mixed expert commission examines the laws before they reach the state president (Palermo, 2013, paras 30–33).

³⁰ Helsinki Declaration on Regional Self-government of the Conference of European ministers responsible for local and regional government, adopted on 28 June 2002, B4.1.

³¹ Helsinki Declaration on Regional Self-government of the Conference of European ministers responsible for local and regional government, adopted on 28 June 2002, B4.2.

³² Recommendation 240(2008) of the Congress of Local and Regional Authorities of the Council of Europe, adopted on 28 May 2008, para 44.

Participation of the autonomous territory in national institutions and decision-making processes

Special status has both a material and a procedural dimension. While the former means, in essence, more and more special powers, the latter essentially consists of a wide range of rights to participate in decision-making, including to be involved and effectively consulted in state decisions affecting their competences, essential interests or the scope of their self-government. The more developed special status regions have direct bilateral channels with the state institutions and can sometimes veto unilateral state decisions affecting the core of their self-government. The involvement of special status entities is ensured through representation in state decision-making bodies and/or through consultation between the state and the regional authorities concerned.

Nearly all special status arrangements provide for a guaranteed representation of the special status region in the national parliament, irrespective of the population ratio. This is of particular importance for small special status regions. Reserved seats in the Danish Parliament are provided for the Faroe Islands and for Greenland, in the Finnish Parliament for the Åland Islands, in the French Parliament for Polynesia, in the Portuguese Parliament for the Azores and Madeira, and so on. The asymmetric structure of special status autonomy can give rise to cases of over-representation and issues of legitimacy.

In some cases, representation for the special status regions is established also in the national government. The president (*Baskhan*) of Gagauzia is automatically a member of the Moldovan cabinet and the presidents of Italian special regions have the right to participate in national cabinet meetings when issues of their specific interest are discussed (Palermo, 2013, paras 34–37).

Even more importantly, for most special status regions bilateral institutions or procedures are in place with a view to establishing direct channels for cooperation and to prevent political conflicts or judicial litigation. These instruments are either limited to specific issues or entrusted with a general competence. Particularly important are the joint commissions in place for each Italian special region. These are composed by an equal number of state and regional representatives and draft the implementing measures (by-laws) for the respective autonomy statute. Such measures enjoy a higher rank than the laws of both the national and the regional parliament.

In exceptional cases, special status regions may even have veto rights over vital decisions affecting them, if the consultation mechanisms have not worked. For example, the Åland Islands have the right to veto international decisions directly affecting their legislation (as expressed by the referendum on EU accession in 1994).

More frequently, special procedures are established to give the autonomous region's authorities time to adapt to reforms or to make their voice heard at state level. In Greenland, all measures that affect or might impact on the island must be communicated in advance to the local authorities, which have in principle six months to take their stand. In the Autonomous Provinces of Trento and Bolzano-South Tyrol in Italy, state laws introducing fundamental socioeconomic reforms enter into force only after six months in order to provide time to adopt the necessary local legislation adapting the principles to the specific needs of the special territories (Palermo, 2013, paras 39–40).

In Finland and Denmark, legal mechanisms exist for preventing conflicts between the national government and the autonomous territories from the beginning: national bills which may affect the autonomous territory have to be submitted to the subnational governments first. Joint organs as well as parliamentary committees for the political resolution or prevention of conflict play an important role. Another key role for cooperation between Åland and the Finnish state is played by the so-called Åland Delegation. The joint organ consists of the Governor of Åland (who is appointed by the President of Finland), two members elected by the Council of State and two elected by the Parliament of Åland (furthermore, both institutions must elect two deputy members). The task of the delegation is to formulate opinions for the Council of State, the national ministries, the government of Åland and the courts if requested (Art. 55–57 of the Act on Autonomy). For example, they decide on matters referring to land and buildings of the national government as well as financial procedures. Moreover, every 'Act of Åland' is accompanied by an opinion of the Åland Delegation. According to the Act on Self-Government of Greenland and the Homeland Act of Faroe disputes between the subnational authorities and the state are resolved by some kind of joint committee. In both cases this committee is composed of two members nominated by the Danish

Government, two members by the Government of Greenland or respectively by the Government of Faroe as well as three judges of the Danish Supreme Court. Both acts stipulate that in case the four government nominees are not able to resolve a dispute, the decision shall be taken by the three judges (Palermo, 2016, para 66).

