

Alma Mater Studiorum – Università di Bologna  
in cotutela con Universiteit Antwerpen

DOTTORATO DI RICERCA IN  
SCIENZE GIURIDICHE

Ciclo 35

**Settore Concorsuale:** 12/E2 – DIRITTO COMPARATO

**Settore Scientifico Disciplinare:** IUS/21 – DIRITTO PUBBLICO COMPARATO

COMPARATIVE CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES:  
A MODEL TO EXPLAIN CONSTITUTIONAL ASYMMETRIES.

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**Esame finale anno 2023**

*To my family*

## ABSTRACT

Comparative studies on constitutional design for divided societies indicate that there is no magic formula or one-size-fits-all solution to the challenges that these societies pose, as lots of factors influence constitutional design. In the literature on asymmetric federalism, the introduction of constitutional asymmetries is considered a flexible instrument of ethnic conflict resolution, as it provides a mixture of the two main theoretical approaches to constitutional design for divided societies (i.e., integration and accommodation). Indeed, constitutional asymmetries are a complex and multifaceted phenomenon, as their degree of intensity can vary across constitutional systems, and there are both legal and extra-legal factors that may explain such differences.

This thesis argues that constitutional asymmetries provide a flexible model of constitutional design and aims to explore the legal factors that are most likely to explain the different degrees of constitutional asymmetry in divided multi-tiered systems. To this end, the research adopts a qualitative methodology, i.e., Qualitative Comparative Analysis (QCA), which allows an understanding of whether a condition or combination of conditions (i.e., the legal factors) determine the outcome (i.e., high, medium, low degree of constitutional asymmetry, or constitutional symmetry). The QCA is conducted on 16 divided multi-tiered systems, and for each case, the degree of constitutional asymmetry was analyzed by employing standardized indexes on subnational autonomy along three dimensions (i.e., status, powers, fiscal arrangements), allowing for a more precise measure of constitutional asymmetry than has previously been provided in the literature on asymmetric federalism.

Overall, the research confirms the complex nature of constitutional asymmetries, as the degrees of asymmetries vary substantially not only across systems but also within cases among the dimensions of subnational autonomy. The outcome of the Qualitative Comparative Analysis also confirms a path of complex causality since the different degrees of constitutional asymmetry always depend on several legal factors, that combined produce a low, medium, or high degree of constitutional asymmetry or, conversely, constitutional symmetry.

The relevance of the implications of the research is a product of the fact that many divided multi-tiered systems are in the European Union (both Member States and prospective members), and many others are located in deeply unstable regions of the world, such as the Middle East (e.g., Iraq, Lebanon, Afghanistan). Therefore, scholars and policymakers may need a new perspective to deal effectively with the challenges raised by divided societies, especially in a post-conflict environment.

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## LIST OF ABBREVIATIONS

|       |                                             |
|-------|---------------------------------------------|
| AC    | <i>Autonomous Community</i>                 |
| AV    | <i>Alternative Vote</i>                     |
| BiH   | <i>Bosnia and Herzegovina</i>               |
| CA    | <i>Constitutional Asymmetries</i>           |
| csQCA | <i>Crisp Set QCA</i>                        |
| ECHR  | <i>European Convention of Human Rights</i>  |
| ECtHR | <i>European Court of Human Rights</i>       |
| ESA   | <i>Enhanced Standard Analysis</i>           |
| FBiH  | <i>Federation of Bosnia and Herzegovina</i> |
| fsQCA | <i>Fuzzy Set QCA</i>                        |
| MTS   | <i>Multi-Tiered System</i>                  |
| NI    | <i>Northern Ireland</i>                     |
| PR    | <i>Proportional Representation</i>          |
| QCA   | <i>Qualitative Comparative Analysis</i>     |
| SA    | <i>Standard Analysis</i>                    |
| SNE   | <i>Sub-National Entity</i>                  |
| STV   | <i>Single Transferable Vote</i>             |

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## INTRODUCTION

### *Unfolding the subject*

Societies divided along ethnic, linguistic, religious, or cultural lines give rise to challenges of highly practical importance. In fact, the tensions between ethnocultural groups may either result in violence (permanent discrimination, civil conflict, ethnic cleansing, genocide) or, even in absence of violence, have a corrosive effect on the political dynamics of the state, creating a stalemate in political institutions or even constitutional crisis. In Bosnia-Herzegovina, ethnic divisions were exploited by political actors in order to fuel nationalist claims, resulting in one of the most violent wars witnessed on European soil since the Second World War. Eventually, the Dayton Peace Agreements ended the war in 1995, introducing a set of complex power-sharing arrangements to hold the system in check. In practice, the complexity of the constitutional settlement is so high and pervasive at every level of governance, that institutional crises are the norm. This means that the political system is unable to deal effectively with important issues such as high levels of emigration, economic crisis, endemic corruption, and secessionist threats. Dayton brought peace in Bosnia, but not a sustainable solution in the long term.

Many other examples may be recalled, both more and less problematic than Bosnia. Comparative studies on the arrangements adopted in divided societies indicate that there is no magic formula or one-size-fits-all solution, as there are lots of different factors that may influence constitutional design. Therefore, the reality of their implementation must always be taken into account in order to effectively deal with these challenges. With that in mind, this thesis does not purport to find a definitive answer to the many questions that arise in divided societies. Instead, the overall aim is to look at the topic from a different perspective, in order to explore alternative explanations and offer valuable insights on the subject. In particular, the research attempts to sew together the scholarship on constitutional design for divided societies with that on federalism, as the two find a middle ground in the introduction of constitutional asymmetries in divided multi-tiered systems.

## *Terminology*

Before diving deeper into the subject, it is worth briefly defining three essential concepts the thesis will deal with, in order to facilitate understanding of the overall research.

### Constitutional design, constitution making

Constitutional design may be defined as the imaginative process according to which government structures and fundamental rights are modeled. Albeit linked to constitution making, the two are to be considered different concepts.<sup>1</sup> In fact, constitutional design is the vision, the process that precedes and accompanies the drafting phase, as well as the outcome of this process, while constitution making is the process in which the design is operationalized in the drafting of a new constitution. In the current research, the expressions “constitutional design”, “constitutional engineering”, and “institutional architecture”, are considered substantially synonyms, even though they may emphasize different aspects of the process of constitutional design. “Constitutional engineering” stresses the adjustment of certain mechanisms in the original design at a later stage, e.g., through constitutional amendments, while “institutional architecture” highlights the institutions established on the basis of the design.

### Federalism, multi-tiered systems

In federal theory, federalism as a concept has not found a comprehensive and widely accepted definition yet.<sup>2</sup> Since this research does not seek to contribute to a re-definition of the debate on a general theory on federalism, this thesis takes a pragmatic approach, relying on the conception of federalism as an overall idea, founded on Elazar’s principle of “self-rule and shared rule”<sup>3</sup> among constituent units. Moreover, it makes reference to federalism as a process rather than as a fixed design as theorized by Friedrich.<sup>4</sup> For this reason, this research refers to the category of “multi-tiered systems” (MTS), namely those system with multiple tiers of government in which the central level coexists with subnational entities (SNEs) having lawmaking powers.<sup>5</sup> This makes

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<sup>1</sup> See Tom Ginsburg, “Introduction,” in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), 1-14.

<sup>2</sup> See Anna Gamper, “A ‘Global Theory of Federalism’: The Nature and Challenges of a Federal State,” *German Law Journal* 6, no. 10 (2005): 1297–1318; Francesco Palermo and Karl Kössler, *Comparative Federalism* (Oxford: Hart Publishing, 2017), 13-19; Patricia Popelier, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy* (London and New York: Routledge, 2021), 9-45.

<sup>3</sup> Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa and London: University of Alabama Press, 1987), 5.

<sup>4</sup> See Carl J Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Waltham: Blaisdell Publishing Company, 1968); Carl J. Friedrich, “New Tendencies in Federal Theory and Practice,” *Jahrbuch des Öffentlichen Rechts* 14 (1965); Carl J. Friedrich, *Trends of Federalism in Theory and Practice* (New York: Frederick A. Praeger, 1968).

<sup>5</sup> For more on multi-tiered systems, see Palermo and Kössler, *Comparative Federalism*, 8; Patricia Popelier and Maja Sahadžić, eds., *Constitutional Asymmetry in Multinational Federalism* (Cham, Switzerland: Palgrave Macmillan, 2019),

it possible to include as many manifestations of federalism as possible, encompassing also those systems wishing to distance themselves from the strict definition of a “federation” such as regional or devolutionary systems. In this research, what matters is not the formal name that constitutional systems decide to adopt to describe themselves (federation, regional state, unitary state with devolution of powers), but the existence of multiple levels of government, interacting with each other and possibly creating constitutional asymmetries within the system.

### Divided societies, multinationalism

As anticipated, this research mainly refers to the term “divided society” as defined by Choudhry: “As a category of political and constitutional analysis, a divided society is not merely a society which is ethnically, linguistically, religiously or culturally diverse. [...] Rather, what marks a divided society is that these differences are politically salient – that is, they are persistent markers of political identity and bases for political mobilization. Ethnocultural diversity is translated into political fragmentation. In a divided society, political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethno-cultural groups”.<sup>6</sup> For methodological purposes, this research also includes those societies that are only “partially divided”,<sup>7</sup> meaning those societies in which ethnocultural divisions may exist only in limited parts of the territory where the minorities are located (e.g. South Tyrol in Italy with the *Südtiroler Volkspartei*, representing the German-speaking and Ladin-speaking minority), while in the rest of the territory the same divisions are legally irrelevant.

The term “divided society” partly overlaps with Stepan’s definition of the multinational state as a state that has territorially based differences rooted in linguistic, religious, cultural and ethnic identities, and in which there are political groups that aim to build political sovereignty, or an independent state (or states), around these territorially based differences.<sup>8</sup> However, the two may be distinguished in terms of their perspectives, justifying my choice. First of all, the category of divided society first makes reference to the societal level, while multinationalism tends to indicate the institutional and territorial manifestations of ethnocultural differences, thus referring to a multinational state (and not society). This leads to a substantial difference between the two, namely

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4; Maja Sahadžić, *Asymmetry, Multinationalism and Constitutional Law* (London and New York: Routledge, 2020), 44-45; Popelier, *Dynamic Federalism*, 50-51.

<sup>6</sup> Sujit Choudhry, “Bridging Comparative Politics and Comparative Constitutional Law,” in *Constitutional Design for Divided Societies*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 4-5.

<sup>7</sup> Nicolò Paolo Alessi and Francesco Palermo, “Intergovernmental Relations and Identity Politics in Italy,” in *Intergovernmental Relations in Divided Societies: A Comparative Perspective*, eds. Yonatan Fessha and Karl Kössler (Cham: Palgrave Macmillan, 2022), 185.

<sup>8</sup> Alfred Stepan, “Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism,” in *Federalism and Democracy in Latin America*, ed. Edward L. Gibson (Baltimore, Maryland: Johns Hopkins University Press, 2004), 39.

their focus on territory. If in Stepan's definition the territory plays an essential role, as also demonstrated by Sahadžić,<sup>9</sup> the fact that ethnocultural differences cover the entire territory or are present in only limited parts is irrelevant to defining a divided society.

A good example of the distinction between the two terms is offered by Northern Ireland. Northern Ireland is considered a classic example of divided society by the literature, but it cannot be classified as a multinational state. On the contrary, the United Kingdom, of which Northern Ireland is an integral part, can be considered a multinational state specifically because Northern Ireland constitutes a territorial manifestation of ethnocultural differences. *Vice versa*, the United Kingdom can also be considered a divided society, because it displays different identities (Scottish, Northern Irish, Welsh), which become markers for political mobilization (e.g., regional political parties such as the Scottish National Parties, Sinn Féin, Plaid Cymru).

Moreover, the violent or non-violent conflict arising from ethnocultural groups in divided societies has led and still leads to processes of constitutional design in order to accommodate such differences. It could be argued that divided societies that underwent a process of constitutional design to accommodate competing claims may later become multinational states. The conflict may then persist, but not necessarily lead to a new process of constitutional design. However, since the focus of this thesis is on constitutional design, and on the introduction of constitutional asymmetries as a distinct model of constitutional design for divided societies, the preferred term will be divided society. This also explains why multicultural states (e.g., the US, Germany, Austria) which have significant internal diversity, but where such diversity does not translate into political mobilization even in limited parts of the territory, will not be considered as either multinational states or as divided societies.

Such clarifications are of crucial importance, as this distinction will constitute one of the criteria<sup>10</sup> used to identify the case studies analyzed in Part II.

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<sup>9</sup> Following Stepan's definition, Sahadžić detects three sub-properties of multinationalism: *territorial* differences based on language, religion, culture, and ethnicity; the *territorial* embeddedness of these differences; the existence of claims to more important political autonomy based on these differences (see Sahadžić, *Asymmetry*, 73).

<sup>10</sup> For more on the selection criteria and on the properties identified to detect a divided society, see chapter 3.4.

### *Research question*

The challenges raised by divided societies spurred a lively debate among scholars, proposing different models of constitutional design to manage internal diversity. McGarry, O’Leary, and Simeon identified two main approaches in the literature on constitutional design for divided societies, i.e., accommodation and integration. The former refers to the group of models built on the assumption that ethnocultural cleavages are resilient and durable, and that for this reason the state should recognize and promote the plurality of identities in the public sphere.<sup>11</sup> Examples of proposals belonging to this approach are the consociational model theorized by Arend Lijphart, as well as the incentive model proposed by Donald Horowitz.<sup>12</sup> Conversely, scholars in the integrationist approach believe that ethnocultural differences do not necessarily translate into political fragmentation, and the state should promote a common public identity, allowing ethnocultural pluralism in the private sphere. In both approaches, territorial and non-territorial autonomy are recognized as valuable solutions to promote internal pluralism. As noted by Simeon, the reasons behind the introduction of a federal structure largely depends on the goals of constitution makers, which can vary significantly among federal systems following an accommodationist or integrationist approach.<sup>13</sup> Indeed, federalism can be tied to the foundations of liberal democracies, i.e., the guarantees of checks and balances, and of an effective separation of powers (as in the United States), or it can be regarded as a device to manage ethnic conflicts in territorially divided systems (as in Belgium and Canada).

This research argues that it is possible to identify a distinct model of constitutional design providing a “middle ground” between accommodation and integration, i.e., the introduction of constitutional asymmetries in divided multi-tiered systems. In the literature on asymmetric federalism, the introduction of constitutional asymmetries is considered a valuable instrument of ethnic-conflict resolution.<sup>14</sup> Moreover, these provide a mixture of the two main theoretical approaches to constitutional design for divided societies,<sup>15</sup> since constitutional asymmetries allow for flexibility and can be more easily acceptable also by those systems which do not identify as

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<sup>11</sup> John McGarry, Brendan O’Leary, and Richard Simeon, “Integration or Accommodation? The Enduring Debate in Conflict Regulation,” in *Constitutional Design For Divided Societies*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 41.

<sup>12</sup> These models will be addressed in detail in chapter 1.2. For further references, see Arend Lijphart, “The Wave of Power-Sharing Democracy,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 37-54; Donald Horowitz, “Constitutional Design: Proposals v. Processes,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 15-36.

<sup>13</sup> Richard Simeon, “Constitutional Design and Change in Federal Systems: Issues and Questions,” *Publius: The Journal of Federalism* 30, no. 2 (2009), 243.

<sup>14</sup> Marc Weller, “Introduction,” in *Asymmetric Settlements and the Settlements of Ethnic Conflict*, eds. Marc Weller and Katherine Nobbs (Philadelphia and Oxford: University of Pennsylvania Press, 2010), 1.

<sup>15</sup> Choudhry, “Bridging,” 34-35.

federations (e.g., Italy, Spain, the United Kingdom). However, the literature has not yet consistently explored the variety of expressions that constitutional asymmetries can have in different constitutional systems, as well as the legal factors that can impact the degree of constitutional asymmetry.

Given these premises, this thesis aims to answer the following research question: *What are the legal factors at the basis of constitutional design that can provide determinant conditions to explain the different intensity of constitutional asymmetries in divided multi-tiered systems?*

Specifically, this research question allows to address three gaps in the literature. First, the majority of studies on this topic are in the field of comparative politics, at the expense of comparative constitutional law. However, constitutional law has the potential to play an essential role in addressing the challenges arisen by divided societies, especially through constitutional engineering. Second, previous works focused on the qualitative assessment of constitutional asymmetries in terms of weak or strong intensity, whereas the present research aims to provide a more nuanced framework on constitutional asymmetries by defining them in terms of degrees (i.e., low, medium, and high). Finally, previous research explored the extra-legal factors leading to the presence or absence of asymmetries within the system, assessing for example the impact of history, party systems, separatist movements, and wealth.<sup>16</sup> Conversely, the focus of this study is on the legal factors that are not only conducive to constitutional asymmetries but are also distinctive elements of constitutional design. This particular perspective allows for a better explanation of the impact that constitutional design has on the degree of constitutional asymmetry in divided multi-tiered systems.

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<sup>16</sup> See Maja Sahadžić, *Asymmetry, Multinationalism and Constitutional Law* (London and New York: Routledge, 2020).

## *Methodology*

In order to link the legal factors to the different degrees of constitutional asymmetry, the research adopts a qualitative methodology, namely Qualitative Comparative Analysis (QCA), defined as a “research design, method and strategy which is especially well-suited to small to medium-N universes where explanations are likely to be complex, multidimensional, and configurational”.<sup>17</sup> The legal factors proposed in the research certainly aim to be “complex, multidimensional, and configurational” explanations of an underdeveloped topic – namely constitutional asymmetries in comparative constitutional law. Therefore, the adoption of QCA allows an understanding of whether a specific combination of conditions (i.e., the legal factors) determines a specific outcome (i.e., high/medium/low constitutional asymmetry), or whether the outcome depends on a single condition rather than another, and not on a combination of conditions. To conduct the QCA, 16 constitutional systems were selected to develop the analysis of the interaction between the conditions and the outcome, and of the solution formula (the condition(s) sufficient for that outcome).

Aside from the QCA, the research employed a variety of qualitative methods to conduct the analysis. First, to measure the outcome (i.e., the degree of constitutional asymmetry), this thesis relied on the subnational autonomy indexes developed by Popelier in her work on autonomy and cohesion in federal systems.<sup>18</sup> Indeed, the use of standardized indexes allowed for a rigorous comparison across cases, and especially for a more precise measure of constitutional asymmetry. Second, another qualitative method that was employed was structured interviews with national experts. Given the number of case studies selected, and the overall complexity of the analysis, data had to be validated to ensure the soundness of results. To this end, a number of scholars and experts<sup>19</sup> having direct expertise on the constitutional systems have been involved in order to discuss the results of the first round of independent analysis, and to validate or correct the data.

Overall, the adoption of different qualitative methods places this research in the developing field of empirical legal studies, with all the consequent challenges and limitations that will be discussed in the thesis.

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<sup>17</sup> Bob Hancké, *Intelligent Research Design* (Oxford: Oxford University Press, 2009), 80.

<sup>18</sup> See Popelier, *Dynamic Federalism*, 87-188.

<sup>19</sup> See Appendix 1 for the list of national experts.



### *Objectives of the research*

The research has two main objectives. The first and most ambitious aim is to shed more light on possible explanations for the different degrees of constitutional asymmetry in divided multi-tiered systems. This is possible thanks to a more precise measure of constitutional asymmetries and to the outcome of the QCA. Exploring alternative solutions for divided societies could be of shared interest for academic scholars and policymakers for two reasons. The first is that many of these divided societies are in the European Union (both Member States and prospective members), and the EU itself may be considered a multinational entity. Therefore, European scholars and policymakers may need a new perspective to deal effectively with the challenges raised by divided societies. The second reason is that many others are located in deeply unstable regions of the world, such as the Middle East (e.g., Iraq, Lebanon, Afghanistan), and it is crucial to understand what model of constitutional design to introduce in a post-conflict environment. Thanks to the model provided by this thesis, it would be possible to explain which legal factors are more likely to produce a high, medium, or low degree of constitutional asymmetry, thus offering a more comprehensive picture to constitutional designers when dealing with divided societies.

The second goal of the thesis is to challenge comparative constitutional law beyond its traditional borders. Indeed, the research deals with many issues that are traditionally the domain of comparative politics. To name just a few, constitutional design, federalism, and asymmetries were first theorized and further refined by comparative political scientists. As will be explained in the first chapter, comparative constitutional law has only played a marginal role in the literature. However, it has the potential to occupy center stage, offering a crucial contribution to the debate. Moreover, comparative constitutional law does not usually adopt qualitative methodologies such as Qualitative Comparative Analysis, the use of standardized indexes or structured interviews, which are all typical methods of the social sciences. Again, the objective is therefore to push the field of comparative constitutional law a little further outside its “comfort zone”, as some instruments of the social sciences would be of great use to this legal field in sharpening its understanding of legal phenomena.

### *Outline of the thesis*

The overall structure of the thesis takes the form of two Parts, consisting of a total of five chapters, excluding the introduction and the conclusion.