Judicial protection and constitutional adjudication

While consultation mechanisms and veto rights are essentially political in their nature, access to judicial remedy to secure the free exercise of powers of regions with special status and the respect for the principles of regional self-government enshrined in domestic law makes it possible to settle conflicts according to legal rules. For this reason, legal protection is a fundamental element of the rule of law, on which regional democracy must be grounded. Historically, controversies between federal and subnational governments have been among the reasons leading to the establishment and development of constitutional adjudication. Thus, the judicial resolution of conflict is standard in most systems and makes guarantees of the autonomous status and powers enforceable (Palermo et al, 2016, para 68).

Thus, in most cases, the judicial body entrusted with adjudicating conflicts over competences of autonomous regions is the national Constitutional Court. The court can be called to resolve legal disputes by the bodies of the state (normally the government) or of the special status authorities (more often the executive, sometimes the parliament). Normally, there is no legal rule for the presence of judges from the autonomous region in the Constitutional Court, although this is provided for in some cases. Section 6 of Canada's 1985 Supreme Court Act foresees, for instance, that at least three of the judges shall be appointed from a superior court of Quebec or from among the advocates of that province. The recently established Supreme Court of the UK has jurisdiction, *inter alia*, to resolve disputes relating to devolution issues, that is concerning conflicts of competence, the powers of the three devolved governments or laws adopted by the devolved legislatures. On some occasions, the courts can render advisory opinions on issues related to autonomous regions, such as in the case of the Supreme Court of Finland on matters regarding the Åland Islands (Palermo, 2013, paras 42–43).

Some autonomy arrangements limit the access to judicial adjudication, at least *de facto*. This is the consequence either of vague provisions that are therefore difficult to adjudicate in a court, as sometimes happens, for instance, for Gagauzia, or of a deliberate choice to resolve issues only at political level. For example, the bilateral treaties concluded after 1994 between Tatarstan and the Russian Federation on a number of subjects including economic policy, military camps and protection of the environment do not provide for a judicial settlement of conflicts and there is no clarity as to what the applicable law should be.

In Italy, the Constitutional Court is entrusted with the adjudication of conflicts regarding competences of state and regions. It contributed significantly to the emancipation of Italian regions in the 1980s and 1990s, developing procedural rights and 'cooperative regionalism'. After the reform of the Italian Constitution in 2001, the court has hampered its role as conflict manager because of the lack of enactment provisions of fundamental parts of the constitution. Consequently, criticism has arisen as to the role of the Constitutional Court: since 2001, it vests a quasi-legislative function, as its extensive case law tends to replace the ordinary legislation by the parliament.

The Spanish Constitutional Court has also contributed significantly to the evolution of what is called in Spain the 'state of autonomies'. In a seminal early ruling, it mandated a restrictive use of the power to adopt harmonisation laws.³³ On the other hand, the case law is also characterised by an extensive interpretation of the national government's power to establish 'basic rules' or enact 'basic legislation'.³⁴ Finally, the Constitutional Court is the ultimate interpreter of the statutes of the autonomous communities with the most notable judgement being the already-mentioned invalidation and reinterpretation of parts of the 2006 Statute of Catalonia (see section 5.2.1).³⁵

³³ STC 76/1983.

³⁴ STC 35/1982; STC 32/1983.

³⁵ STC 31/2010.

Ch. 6 Concluding remarks

The objective of this study was twofold. The first was to analyse Bougainville's current arrangement in the context of other forms of autonomy arrangements available and practised elsewhere. To this end, we explored, after preliminary explanations of what autonomy means (Section 1), the reasons for establishing arrangements of self-government (Section 2) and the functioning of different types of autonomy (Section 3) before we provided an assessment of Bougainville's current arrangement (Section 4). The second objective of the study was then to offer choices between the existing autonomy arrangement and full independence. Alternative options of institutional design were outlined, to link them with the aforementioned assessment of the current status of autonomy. This was done with a focus on three areas that seem particularly crucial: entrenchment and implementation of autonomy, autonomous powers, and intergovernmental relations and conflict management. This focus on particular elements of autonomy was necessary because our experience with arrangements worldwide has taught us that it is impossible to recommend and simply transplant entire arrangements, considered as 'models', into other contexts. What does make sense, however, is to gain insights from comparative analysis of the institutional design in specific areas such as the three particularly important ones referred to here.