Part I lays down the theoretical foundation of the research as a whole. The first chapter starts with an introduction on the concept of constitutional design and on the debate concerning constitutional design for divided societies. Then, the chapter explores the link between the scholarship on constitutional design and that on federalism and explains why asymmetric federalism constitutes a middle ground between the two. The chapter concludes with a brief analysis of the role played by constitutional courts in divided societies. In chapter two, the analysis continues with the definition of asymmetries in comparative federalism, distinguishing between political (*de facto*) and constitutional (*de jure*) asymmetries, then moving to the measure of “high”, “medium” and “low” constitutional asymmetries in multi-tiered systems. Furthermore, the chapter identifies the legal and extra-legal factors that are distinctive elements of constitutional design as well as factors conducive to constitutional asymmetries. Moreover, the second chapter also outlines the challenges deriving from constitutional asymmetries and the role of constitutional and supreme courts in shaping the degree of asymmetry in divided multi-tiered systems.

Part II constitutes the very core of the thesis, as it translates into practical terms the foundations provided in Part I. First, the third chapter is dedicated to the theoretical reasoning behind the choice of Qualitative Comparative Analysis (QCA) as an alternative framework to explain the degrees of constitutional asymmetry. Therefore, the chapter first revives the debate on the role played by methodology in comparative constitutional law and on the interplay with the instruments of the social sciences. Then, the chapter moves to the choice of QCA and to the explanation of how it is conducted and its possible shortcomings. The last part of the chapter is dedicated to the model that will be developed in the next chapter, namely how the conditions and the outcome are constructed and calibrated. It also deals with the selection criteria which determined the 16 case studies for the QCA. Then, chapter four tackles in detail the Qualitative Comparative Analysis in all its stages (analysis of necessity and sufficiency), and examines the solution formulas emerging from the QCA, i.e., the combination of legal factors that are more likely to produce a different degree of constitutional asymmetry. Finally, chapter five carries out a comparative overview of the case studies, dividing them according to each outcome, namely each degree of constitutional asymmetry (high, medium, and low), and constitutional symmetry. Each paragraph first comments on the autonomy scores for each constitutional system and the resulting asymmetry, and subnational autonomy is then reviewed in detail at both the subnational entity level and on average at the country level. Then, the paragraphs address whether constitutional

asymmetries “in the books” actually reflect the asymmetries “in action”, and compares the outcome of the analysis to previous works on constitutional asymmetries, to assess whether this study is in line with previous research or not, and in this latter case offer explanations for deviation from the literature.

## **PART ONE: THEORETICAL FRAMEWORK**

Part I lays down the theoretical foundation of the whole research. Chapter one starts with an introduction on the concept of constitutional design and on the debate concerning constitutional design for divided societies. Then, the chapter explores the link between the scholarship on constitutional design and that on federalism and explains why asymmetric federalism constitutes a middle ground between the two. The chapter concludes with a brief analysis of the role played by constitutional courts in divided societies. In chapter two, the analysis continues with the definition of asymmetries in comparative federalism, and how to measure “high”, “medium” and “low” constitutional asymmetries in multi-tiered systems. Furthermore, the chapter identifies the legal and extra-legal factors that are distinctive elements of constitutional design as well as factors conducive to constitutional asymmetries.

## CHAPTER ONE

### CONSTITUTIONAL DESIGN, FEDERALISM, ASYMMETRIES

As anticipated in the introduction, this first chapter lays down the theoretical framework on which the research is built. This also means providing a more complete understanding of the different concepts which make up the research question: What are the legal factors at the basis of constitutional design that can provide determinant conditions to explain the different intensity of constitutional asymmetries in divided multi-tiered systems?

First of all, the chapter deals with the concept of constitutional design, defined as the imaginative process according to which government structures and fundamental rights are modeled, and then focuses on the debate on divided societies. Without purporting to be exhaustive, the first two paragraphs of the chapter review the classic literature on the two topics, in order to identify the roots of the debate as well as the recurring problems, that make the topic still relevant today.

Then, the third paragraph puts constitutional asymmetries at the core of the research, identifying them as the middle ground between the scholarship on constitutional design for divided societies and that on federalism. Moreover, the gap in the literature concerning constitutional asymmetries is highlighted as a model of constitutional design.

Finally, the chapter ends with an overview of the role played by constitutional courts in divided societies and in multinational federal systems through the interpretation of power sharing and management of disputes between the central and subnational levels, assessing the cases in which courts have upheld centralization rather than decentralization.

## 1.1 Literature background on constitutional design

“Constitution making is more art than science”.<sup>20</sup>

### 1.1.1 Introducing the concept

Though not strictly a scientific expression, constitutional design may be first defined as a human effort to impact on the future.<sup>21</sup> In fact, constitution drafters attempt to regulate human behavior on the basis of tentative speculations as to how the institutions they are designing will work in reality. They make an effort to imagine the best possible solution for the constitutional system they intend to regulate, to guarantee its functioning. By doing so, they make predictions on what the outcome of their design might be, considering the inevitable compromise typical of every process of constitution making. However, as predicting the future goes far beyond any human capability, constitution makers found their design on probabilistic guesses.<sup>22</sup>

In more technical terms, constitutional design is the process according to which governmental structures are modeled, as well as fundamental rights and principles.<sup>23</sup> The term “design” has often been contested, and is not the only term used to indicate the same concept.<sup>24</sup> The ground for such contestation is that the term could imply a technocratic paradigm that does not fit the reality in which constitutions are drafted, often subject to political conflicts or even violence. For this reason, Horowitz observed that the term “constitutional process” would be more appropriate, as it is closer to the reality of constitution making.<sup>25</sup> It is also worth clarifying that constitution making and constitutional design are strictly linked, but they are not the same. In fact, constitution making is the process in which a new constitution is drafted and later adopted,<sup>26</sup> while constitutional design can be considered a mindset, an imaginative process which precedes and accompanies the drafting phase, and which is guided by the belief that “desirable social and

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<sup>20</sup> Ginsburg, “Introduction,” 2.

<sup>21</sup> Simeon, “Constitutional Design,” 242.

<sup>22</sup> Ginsburg, “Introduction,” 1.

<sup>23</sup> Simeon, “Constitutional Design,” 243.

<sup>24</sup> For example, Giovanni Sartori preferred to use the expression “constitutional engineering” in Giovanni Sartori, *Comparative Constitutional Engineering* (New York: New York University Press, 1997). “Institutional design” is often used as well.

<sup>25</sup> Donald Horowitz, “Constitutional Design: Proposals Versus Processes,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2012), 15-36.

<sup>26</sup> Jennifer Widner identified five stages of constitution making in order to guide practitioners: drafting; consultation; deliberation; adoption; ratification. See Jennifer Widner, “Proceedings,” *Workshop on Constitution Building Process* (Princeton University, 17-20 May 2007). For other references on constitution making, see David Landau and Hanna Lerner, eds., *Comparative Constitution Making* (Cheltenham and Northampton: Edward Elgar Publishing, 2019); Sujit Choudhry and Tom Ginsburg, eds., *Constitution Making* (Cheltenham and Northampton: Edward Elgar Publishing, 2016); Giuseppe de Vergottini, *Diritto Costituzionale Comparato* (Milano: Wolters Kluwer, 2019): 232-262; Julia Raue and Patrick Sutter, eds., *Facets and Practices of State-Building* (Leiden: Nijhoff, 2009); Edward McWhinney, *Constitution-Making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981); Claude Klein and András Sajó, “Constitution-Making: Process and Substance”, in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 419-441.

political outcomes may be accomplished through optimal institutional planning and implementation”.<sup>27</sup> However, as Ginsburg observes, “as long there is constitution making, there will be attempts at constitutional design”.<sup>28</sup>

Whatever the expression used, two interlinked characteristics of constitutional design should be emphasized to get to its essence: constitutional design tends to be inherently normative, and most importantly it is comparative in its nature.<sup>29</sup> In fact, in order to design how institutions should work, constitution drafters can look at and learn from prior experiences, as polities may face recurrent problems and challenges.<sup>30</sup> The normative goal of constitutional design may be enhancing the democratic credentials of a political system, increasing accountability and transparency, balancing the principle of majority rule with political pluralism. At the same time, constitutional design also acts at a more practical level, aiming to improve the quality and the effectiveness of public policy making, and to support political, cultural, and economic development.<sup>31</sup> In doing so, adopting a comparative approach is fundamental to navigating the domain of constitutional design, balancing between borrowing models and tailoring to the local polity, and between conventional choices and creative innovations.<sup>32</sup> Moreover, comparative studies offer new perspectives on different aspects of the process of constitution making, facilitating a better understanding of choices faced and decisions made by drafters while crafting a new constitution.<sup>33</sup>

### 1.1.2 Brief overview of the early scholarship on constitutional design

The roots of constitutional design lie far back in history. Aristotle, in the *Politics* (VII-VIII), produced a systematic evaluation of the constitutions of the Greek city-states. Even though constitutions were analyzed by adopting normative and universalistic terms, the Greek philosopher discovered variations among different experiences, and concluded his analysis by emphasizing that

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<sup>27</sup> Ran Hirschl, “The ‘Design Sciences’ and Constitutional ‘Success,’” *Texas Law Review* 87 (2009): 1339.

<sup>28</sup> Ginsburg, “Introduction,” 2.

<sup>29</sup> Such a statement can be further justified recalling the well-known concept of “migration of constitutional ideas” or “circulation of constitutional models” that can be found in the literature on comparative constitutionalism. See for example Giuseppe de Vergottini, “Constitutional Law and the Comparative Method,” in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Cham: Springer International Publishing, 2020), 3-4; Gábor Halmai, “Constitutional Transplants,” in *The Cambridge Companion of Comparative Constitutional Law*, eds. Roger Masterman and Robert Schütze (Cambridge: Cambridge University Press, 2019), 580-603; Vlad Perju, “Constitutional Transplants, Borrowing, and Migrations,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 1304-1327; Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006). This aspect will be further explored in chapter 3.1, while dealing with the comparative method in comparative constitutional law.

<sup>30</sup> Ginsburg, “Introduction,” 2.

<sup>31</sup> Hirschl, “The ‘Design Sciences,’” 1339.

<sup>32</sup> Ginsburg, “Introduction,” 2.

<sup>33</sup> Justin Blount, Zachary Elkins, and Tom Ginsburg, “Does the Process of Constitution Making Matters?,” in *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), 33-34.

mixed constitutions would be the best solution for an ideal polity, thus rejecting the ideal types. The advent of the modern age brought forward a new set of analyses by political theorists such as Machiavelli, Montesquieu, and John Stuart Mill. Once again, their comparative analyses of constitutions were aimed at informing normative design for new constitutions. Then, in the seventeenth century, constitutional design first made its appearance as an instrument to resolve possible constitutional problems. In fact, state-builders in the Netherlands engaged in an extensive comparative analysis of ancient and contemporary constitutional models, in order to address the problems of the nascent Dutch republic. A century later, the comparative approach to the study of constitutions was adopted by lesser-known scholars such as Gottfried Achenwall and Johann Heinrich Gottlieb von Justi, who undertook comparative studies of political forms.<sup>34</sup>

However, constitutional design in its contemporary sense is strictly associated with the spread of the written constitutional form, and thus with constitution making.<sup>35</sup> In fact, conceiving of the constitution as an integrated text is the starting point of the process of constitutional design, as it is precisely the moment at which institutions have to be designed following a purposive project. This mindset led Enlightenment political thinkers to interpret constitutions as “devices to channel self-interest into larger public ends”.<sup>36</sup> By doing so, they engaged in comparative studies of what were the desirable features for the newly designed political institutions, prompting a debate on what would be the most appropriate model. Therefore, comparative inquiries with rationalist ends of optimal design are at the heart of modern constitutions.<sup>37</sup> In the eighteenth century, the next wave of constitution making came in Latin America, and the liberal models were channeled through the 1812 Cadiz Constitution, influencing many others.<sup>38</sup> In each process of constitution making, the drafters sought to borrow the best from other models, while adapting them to the local context and introducing original innovations. In the meantime, in Western Europe as well as in Japan, state-builders adopted the new technology of the written constitutional form, and, as in the previous century, they engaged in practical comparisons about which institutions were optimal, using a mixed method of positive and normative analysis.

As we can see, early scholarship on constitutional design was deeply case-driven and responsive to constitutional events, such as the revolutions of the eighteenth century, the constitutional wave of the nineteenth century, and the World Wars in the first half of the twentieth

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<sup>34</sup> Miguel Gonzáles Marcos, “Comparative Law at the Service of Democracy: A Reading of Arosemena’s Constitutional Studies of the Latin American Governments,” *Boston University Law Review* 21 (2003): 313.

<sup>35</sup> Ginsburg, “Introduction,” 2.

<sup>36</sup> Ginsburg, “Introduction,” 3.

<sup>37</sup> Ginsburg, “Introduction,” 3.

<sup>38</sup> In particular, the 1821 Constitution of Gran Colombia, the 1823 and 1828 Constitutions of Peru, the 1826 Constitution of Argentina, the 1828 Constitution of Chile, the 1830 Constitution of New Granada, the 1830 Constitution of Venezuela, and the 1830 Constitution of Uruguay.



century. Much of the analysis was merely descriptive<sup>39</sup> and focused in particular on executive-legislative relations,<sup>40</sup> as well as on forms of territorial organization of power as regionalism or federalism. The second half of the last century brought about two developments that provided ground for the growth of the scholarship on comparative constitutional design. The first development was academic, with the revival of institutionalisms<sup>41</sup> in the social sciences. This meant a renewed emphasis on the individual agency embedded in broader institutional structures, and on the influence that structures had on determining the outcomes.<sup>42</sup> The second was a historical development, namely the so-called third wave of democratization,<sup>43</sup> bringing about major turning points such as the Portuguese revolution in 1974, the fall of the Soviet Union and of Yugoslavia, and the overall end of the Cold War in the 1990s. The dissolution of the USSR and of the Yugoslav federation marked the emergence of new states and new constitution-making processes, which prompted a new round of debates on which model of constitutional design was the most appropriate. As will be further explained in the next paragraph, in this phase constitutional design became central to addressing the challenges that arise in ethnically divided societies, with a renewed interest in federalism.

### 1.1.3 The sense of constitutional design

Today, constitutional design is more relevant than ever. The conflicts in the Middle East (e.g., Iraq, Afghanistan, Syria, Yemen) will need some form of resolution and constitutional reconstruction. Constitutional designers will be called upon to help the drafters in imagining which institutions would improve governance and guarantee the functioning of the constitutional system. Recalling Ginsburg's words ("Today, there is much demand for wisdom and knowledge, largely driven by real-world constitutional designers")<sup>44</sup>, this research has been developed expressly

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<sup>39</sup> Ginsburg recalls some exceptions. Kantorowicz examined the Weimar constitution to ascertain the political goals of the designers and how they met them (see Hermann Kantorowicz, "The New German Constitution in Theory and Practice," *Economica* 19 (1927): 37-62). Chapman did a similar operation with the Cuban constitution (see Charles E. Chapman, "The Cuban Constitution and Congress," *California Law Review* 14, no. 1 (1925): 947-954). Finally, Arangio-Ruiz addressed the evolution of constituent power in Italy from 1848 onwards (see Gaetano Arangio-Ruiz, "The Amendments to the Italian Constitution," *Annals of the American Academy of Political and Social Science* 6 (1895): 1824-1872).

<sup>40</sup> See Charles Albert, S. M. Lindsay, and Leo S. Rowe, "Supplement: Constitution of the Kingdom of Italy," *Annals of the American Academy of Political and Social Science* 5 (1894): 1-44.

<sup>41</sup> See for example James G. March and Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989); Walter Powell and Paul Dimaggio, *The New Institutionalism in Organizational Analysis* (Chicago: University of Chicago Press, 1991).

<sup>42</sup> Ginsburg, "Introduction," 4.

<sup>43</sup> The expression "wave of democratization" was coined by Samuel P. Huntington in 1991, identifying three waves (see Samuel P. Huntington, "Democracy's Third Wave," *Journal of Democracy* 2, no. 2 (Spring 1991): 12-34), while Jon Elster makes reference to seven "waves of constitution-making" (see Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal* 45 (1995): 368-373).

<sup>44</sup> Ginsburg, "Introduction," 4.

considering the importance of remembering reality while examining different constitutional design models. However, the search for “best practice” does not encounter many areas in which a clear consensus has been reached. In fact, the eternal dispute on the optimal form of government, split between presidentialism and parliamentarism,<sup>45</sup> is far from being resolved, as it is strongly influenced by ideological choices, identity and nationalism,<sup>46</sup> and power relations. In other domains, such as the electoral systems and the mechanisms of judicial appointments, it has been possible to identify little more consensus among scholars.

Over the last decade, scholars have extensively debated constitutional design<sup>47</sup> and its overall sense. On the one hand, part of the literature intends constitutional design as a useful instrument to guide constitution drafters,<sup>48</sup> adopting a “pragmatic vision of constitution-making as a response to concrete problems and challenges”.<sup>49</sup> Some scholars even attempted to define a number of “general principles”.<sup>50</sup> In particular, Lutz, by stressing the link between constitutional design (and constitutionalism) and Western political philosophy,<sup>51</sup> identified eight general principles of constitutional design.<sup>52</sup> Of course, Lutz is aware of the fact that the term “principle” is problematic, as it might imply “something that sounds like a science”,<sup>53</sup> which is far from being the case in the study of politics and of constitutions, which necessarily involves normative, analytic, and empirical

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<sup>45</sup> Markus Böckenförde, “The Design of the Executive Branch,” in *A Practical Guide to Constitution Building*, ed. Böckenförde Markus, Hedling Nora, and Wahi Winluck (Stockholm: International IDEA, 2011), 147–83.

<sup>46</sup> See for example Sujit Choudhry, “Managing Linguistic Nationalism through Constitutional Design: Lessons from South Asia,” *International Journal of Constitutional Law* 7, no. 4 (2009): 577–618; Sujit Choudhry, “Citizenship and Federations: Some Preliminary Reflections,” in *The Federal Vision: Legitimacy and Levels of Governance in the US and the EU*, ed. Kalypso Nicolaidis and Robert Howse (Oxford: Oxford University Press, 2001), 377–402.

<sup>47</sup> The main references on constitutional design have been Tom Ginsburg, ed., *Comparative Constitutional Design* (Cambridge: Cambridge University Press, 2012); Adrian Vermule, *Mechanisms of Democracy* (Oxford: Oxford University Press, 2009); Walter F. Murphy, *Constitutional Democracy* (Baltimore: Johns Hopkins University Press, 2007); Edward V. Schneier, *Crafting Constitutional Democracies* (Lanham: Rowman & Littlefield, 2006); Donald S. Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006); Ian Shapiro, and Stephen Macedo, eds., *Designing Democratic Institutions* (New York and London: New York University Press, 2000).

<sup>48</sup> For example, Hayden and Venter constructed a common framework and evaluated constitutional design processes as to the representativeness of the process, the mechanisms used to create the document and aggregate interests, and, finally, the extent of popular participation. See Göran Hydén and Denis Venter, eds., *Constitution-Making and Democratisation in Africa* (Pretoria: Africa Institute of South Africa, 2001).

<sup>49</sup> Hirschl, “The ‘Design Sciences’,” 1340.

<sup>50</sup> Lutz, *Principles of Constitutional Design*, 209–220.

<sup>51</sup> In Lutz’s view, constitutional designers, as well as political philosophers, assess the reason *why* it would be appropriate to adopt a model rather than another. Another common element between the two is the stretch between the ideal and the actual, as both fields must face the “limits imposed by the world of politics”. In fact, Lutz clarifies that “constitutional design is always condition by some vision of the ideal, but institutions rest on real people in the actual world”, and he warns about the possible dangers of aiming for a perfect and ideal result, as institutions are inevitably imperfect (see Lutz, *Principles of Constitutional Design*, 209–212).

<sup>52</sup> The eight principles are: 1. Match the government to the people; 2. Seek the best possible political system under the circumstance, not the ideal; 3. Political power is an unavoidable danger that must be understood and faced; 4. The idea of a constitution is to marry justice with power; 5. Distribution of power; 6. Collective decision making as a complete system of interlocking institutions; 7. Systems of institutions should be grounded in a coherent theory apparent from the behavioral implications; 8. A constitution does not rely only on history and the present, but also on probable future developments (see Lutz, *Principles of Constitutional Design*, 218–220).

<sup>53</sup> Lutz, *Principles of Constitutional Design*, 216.

considerations. For the purposes of the current review, the precise content of Lutz's principles is not relevant, but they are useful in identifying the understanding of constitutional design as a domain that, even if not a precise science, can be an instrument to achieve a goal: crafting a new constitution following an integrated and coherent project, having to deal with reality.