Even if this report outlined certain options for alternative institutional design, there are still other preconditions for such design to work, beyond all technicalities. Chief among them is the willingness (despite the need for entrenchment) to consider a flexible adaption of autonomy over time and, not least for this purpose, continual negotiations between the national and autonomous governments. As to the first point, one country, whose arrangement of federalism and autonomy has been blessed with particular longevity, has to offer an important lesson in terms of flexibility. It is claimed that Canada has survived as a country since 1867 "despite the threat of separatism ... because it has not stagnated; it is constantly rebalancing" (Linden, 2006, p. 18). Experience from Canada (and from other countries) indeed implies that successful institutional design of autonomy does not only require balancing the interests of different stakeholders in the first place to establish autonomy as a tailor-made 'constitutional bargain', (Riker, 1964, p. 1) (on autonomy's pragmatic nature as a negotiated compromise solution, see Section 2.1) but also rebalancing over time to maintain self-government. Any autonomy arrangement needs to be sufficiently flexible to adapt to changing cultural, social, economic, political and legal contexts because an overly rigid, even, sclerotic form of autonomy has little potential to be and remain widely accepted. Precisely such acceptance is essential not just at the moment of concluding such an arrangement (no 'one-size-fits-all' solution), but also during its subsequent functioning in practice (no 'once-and-for-all' solution). Based on the assumption that conflicts can be managed, at least to some extent, through institutional designs like autonomy, it is thus crucial that self-government structures succeed, in the long run, in solving 'commitment problems' (Fearon, 1998, p. 107ff) by providing incentives for all main actors to adhere to these structures. This does not even necessarily require in all cases a very extensive degree of autonomy, but it always requires an appropriate degree tailored to actual circumstances (Packer, 2007, p. 71).

The flexibility to adapt and find the in-the-long-run appropriate and widely acceptable degree of autonomy is basically achieved by three different tools. The first one is formal constitutional amendments, which have played, as it happens, only a very marginal role in the Canadian case. Two other tools have been much more important: the intergovernmental agreements and jurisprudence of the Supreme Court. Case law has contributed to the transformation of an initially very centralised and only 'quasi-federal' (Wheare, 1946, p. 19.) state into "one of the world's most decentralized federations" (Simeon & Papillon, 2006, p. 92). The crucial importance of intergovernmental agreements for adapting the autonomy of Canadian provinces relies on an understanding of the distribution of powers not as a rigid ordering of national-subnational relations but as a flexible framework for negotiations and compromise. This has made formal amendments necessary, as mentioned earlier, only in very few cases. Moreover, it has enabled the conclusion of numerous intergovernmental agreements, some of which Quebec participated in while it opted out from others – always in a very flexible way. This constant

rebalancing and adaptation through such agreements has certainly diminished the risk of state disintegration, just as constitutional jurisprudence has done as well. As the former Prime Minister Pierre Trudeau famously remarked, if the judges “had not leaned in that [provincial] direction, Quebec separation might not be a threat today; it might be an accomplished fact” (Trudeau, 1968, p. 198).

When it comes to the balancing of interests and acceptance of an autonomy arrangement, it is important to emphasise that this acceptance should be as broad as possible in order to both do justice to different claims of different groups and to prevent a lapse back into times of violent conflict. If autonomy is not conceived as territorial but designed as a tool for the dominant group(s) of the autonomous region to majoritise and marginalise its minorities, this does not only negate the ethno-culturally diversity of most territories (Kössler, 2015, p. 245). If self-government is seen as being owned by one or some communities and not as something shared (see Section 3.3.2), this risks sowing the seeds for further conflict – in this case internally within the autonomous region. Thus, autonomy itself may be a double-edged sword, as it does not always work to the benefit of all groups involved. In other words, “[a]utonomy is a response to marginalisation, or oppression, but can itself all too easily become an instrument for the marginalisation of others. ... Starting as a response to discrimination, it sets up its own orthodoxy. Justified in the name of diversity, it tends to entrench boundaries between cultures. Instead of defining identity as a composite of different values and multiple affiliations, identity is perceived as made up of a singular and exclusive affiliation” (Woodman & Ghai, 2013, p. 485).