On the other hand, another part of the literature is skeptical of the actual relevance of constitutional design. For example, Hirschl<sup>54</sup> is quite critical of the ability of constitutional design to address global challenges, which go beyond constitutions alone. In fact, Hirschl emphasizes the gap between planning and implementation, coming to a series of possibilities<sup>55</sup> about how to define the "success" of constitutional design. One of the most debated is the ability to actually implement prefixed constitutional aspirations. In particular, scholars disagree on the respective weight that constitutional design should have compared to a developed rights-supportive environment. Indeed, some argue that, in maintaining democratic political institutions, constitutional arrangements (and a bill of rights) are less important than the existence of favorable sociocultural conditions.<sup>56</sup> This would imply that in order for a democracy to endure in a given polity, a vibrant civil society and a rights-supportive culture is more important than a correctly structured institutional setting.<sup>57</sup> By contrast, others believe that constitutional design is essential in structuring political institutions and in limiting power,<sup>58</sup> which are the very foundations of a polity. In this respect, the present research is situated in between the two extremes, as constitutional design is considered something necessary, but not sufficient.<sup>59</sup> Without a support structure fostering democratic culture and political pluralism in civil societies, constitutional design is to be considered incomplete, as it ends up being ineffective in supporting a full democracy. As will become evident in the next paragraph, this is especially true when it comes to divided societies.<sup>60</sup>

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<sup>54</sup> Hirschl, "The 'Design Sciences'," 1339-1374.

<sup>55</sup> These are: endurance; actual implementation of constitutional aspirations; contribution in accomplishing substantive goals as democracy, prosperity, and human development; (in)ability of constitutions to address some of the world's biggest challenges; real success rate of constitutions in mitigating existential tensions in conflict or post-conflict settings.

<sup>56</sup> See Robert A. Dahl, "Thinking about Democratic Constitutions: Conclusions from Democratic Experiences," in *Political Order*, ed. Ian Shapiro, and Russel Hardin (New York: New York University Press, 1998), 175-178; Robert D. Putnam, Robert Leonardi, and Raffaella Nanetti, *Making Democracy Work* (Princeton: Princeton University Press, 1993), 91-99.

<sup>57</sup> Hirschl, "The 'Design Sciences'," 1356.

<sup>58</sup> Sartori argues that constitutions are first of all procedures designed to ensure a controlled exercise of power, and that contemporary constitution makers have forgot the incentive-monitored and incentive sustained characters of constitutions. See Sartori, *Comparative Constitutional Engineering*, 195-201.

<sup>59</sup> Hirschl, "The 'Design Sciences'," 1355.

<sup>60</sup> Along these lines, Epp believes that having a bill of rights matters to the extent that a support structure for legal mobilization (rights-advocacy organizations, rights-supportive lawyers, law schools, governmental rights-enforced agencies, legal-aid schemes) is well developed. See Charles R. Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998), 14.

## 1.2 Constitutional design for divided societies

### 1.2.1 Introducing the debate

The most vivid scientific debate on constitutional design is provided by discussions on divided societies. The first necessary remark concerns the striking difference between the considerable scientific production in the field of comparative politics,<sup>61</sup> and the rather modest one in the domain of comparative constitutional law.<sup>62</sup> Both Issacharoff<sup>63</sup> and Choudhry<sup>64</sup> observe that, unfortunately, comparative constitutional law has been a side discipline in this vibrant debate. Yet despite this, it should occupy center stage, as constitutions play a crucial role in dealing with the challenges arisen by divided societies. Precisely for this reason, the ultimate goal of this research would be to “bridge comparative politics and comparative constitutional law through a genuinely interdisciplinary conversation”,<sup>65</sup> from a theoretical as well as a methodological point of view. If the latter will be unfolded in Part II, the former is at the core of Part I. In fact, the following pages will attempt to look at constitutional design for divided societies, as well as asymmetric federalism, from a constitutional law perspective, by drawing on the foundations of the debate in comparative politics.

Belmont, Mainwaring, and Reynold, while introducing one of the most important works on the topic,<sup>66</sup> offer a threefold motivation for focusing on institutional design as a way to manage conflict in divided societies. First, they maintain that “in the short term, structural, cultural, and international factors that affect the prospects for building a stable democracy cannot be changed profoundly”,<sup>67</sup> while political institutions can be shaped in order to increase the probability of a democratic management of ethnocultural conflicts. Second, they support the idea that democracy

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<sup>61</sup> Among many others, see Adrian Guelke, *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Basingstoke and New York: Palgrave Macmillan, 2004); Donald Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 2001); Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011); Arend Lijphart, “Constitutional Design for Divided Societies,” *Journal of Democracy* 15, no. 2 (2004): 96-109; Arend Lijphart, *Patterns of Democracy* (New Haven and London: Yale University Press, 2012); Joanne McEvoy and Brendan O’Leary, eds., *Power Sharing in Deeply Divided Societies* (Philadelphia: University of Pennsylvania Press, 2013); Andrew Reynolds, ed., *The Architecture of Democracy* (Oxford: Oxford University Press, 2002); Joseph Siegle, “Constitutional Design: Vital but Insufficient for Conflict Management,” *Ethnopolitics* 15, no. 5 (2016): 533-537.

<sup>62</sup> The main references in the field of comparative constitutional law are Sujit Choudhry, ed., *Constitutional Design for Divided Societies. Integration or Accommodation?* (Oxford: Oxford University Press, 2008); Yash Ghai, ed., *Autonomy and Ethnicity. Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000); Colin Harvey and Alex Schwartz, *Rights in Divided Societies* (Oxford and Portland: Hart Publishing, 2012); Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

<sup>63</sup> Samuel Issacharoff, “Constitutionalizing Democracy in Fractured Societies,” *Texas Law Review* 82 (2004): 1870.

<sup>64</sup> Choudhry, “Bridging,” 7.

<sup>65</sup> Choudhry, “Bridging,” 13.

<sup>66</sup> Andrew Reynolds, ed., *The Architecture of Democracy* (Oxford: Oxford University Press, 2002).

<sup>67</sup> Katharine Belmont, Scott Mainwaring, and Andrew Reynolds, “Introduction,” in *The Architecture of Democracy*, ed. Andrew Reynolds (Oxford: Oxford University Press, 2002), 2.

can be sustained even in countries that face daunting structural and cultural obstacles, showing a good dose of optimism. Third, the three scholars believe that it is precisely in divided societies that constitutional design may have the greatest impact, and that it can make a difference in a democratic conflict resolution. Their motivations in wanting to address these issues are quite explicative of the centrality of constitutions in the overall process of constitutional design. Another interesting note is their pragmatism: they do not intend to predict the future or to proselytize, as it is impossible to prescribe a univocal set of institutional arrangements to be applied in all divided societies.<sup>68</sup> This pragmatic approach is crucial when diving into the domain of constitutional design for divided societies, as there is no magic formula capable of fitting all polities. Rather, it is an attempt to define a broad frame which has to be adapted to the specific divided society.

Coming more specifically to the scientific debate, it was first led by two main scholars, Lijphart and Horowitz, who both assumed as a paradigm the majoritarian democracy modeled on the Westminster system. They both agreed on the fact that a purely procedural conception of democracy was inadequate for divided societies, because even if the procedure was correctly executed, minorities may be permanently excluded from the decision-making process. Starting from this assumption, the two scholars sharply disagreed on the possible solutions, proposing two radically different models. These will be further analyzed in the next section. For the current introduction it is sufficient to mention that Lijphart promotes consociational (or power-sharing) democracy, while Horowitz advocates a centripetal democracy. Their competing proposals had a real-time, contemporary perspective, as they wrote against the backdrop of the third wave of democratization.<sup>69</sup> For the last three decades, the debate was polarized between these two sets of proposals. More recently, McGarry, O'Leary, and Simeon reframed the debate, distinguishing two more general approaches: accommodation and integration. The key distinction between the two is their attitude towards the durability of ethnocultural differences: accommodationists believe that ethnocultural divisions are resilient and durable; integrationists reject the idea that ethnic differences should necessarily translate into political differences, and they argue for the possibility of a common public identity.<sup>70</sup>

Before analyzing in detail the features of the accommodationist and integrationist models, it is necessary to make a clarification: both integration and accommodation must be distinguished from assimilation. Supporters of assimilation seek the erasure of private and public differences between and among citizens as well as the creation of a common public identity. This can happen

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<sup>68</sup> Belmont, Mainwaring, and Reynolds, "Introduction," 3.

<sup>69</sup> Choudhry, "Bridging," 22-23.

<sup>70</sup> McGarry, O'Leary, and Simeon, "Integration or Accommodation," 41.

through fusion, meaning the mixture of two or more communities into something new ( $A+B=C$ ), or acculturation, namely the adoption and absorption of the dominant culture by a community ( $A+B=A$ ). Sometimes, integration is misinterpreted as assimilation, since some integrationist scholars are not against voluntary assimilation as an ultimate goal, or they see it as a positive byproduct of integration. Nonetheless, neither integration and accommodation require cultural conformity across the public or private dimensions of life.<sup>71</sup> On the one hand, if it is true that integrationists support the development of a common public identity, it is also true that they promote the maintenance of ethnocultural differences in the private sphere, or at least they show indifference towards such differences. On the other, accommodationists support the maintenance of those divisions both in the private and in the public sphere. Whatever the attitude towards ethnocultural identities, both models firmly reject any form of coercive assimilation, condemning ethnocide, linguicide, and theocide.<sup>72</sup>

### 1.2.2 The accommodationist model

According to McGarry, O'Leary, and Simeon, accommodation<sup>73</sup> can take different forms, analyzed separately below. Despite the differences, they all have an essential common feature: they all require the “recognition of more than one ethnic, linguistic, national or religious community in the state”.<sup>74</sup> In general terms, the accommodationist model aims to secure the coexistence of different identities within the same state, allowing secession<sup>75</sup> only if any form of accommodation proves impossible to be successfully implemented. McGarry, O'Leary, and Simeon identify three main accommodationist approaches (i.e., consociationalism, centripetalism, and multiculturalism) that will be briefly addressed separately.

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<sup>71</sup> McGarry, O'Leary, and Simeon, “Integration or Accommodation,” 42-43.

<sup>72</sup> Forced assimilation can assume many forms, from the stigmatization of local dialects to the erasure of minority history from school curricula to the illegalization of minority ethno-cultural parties.

<sup>73</sup> More on accommodationist models can be found in Roberto Toniatti, “Minorities and Protected Minorities: Constitutional Models Compared,” in *Citizenship and Rights in Multicultural Societies*, ed. Michael Dunne and Tiziano Bonazzi (Staffordshire, UK: Keele University Press, 1995), 195-220.

<sup>74</sup> McGarry, O'Leary, and Simeon, “Integration or accommodation,” 52.

<sup>75</sup> For a comprehensive review on secession, see Susanna Mancini, “Secession and Self-determination,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 481-500.

### Consociation

The main theorist of consociationalism is Arend Lijphart, who dedicated to power sharing<sup>76</sup> a substantial part of his work.<sup>77</sup> Lijphart's definition of consociational democracy started as a contrast to the majoritarian interpretation of democracy, modelled on the Westminster system. In fact, Lijphart believes that the inherently competitive character of majoritarianism is not adequate for divided or plural societies, as it would create conflict between the majority and the opposition. If in the Westminster model majority and opposition generally alternate in government, in plural societies it is impossible that the competition will actually lead to a governmental alternation between the majority and the minorities. On the contrary, in divided societies, majority rule would create a condition of perpetual exclusion of minorities from political power, as well as discrimination and loss of allegiance to the regime. Therefore, Lijphart argues that divided societies require a consociational model of democracy (also called "power-sharing democracy").<sup>78</sup>

| <b>Majoritarian democracy</b>                            | <b>Consociational democracy</b>                   |
|----------------------------------------------------------|---------------------------------------------------|
| Concentration of power;                                  | Distribution of power;                            |
| Asymmetry among powers;                                  | Equilibrium among powers;                         |
| Asymmetric bicameralism;                                 | Symmetric bicameralism;                           |
| Two-party system;                                        | Multi-party system;                               |
| Unidimensional party system;                             | Multidimensional party system;                    |
| Majoritarian electoral system;                           | Proportional electoral system;                    |
| Unitary and centralized government;                      | Federal and decentralized government;             |
| Non-written constitution and<br>parliamentary supremacy; | Written constitution and minority veto<br>powers; |
| Absence of judicial review;                              | Judicial review;                                  |
| Central bank controlled by the<br>executive.             | Central bank independence.                        |

Table 1: Majoritarian v. consociational democracy

Lijphart observes that scholars on divided societies have reached a certain amount of agreement on some essential points.<sup>79</sup> Firstly, they agree on the fact that divided societies pose a

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<sup>76</sup> For more recent literature on power sharing, see Allison McCulloch, "Consociational Settlements in Deeply Divided Societies: The Liberal-Corporate Distinction," *Democratization* 21, no. 3 (April 16, 2014): 501–18; Feargal Cochrane, Neophytos Loizides, and Thibaud Bodson, *Mediating Power-Sharing: Devolution and Consociationalism in Deeply Divided Societies* (London; New York: Routledge, 2018); Soeren Keil and Allison McCulloch, eds., *Power-Sharing in Europe. Past Practice, Present Cases, and Future Directions* (London; New York: Palgrave Macmillan, 2021); Joanne McEvoy and Brendan O'Leary, eds., *Power Sharing in Deeply Divided Places* (Philadelphia, Pennsylvania: University of Pennsylvania Press, 2013); Marc Weller, Barbara Metzger, and Niall Johnson, eds., *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (The Hague: Martinus Nijhoff, 2008).

<sup>77</sup> Lijphart's major essays on power sharing are collected in Arend Lijphart, *Thinking about Democracy* (London and New York: Routledge, 2008).

<sup>78</sup> Lijphart, *Patterns of Democracy*, 30-33.

<sup>79</sup> Lijphart, "The Wave," 38.

serious problem for democracy, and the challenges that those societies give rise to make it more difficult to establish and maintain a democracy than in a homogeneous society. Secondly, experts agree that these challenges are greater in not yet democratic or not fully democratic regimes, than in well-established democracies. The third point that Lijphart mentions is not exactly a point of universal agreement, as it is precisely the issue over which the dispute with Horowitz originated. This is that “the two ingredients for successful democracy in divided societies are the sharing of executive power and group autonomy”.<sup>80</sup> These two elements are what Lijphart defines as the “primary characteristics” of consociational democracy.<sup>81</sup> With power sharing, Lijphart means the equal participation of representatives of the significant ethnocultural group in the executive; while autonomy may be translated in territorial or non-territorial terms.<sup>82</sup> In the first case, autonomy assumes the characters of federalism and decentralization, while in the second it means the groups’ authority to manage their own internal affairs, especially in the educational and cultural sectors. As we will analyze in the subsequent section and have in part already mentioned, Horowitz has a completely different stance on this issue.

To these two primary characteristics, Lijphart adds two “secondary characteristics”,<sup>83</sup> namely proportionality and mutual veto. By proportionality, Lijphart refers to the proportional electoral system, preferable to the first-past-the-post system typical of majority rule. In fact, Proportional Representation (PR) is considered a more appropriate system as it allows for a broader representation of minorities, which would be otherwise excluded.<sup>84</sup> Finally, in consociational democracies groups should have the option to exercise veto power on vital interest issues that may affect the rights and autonomy of minorities.<sup>85</sup>

Power-sharing democracy has attracted many criticisms, which Lijphart summarizes<sup>86</sup> in six main categories: 1. It is not sufficiently democratic; 2. It cannot work in practice; 3. A key explanation for its failure is that it does not contain incentives for moderate behavior; 4. Regional autonomy may lead to secession and territorial partitions; 5. It strengthens rather than weakens

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<sup>80</sup> Lijphart, “The Wave,” 38-39.

<sup>81</sup> Arend Lijphart, “Multiethnic Democracy,” in *The Encyclopedia of Democracy*, ed. Seymour Lipset, vol. III (London and New York: Routledge, 1995), 859.

<sup>82</sup> For more recent works on territorial and non-territorial autonomy, see Marc Weller and Katherine Nobbs, eds., *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia: University of Pennsylvania Press, 2010); Michael Keating, and Alain-G Gagnon, eds., *Political Autonomy and Divided Societies. Imagining Democratic Alternatives in Complex Settings* (London: Palgrave Macmillan, 2012); Tove Malloy, and Francesco Palermo, eds., *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford: Oxford University Press, 2015); Dawn Walsh, *Territorial Self-Government as a Conflict Management Tool* (Cham, Switzerland: Springer International Publishing, 2018); Felix Schulte, *Peace through Self-Determination: Success and Failure of Territorial Autonomy* (Cham: Springer International Publishing, 2020).

<sup>83</sup> Lijphart, “The Wave,” 39.

<sup>84</sup> Arend Lijphart, “Constitutional Design for Divided Societies,” *Journal of Democracy* 15, no. 2 (2004): 99-101.

<sup>85</sup> Lijphart, “Constitutional Design,” 107.

<sup>86</sup> Lijphart, “The Wave,” 40.



the cohesion and distinctiveness of ethnic groups, and thus increases conflict between them; 6. Both primary as well as secondary characteristics are based on European or Western experience, and thus they are unsuitable for multiethnic societies in other parts of the world. Lijphart responds to each criticism.<sup>87</sup> To the first argument, he simply observes that the mere alternation between majority and opposition governments is modelled on the majoritarian model of democracy, and it does not exhaust the full range of democratic possibilities. Concerning the critics' argument that it is impossible to make a decision when power is shared, Lijphart replies that there are successful examples that demonstrate that it is indeed possible to have functioning democratic institutions in consociational democracies. Lijphart also adds that even if power sharing fails, as it did in Cyprus in 1963 and in Lebanon in 1975, it should be repaired rather than replaced, as it constitutes the optimal chance for a successful conflict resolution. The criticism concerning incentives is the one put forward by Horowitz, to which Lijphart responds by stating that if it is true that coalescence and compromise are analytically different, as to coalesce does not necessarily mean to compromise, it is also true that parties have the general inclination to want to be included in the cabinet, and that especially in divided societies this represents a sufficient incentive to compromise. To the arguments concerning territorial autonomy, Lijphart observes that there is no empirical evidence that confirms the link between autonomy and secession, on the contrary granting group autonomy may be an effective means of regional conflict resolution.<sup>88</sup> The same logic applies to the risk of ethnic conflict, as the existence of strong and autonomous groups may not necessarily lead to political confrontation among them, on the contrary if correctly designed they may have a constructive role in conflict resolution. Concerning the last criticism, Lijphart opposes many examples of power sharing democracies in the non-Western world, along with many non-Western scholars who emphasize that majority rule goes against their native traditions of trying to reach a consensus, recalling the essential basis of power sharing.

Even though Lijphart strongly defends his theory, there is an “especially valid and serious criticism”,<sup>89</sup> namely that the key concepts of power sharing have been particularly hard to define and measure with a confident amount of precision. Lijphart admits the impossibility of coming to a satisfying answer, and thus concludes that “this is an insoluble problem and that we shall simply have to live with concepts that have very important theoretical and policy significance but cannot be measured precisely”.<sup>90</sup>

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<sup>87</sup> Lijphart, “The Wave,” 41-45.

<sup>88</sup> See also Will Kymlicka, “The Internationalization of Minority Rights,” in *Constitutional Design for Divided Societies*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 111-140.

<sup>89</sup> Lijphart, “The Wave,” 46.

<sup>90</sup> Lijphart, “The Wave,” 46.

*Centripetalism (or incentive approach)*

The most prominent critic of consociational theory can be considered Donald Horowitz, who proposes instead the so-called “incentive approach” (or “centripetalism”<sup>91</sup> as defined by McGarry, O’Leary, and Simeon). Before moving to the analysis of Horowitz’s approach, it is useful to first consider his criticisms of Lijphart’s theory.

As previously mentioned, Horowitz questions the motivations that lead ethnocultural groups to share power in a consociation, considering them inadequate and unconvincing. The desire to be included in the cabinet is not enough of an incentive to share power, especially in cases of large groups which could alone gain the majority of votes in the electoral competition.<sup>92</sup> The same applies to political élites and their degree of tolerance towards other ethnocultural groups: statesmanship alone is not enough. Another criticism concerns cultural autonomy. As cultural matters are habitually divisive issues, they go straight to the heart of the conflict, and to accord equal recognition to all cultures, religions, and languages has three different effects. First, it means to concede equal ownership, contrary to what groups are normally willing to concede. Second, it means to concede the issue of group superiority, which can be contested by reference to disputes over cultural superiority and primacy. Lastly, it means to concede the issue of the identity of who will dominate, which would be otherwise regulated by limitations on languages and educational streams associated with competitors.<sup>93</sup> A final criticism moved by Horowitz against Lijphart’s consociational theory is the failure to distinguish between pre-electoral and post-electoral coalitions. In fact, the coalitions recommended in a consociation are post-electoral coalitions, which do not typically compromise on inter-ethnic issues, but rather on the division of portfolios in the shared cabinet. By contrast, pre-electoral coalitions would foster compromise on ethnic issues.<sup>94</sup>

Moving away from these criticisms, Horowitz proposes a theory based on incentives promoting moderation among ethno-cultural groups. Following this logic, Horowitz recommends the use of Alternative Vote (AV) as electoral system, as the multipolar fluidity of vote pooling would facilitate inter-ethnic accommodation. Conversely, PR and Single Transferable Vote (STV)<sup>95</sup> would favor ethnic parties, not fostering moderation.<sup>96</sup> Vote pooling would require at least the

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<sup>91</sup> The incentive approach supporters emphasize moderation and compromise, thus an overall convergence of political actors, while consociation is deemed to generate centrifugal politics (see McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 53-56).

<sup>92</sup> Horowitz, “Constitutional Design,” 20.

<sup>93</sup> Horowitz, “Constitutional Design,” 22.