In research on institutional design, the issue of internal minorities and the need for a conception of shared autonomy has not passed unnoticed. Some scholars have proposed what may be called external substantive limits to the scope of majoritarisation of these minorities without, however, changing majoritarian decision-making as such. Cases in point are the power of the national government to intervene on behalf of these groups in certain sensitive policy fields (e.g. Art. 349–51 of the Constitution of India) and a comprehensive catalogue of fundamental rights in the national constitution (e.g. the 1982 Canadian Charter of Rights and Freedoms) (Watts, 2008, pp. 165–66). These instruments do not, however, directly address the fundamental problem of internal minorities being outnumbered under majority rule and thus refrain from introducing internal procedural limits to this kind of decision-making (on external substantive and internal procedural limits to majoritarianism, see Kössler, 2015, pp. 269–72). Such limits are only in place if elements of power-sharing are introduced at the subnational level. In concrete terms, instruments for sharing legislative and executive power within a subnational entity, like special parliamentary voting procedures for certain subject matters or mandatory representation in the subnational government and public administration, protect internal minorities at least partially against being outnumbered (Kössler, 2016, pp. 39–66).

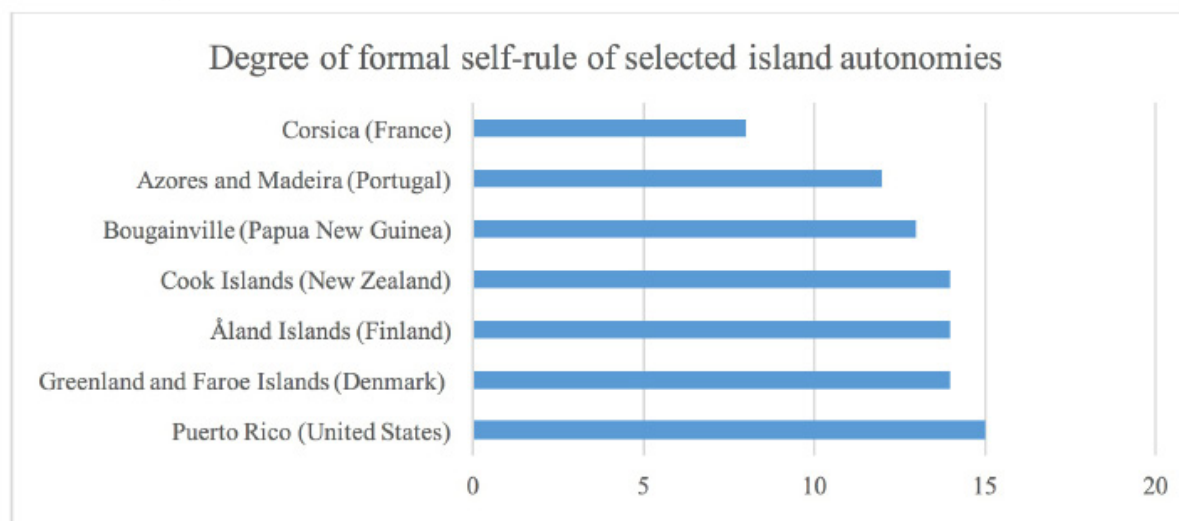
The fact that an arrangement of self-government needs to recognise diversity within the autonomous territory for it to be a sustainable solution seems important for an island territory as diverse as Bougainville which boasts 25 different language groups and further distinct cultural identities within these groups (Tryon, 2003, p. 31ff). Much of identity politics over recent decades seems to have been related in one way or another to the operation from 1972 to 1989 of the Panguna copper and gold mine on the island, which was established by the Australian colonial government (Ghai & Regan, 2000, p. 242ff). First, it influenced identity formation of native Bougainvilleans. Secondly, it resulted in immigration of a workforce to the island from other parts of PNG that was seen by some as changing traditional Bougainvillean identity and culture. Although violence against the latter group of people in 1989–90 has led to an exodus from the island, ethno-cultural diversity remains a salient political issue. Another dimension of identity is territorial, with the north of the island being more developed, not least due to the impact of colonialism, and having closer ties to the rest of PNG. A final identity marker is political and concerns, above all, the cleavage between secessionists and those opposing independence. While these positions came to be represented during the civil war by the Bougainville Revolutionary Army and the Bougainville Resistance Forces, respectively, that cleavage significantly subsided with the intra-Bougainville compromise in 1999 on a common negotiating position (Regan, 2010, p. 85ff). A look at the current subnational constitutional framework reveals that these diverse identities are, at least to some extent, legally recognised. Examples are the integration of traditional local authorities, i.e. councils of elders, into the system of local government (Art. 49(2) of the Bougainville Constitution), as well as certain elements of executive power-sharing:

the Ministers constituting together with the president the Bougainville Executive Council are chosen by the president from the members of the legislature, but this is subject to guarantees of representation for the three regions: north, central and south (Art. 80-81 of the Bougainville Constitution).

Functioning autonomy depends on a critical amount of acceptance from different conflict parties, not least also internally within the autonomous regions, hence implying that it is by no means set in stone. This also holds true if it is adapted over time, even if the prospects for success seem in that case better. Indeed, comparative evidence demonstrates that regimes of self-government were sometimes dissolved in the case of a loss of such critical support and thus proved to be merely transitional. Transition then may either lead to independent statehood or to full integration into the state. An example of the latter pathway is the autonomy of Hong Kong and Macau within the People's Republic of China, which is ensured, at least in legal terms, for 50 years after reunification. Thus, Art. 5 of the Hong Kong Basic Law states, for example, that "[t]he socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years." In many more cases, however, transitional autonomy has led to independent statehood, which was achieved most often without a constitutionally guaranteed right to secede. While we have pointed out that an instinct of self-preservation typically prevents states from enshrining such a right, the long-term perspective of legally enabled independence plays an important role for some autonomous regions. Examples include islands in particular and, among them, such diverse cases as Greenland, New Caledonia and, of course, Bougainville. If independence is an explicit alternative, autonomy is not only transitional but also conditional. The merits of autonomy, or rather of the very specific arrangement in each single case, are in such instances tested for a certain period of time. A referendum on independence then represents the ultimate evaluation at the end of this process.

In Bougainville as well, such an evaluation will demonstrate whether the current autonomy regime does not only set up a governmental framework for the various institutional actors but also entails tangible governance benefits for the people, from their perspective. Indeed, "[w]hile the arrangements focus on government, their real importance is on the effects they have for governance more broadly defined. The ultimate test of their impact and effectiveness will be the referendum ..." (Wolfers, 2007). While expert observers have described the record of the arrangement so far as mixed (Regan, 2013, p. 445), the people will be called to render a judgement by weighing autonomy, albeit not necessarily in its current form, against the alternative of independent statehood. As described above, the legal framework grants Bougainville considerable legislative and administrative competences, as well as some judicial and external powers, which are – also in comparative perspective – quite substantial. The chart demonstrates that, from a formal perspective, the autonomous territory was actually granted a quite high degree of self-rule (Hooghe et al, 2007, pp. 349–60).

Chart 1: Degree of formal self-rule of selected island autonomies



At the same time, however, we have also drawn attention to problems of the autonomy arrangement that concern its implementation. In short, rather than this arrangement itself, putting self-rule into practice seems to be the crucial challenge. This is because making use of autonomy requires adequate financial and administrative resources. The inherent nexus between effective autonomy and capacity development is, therefore, of utmost importance.

Finally, it will be up to the people of Bougainville to evaluate their past experience with autonomy and make a choice – inevitably, they will have to do so without having experience with independence. It has been pointed out in this report that regions often, albeit not always, prefer regimes of self-government to outright secession (see Section 3.1). This is due not only to the success of these arrangements themselves but also to certain elements of uncertainty, above all around economic viability and access to the international community, which sometimes make full separation a leap in the dark. On the other hand, any autonomy arrangement needs in order to function some common ground, which the national government and the autonomous region may build on. Whether such common ground (still) exists, will be revealed in June 2019.

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