<sup>94</sup> Ibidem.

<sup>95</sup> Some accommodationists prefer the STV version of proportional representation, as it has a higher effective threshold than most forms of list-based proportional representation, and it may facilitate transfers in favor of candidates and parties prepared to maintain power sharing.

<sup>96</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 53.

winning candidates to pool votes from among different ethnic voters in order to gain the majority. This logic is also reflected in the choice of the form of government: a single presidency rising above ethnic politics.<sup>97</sup> Even though Horowitz recognizes that the incentive approach is difficult to adopt, he believes that once adopted it has a great advantage: it can prevent the crystallization of identities and the emergence of more severe conflict.<sup>98</sup>

| Lijphart                                                                                                     | Horowitz                                                                                                               |
|--------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|
| <b>Consociational democracy:</b> power is shared among members of different communities;                     | <b>Incentive approach:</b> it is necessary to offer more incentive to produce moderation and cooperation among groups; |
| <b>Proportional representation:</b> adequate representation of all ethnic groups (including minorities);     | <b>Alternative vote:</b> it ensures a majority to the winning candidates;                                              |
| <b>Executive:</b> cabinet including representatives of major ethnic groups ( <i>power-sharing cabinet</i> ). | <b>Executive:</b> single president rising beyond ethnic politics ( <i>single presidency</i> ).                         |

Table 2: Essential points of the Lijphart-Horowitz debate

### Multiculturalism

The accommodationist version of multiculturalism is something different from what we generally associate with the concept. In fact, in accommodationist terms, multiculturalism should entail some respect for a group's self-governance in matters defined as important, as well as some broad appreciation of the principle of proportional representation of all groups in key public institutions (although not necessarily by quotas). Then, it should offer a share of public political power through consociational arrangements,<sup>99</sup> and it should provide for territorially based communities to share power through a pluralist federation or a pluralist union state respecting historic nationalities, languages or religions.<sup>100</sup> Moreover, multiculturalism should promote public schools for national minorities, as well as other forms of cultural autonomy. By contrast, Western multiculturalism has avoided such policies, and is limited to tolerance of such differences in the private domain while promoting integration in the public sphere.<sup>101</sup>

<sup>97</sup> Choudhry, "Bridging," 22.

<sup>98</sup> Horowitz, "Constitutional Design," 25.

<sup>99</sup> For this reason, Multiculturalism has also been defined a semi-consociation, as it presents some of the distinctive elements of a typical consociation, but not others (see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations. Human Rights versus Power Sharing* (Oxford: Oxford University Press, 2013), 9-10).

<sup>100</sup> McGarry, O'Leary, and Simeon, "Integration or Accommodation," 57-58.

<sup>101</sup> McGarry, O'Leary, and Simeon, "Integration or Accommodation," 56-57.

### 1.2.3 The integrationist model

Following the previous definition of integration, the integrationist model of constitutional design “aims at equal citizenship”, turning “a blind eye to difference for public purpose”.<sup>102</sup> As written by Barry, one of the most prominent scholars in the integrationist field, integration can be defined as the privatization of national, ethnic, and cultural differences,<sup>103</sup> capturing the liberal philosophy behind integration. In fact, advocates of integrationist arrangements for divided societies believe that political instability and conflict are the result of group-based partisanship in the public sphere, namely within political institutions. To avoid such conflict, integrationists advise against ethnocultural political parties, and favor cross-cutting parties. In the same spirit, the integrationist model backs electoral systems that require winners to achieve broad-based support, as well as supporting executives that favor candidates who rise above ethnocultural factions. Besides, they discourage the delegation of some public policy functions to minority groups, and they oppose any form of territorial or non-territorial autonomy based on groups. Integration is the dominant goal, and it embodies the received wisdom regarding conflict regulation and conflict resolution in the longer established democracies. International political actors such as the European Union, the United Nations, the World Bank, the International Monetary Fund, and the OSCE’s High Commissioner on National Minorities (HCNM)<sup>104</sup> generally advocate integration. Among states actors, the supporters of integration may vary, as they may be large majorities, small minorities, middlemen minorities, indigenous people. Conversely, large minorities, especially when territorially concentrated and nationally mobilized, are firmly opposed to integration.<sup>105</sup>

McGarry, O’Leary, and Simeon identify three main groups within the integrationist field, briefly analyzed below.

#### Republicans

This first group of integrationists are supporters of the civic “nation-state”, and they derive inspiration from those political thinkers who considered the conditions under which city states or agrarian republics would flourish, such as Niccolò Machiavelli, James Harrington, Jean-Jacques Rousseau, Thomas Jefferson, and Immanuel Kant. They all believed that “citizens needed sufficient property and sufficient equality to be sturdy and independent of the state and oppressive

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<sup>102</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 45.

<sup>103</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), 19-62.

<sup>104</sup> See for example The Ljubljana Guidelines on Integration of Diverse Societies published by the HCNM in 2012 (available at <https://www.osce.org/files/f/documents/0/9/96883.pdf>, last accessed 19 January 2023). Another meaningful document is the Thematic Commentary n. 4 on the Scope of Application of the Framework Convention for the Protection of National Minorities, adopted by the Council of Europe in 2016 (available at <https://bit.ly/34gi1kG>, last accessed 19 January 2023).

<sup>105</sup> See Kymlicka, “The Internationalization of Minority Rights,” 138-139.

social organizations”.<sup>106</sup> Republicans veer towards integral nationalism, in an assimilationist direction. Overall, they support civic virtue among citizens, shared citizenship, education, language, religion, and military service, and most of all they are the strongest advocates of a nation of individuals, opposing any form of group-based advantage. The clearest examples of republicanism are French Jacobinism and Turkish Kemalism.

### Liberals

Unlike republican integrationists, liberals have a less expansive view of what should be publicly homogenized. In general terms, liberals are champions of the nation-state and of international liberal institutions, towards the construction of a cosmopolitan political order. The ancestors of liberal integrationism are to be found in utilitarianism and rights-based defenses of the value of liberty. If republicans promote a community of individuals, liberals’ key premise is the individual *per se*. In fact, liberals support those conditions that enable strong individuals, they value political competition, and they promote liberal values such as choice, freedom, and equality. They disagree with accommodationist coercive solidarity, and oppose difference in treatment on the ground of culture, though they allow it based on morality or ability. Liberal integrationism is particularly popular in the United States, following the tradition of Charles-Louis de Secondat, Montesquieu, and John Locke.<sup>107</sup>

### Socialists

The concept of the nation-state divides the socialist integrationist field: some believe it constitutes a barrier against the creation of a global socialist civilization, while others see it a bastion against capitalism. After the focus of republicans on the community and liberals on the individual, the key component for socialists is the social class. They regard distributive justice as the public priority of the state, and social democrats regard substantive social citizenship as the best means to realize it.<sup>108</sup> From their perspective, ethnocultural politics inhibit the “correct” working class politics. In fact, the capitalist order profits from ethnocultural divisions and the fact that such divisions obscure the similar interests of members of different communities. Socialists advocate a strong welfare state, with redistribution and public investment in deprived areas to deal with the presumed “material bias” of ethnic or other collective identity, at the cost of temporarily

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<sup>106</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 46.

<sup>107</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 46–48.

<sup>108</sup> See Thomas Humphrey Marshall and Tom Bottomore, eds., *Citizenship and Social Class* (London: Pluto Press, 1992).

supporting positive action policies to achieve equality.<sup>109</sup> Social integrationism is popular with the European left and Marxists around the world, including the South African Communist Party.

**Table 1.** State response to ethnic and national diversity: From integration/non-accommodation to accommodation/disintegration

| Assimilation | Integration                  |                                  |                            | Accommodation                                                                                                                                                    |                                                       |                                                                                                    |                                                                                     | Secession/<br>Partition |
|--------------|------------------------------|----------------------------------|----------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------|----------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|-------------------------|
|              | Republicans                  | Socialists                       | Liberals                   | Centripetalists                                                                                                                                                  | Multiculturalists                                     | Consociationalists                                                                                 | Territorial pluralists                                                              |                         |
|              | Promotion of the common good | Promotion of class consciousness | Promotion of individualism | Group-recognition; Incentivize inter-group coalitions of moderates; Decentralization to (a) appease groups to avoid secession (b) divide potential nationalities | Group recognition; Proportionality; Cultural autonomy | Group recognition; Cross-community executive power-sharing; Proportionality; Autonomy; Veto Rights | Group recognition; Territorial self-government; Cross-border institutional linkages |                         |

*Figure 1: McGarry, O'Leary, and Simeon's summary of state response to ethnocultural diversity*<sup>110</sup>

<sup>109</sup> McGarry, O'Leary, and Simeon, "Integration or Accommodation," 50.

<sup>110</sup> Source of the figure: McGarry, O'Leary, and Simeon, "Integration or Accommodation," 68.

### 1.3 Asymmetries as the middle ground between accommodation and integration

#### 1.3.1 Linking two scholarships: constitutional design and federalism

In the literature on constitutional design, federalism often makes an appearance. As already recalled in the previous pages, territorial organization of power as regionalism or federalism provided one of the main factors on which the original case-driven analyses focused.<sup>111</sup> Besides, Lutz includes federalism in his “general principles of constitutional design” when discussing the issue of the distribution of power.<sup>112</sup> Moreover, Simeon provided a checklist of the main issues and questions on constitutional design and amendments in federal systems.<sup>113</sup> Interestingly, Simeon observed that views on the fundamental goals of federalism influence the process of constitutional design, as federalism could be intended as an integral element of liberal democracies, founded on the separation of powers and on checks and balances (i.e., the United States), or as a device for the development and delivery of public services (i.e., Germany and Australia), or again as a device for managing conflicts in territorially divided societies (i.e., Canada, Belgium, Spain).<sup>114</sup> Each process entails a set of “institutions and rules that would provide incentives for leaders to promote and sustain certain values, and limit behavior that undermines them”.<sup>115</sup> Therefore, the two domains of constitutional design and federalism are deeply intertwined. This becomes even more evident once we shift to the literature on constitutional design for divided societies.<sup>116</sup> In fact, this consolidates the suggestion that federalism is one of the possible arrangements to address

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<sup>111</sup> Ginsburg, “Introduction,” 3-4.

<sup>112</sup> Lutz, *Principles of Constitutional Design*, 219-220: “A critical problem in constitutional design is the distribution of power: Why should we distribute power, and how should we do it? Consider separation of powers, *federalism*, institutional complexity, and accountability. Evaluate basic constitutional models: the parliamentary model (constraint by tradition) versus the separation of powers model (constraint by institutional complexity); the mixed regime model (balance) versus the presidential model (legitimate force); the framework model (process over content) versus the code model (content over process); and the covenant model (communitarian civic relationships) versus the manifesto model (communitarian transformational relationships).”

<sup>113</sup> Simeon identified a series of issues, such as the number and character of the constituent units, the division of powers, fiscal arrangements, intergovernmental relations, representation at the center, judicial review, some of which will be discussed in Chapter 2 while explaining the legal factors conducive to constitutional asymmetry (see Simeon, “Constitutional Design,” 241-261).

<sup>114</sup> Simeon, “Constitutional Design,” 243.

<sup>115</sup> Ibidem.

<sup>116</sup> See for references Liam Anderson, *Federal Solutions to Ethnic Problems: Accommodating Diversity* (London and New York: Routledge, 2013); Sujit Choudhry, and Nathan Hume, “Federalism, Secession and Devolution: From Classical to Post-Conflict Federalism,” in *Comparative Constitutional Law*, ed. Tom Ginsburg, and Rosalind Dixon (Cheltenham: Edward Elgar, 2011); Jan Erk, and Lawrence M. Anderson, *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (London and New York: Routledge, 2013); Yash Ghai, *Autonomy and Ethnicity. Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000); Michael Keating, and Alain-G Gagnon, eds., *Political Autonomy and Divided Societies. Imagining Democratic Alternatives in Complex Settings* (London: Palgrave Macmillan, 2012); Neophytos Loizides, Iosif Kovras, and Kathleen Ireton, “Introduction Federalism, Reconciliation, And Power-Sharing in Post-Conflict Societies,” *Federal Governance* 8, no. 2 (2011); Dawn Walsh, *Territorial Self-Government as a Conflict Management Tool* (Cham, Switzerland: Springer International Publishing, 2018).

internal divisions on ethnocultural lines,<sup>117</sup> as both the integrationist and accommodationist side include federalism in their models.

On the one hand, on the integrationist side federalism is not supported by all groups. If republicans are generally the champions of a centralized and unitary state, following a monistic concept of sovereignty,<sup>118</sup> liberal integrationists are strong supporters of the federal model over the unitary state, through the creation of national federations, as they believe that liberty is better protected through the division and separation of powers. Nevertheless, liberals oppose ethno-federations, since these may encourage secession and separatism.<sup>119</sup>

On the other hand, among the accommodationists, Horowitz believes that federalism or regional autonomy can have positive effects on divided societies, preserving multipolar fluidity, acting in aid of the electoral system, fostering intra-group competition in homogeneous federal units, or providing political socialization among different groups in heterogeneous units.<sup>120</sup> The main supporter of centripetalism also believes that federalism has “conciliatory potential”,<sup>121</sup> as it may allow stateside minorities to become regional majorities, as well as potentially facilitating asymmetrical autonomy arrangements for regions with distinctive identities and issues. Moreover, federations disperse power from the center, generally inhibiting authoritarianism, and provide a training ground for local politicians and party leaders to engage in ethnic bargaining at the local level.<sup>122</sup> On the accommodationist side, McGarry, O’Leary, and Simeon also identify a model called “territorial pluralism”, which is especially prevalent in pluralist or ethno-federations,<sup>123</sup> namely those federations whose internal boundaries respect ethnocultural divisions.<sup>124</sup>

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<sup>117</sup> Hirschl, “The ‘Design Sciences’,” 1366-1367; Palermo and Kössler, *Comparative Federalism*, 97-111; Elazar, *Exploring Federalism*, 248-251. For more on federalism and conflict resolution see for example Soeren Keil, “Federalism as a Tool of Conflict Resolution,” in *A Research Agenda for Federalism Studies*, ed. John Kincaid (Cheltenham: Edward Elgar Publishing, 2019), 151-161; Soeren Keil and Elisabeth Alber, “Introduction: Federalism as a Tool of Conflict Resolution,” *Ethnopolitics* 19, no. 4 (2020): 329-41; Elisabeth Alber and Michael G. Breen, “Federalism and Ethnic Relations,” in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Cham: Springer International Publishing, 2022), 1-26.

<sup>118</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 48.

<sup>119</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 49.

<sup>120</sup> Horowitz, “Constitutional Design,” 25.

<sup>121</sup> Donald Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1992), 214.

<sup>122</sup> Donald Horowitz, “The Many Uses of Federalism,” *Drake Law Review* 55 (2007): 958-962.

<sup>123</sup> Although, territorial pluralism as a model of accommodating diversity can be also found in formally unitary states (e.g., United Kingdom, Spain, Denmark), as long as they recognize historic nationalities and their boundaries.

<sup>124</sup> McGarry, O’Leary, and Simeon, “Integration or Accommodation,” 53, 63-67. See also Palermo and Kössler, *Comparative Federalism*, 98-101; Alain-G. Gagnon, and Arjun Tremblay, “Federalism and diversity: a new research agenda,” in *A Research Agenda for Federalism Studies*, John Kincaid ed. (Cheltenham: Edward Elgar Publishing, 2019), 129-139.



For his part, Lijphart dedicated part of his work to the link between consociations and federations,<sup>125</sup> considering them both as models of non-majoritarian democracy<sup>126</sup> viable to address the problems of plural societies and identifying the conditions under which a consociation is also a federation, and those under which a federation is also a consociation. From the comparison of the core elements of consociational and federal theories, Lijphart starts by observing that one of the primary characteristics of power sharing, i.e. segmental autonomy, can take territorial and non-territorial forms,<sup>127</sup> and most of the time territorial segmental autonomy is translated into federal arrangements.<sup>128</sup> Therefore, a consociation is also a federation when: the segments of plural societies are geographically concentrated;<sup>129</sup> the boundaries between the federal units follow segmental boundaries; and the other federal principles are applied as well.<sup>130</sup> Lijphart also highlighted the consociational elements in federal theory, arguing that the latter embodies all the basic principles of consociational theory. In fact, federal units enjoy a high degree of autonomy in organizing their internal affairs (autonomy); all units participate in the decision-making process at the central level of government in the federal chamber (power sharing in grand coalitions); the federal chamber is often composed according to the idea of proportionality as a minimum and minority representation (proportionality); and the amendment procedure of the federal constitution generally requires the consent of the federal units (veto power).

However, Lijphart specified that not every consociation is a federation, nor is every federation necessarily a consociation.<sup>131</sup> First of all, a federal structure does not entail democracy,<sup>132</sup>

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<sup>125</sup> See Arend Lijphart, "Consociation and Federation: Conceptual and Empirical Links," *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 12, no. 3 (1979): 499-515; Arend Lijphart, "Federal, Confederal, and Consociational Options for the South African Plural Society," in *Conflict and Compromise in South Africa*, eds. Robert I. Rotberg, and John Barrett (Lexington, Massachusetts: Lexington Books, 1980), 51-75; Arend Lijphart, "Non-majoritarian Democracy: A Comparison of Federal and Consociational Theories," *Publius: The Journal of Federalism* 15 (1985): 3-15.

<sup>126</sup> Lijphart, "Non-majoritarian Democracy," 4.

<sup>127</sup> Lijphart observes that federalism offers an excellent opportunity for group autonomy when groups are geographically concentrated, thus opting for a territorial form of autonomy. By contrast, when the groups are geographically dispersed, autonomy can be instituted on a non-territorial basis in fields as education and culture (see Lijphart, "The Wave," 51-52).

<sup>128</sup> Lijphart, "Consociation and Federation," 505.

<sup>129</sup> As also suggested by Livingston in his definition for "federal societies", meaning a federation which is needed when the constitutional system has diverse, geographically concentrated, and politically mobilized communities (see William S. Livingston, *Federalism and Constitutional Change* (Oxford: Oxford University Press, 1956).

<sup>130</sup> Lijphart makes specific reference to the necessary requirements of a central-regional division of power, of internal constitutional autonomy and decentralized government, of bicameralism, minority over representation in the federal chamber, and of a written constitution specifying the division of powers.

<sup>131</sup> Lijphart, "Consociation and Federation," 509-512.

<sup>132</sup> Lijphart offers a few examples: Soviet Union, Czechoslovakia, Argentina, Brazil. However, if Lijphart assumes that consociation and consociational democracy are synonymous, many critics have questioned the compatibility of power sharing with democracy (see for example Christine Bell, "Power-sharing and Human Rights law," *The International Journal of Human Rights* 17, no. 2 (2013): 204-237). Daniel J. Elazar in 1987 defined this specific assumption of consociations as inherently democratic as "problematic", arguing that there is no guarantee that democracy will actually prevail within the different segments (see Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa and London: University of Alabama Press, 1987), 24-25).

thus a federation can be also a consociation if it has a democratic regime. Second, a consociation operates in the context of a divided society, while a federation may also occur in homogeneous societies (e.g. Australia, Germany, Austria, United States), therefore “only federations in plural societies can be consociations”.<sup>133</sup> Moreover, a federation is a consociation only if all four basic principles of a power sharing democracy are present, whereas federal systems where the scope of autonomy of the subnational units is extensive can be considered consociations.<sup>134</sup> Perhaps the most interesting point raised by Lijphart, especially for the purpose of this research, is the one concerning symmetry and asymmetry in federal systems.<sup>135</sup> Recalling Charles D. Tarlton’s definition, Lijphart identified asymmetric federations as the only ones that can also be considered consociations, since asymmetric federal systems are “composed of political units corresponding to differences of interest, character, and makeup that exist within the whole society”.<sup>136</sup> On a related note, a final condition is that a federation should consist in as many units as there are segments in a divided societies, in order to be defined as a consociation as well.

Moving to the federal scholarship’s perspective, it is interesting to recall two authors who examined the link between federalism and consociationalism, both starting from Lijphart’s work. The first was Ivo D. Duchacek,<sup>137</sup> who argued that “the inevitably consociational origin of federalism neither requires nor promises a continuation of consociationalism in the future management of the federal system”.<sup>138</sup> The “consociational cradle” Duchacek was referring to in his article concerns the initial compact among political actors, requiring their initial consensus to give birth to a “future federal nation”.<sup>139</sup> However, the author is convinced that such consociational birth does not entail the rejection of majoritarianism, since “from inter-elite summit there emerges a commitment to a majoritarian decision mode”.<sup>140</sup> Instead, Duchacek closely associates consociations and confederal systems, as consociational principles (e.g., consensus, veto rights)

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<sup>133</sup> Lijphart, “Consociation and Federation,” 509.

<sup>134</sup> Such passage in Lijphart’s work appears to be somewhat enigmatic, as he states that “only *decentralized* federations can be consociations”. However, the term “decentralized federations” seems to be redundant, as the principle of self-rule and shared rule necessarily implies a form of decentralization. Perhaps, what Lijphart is referring to is the extensiveness of the scope in which subnational units (i.e., the “segments”) may exercise their autonomy (i.e., self-rule) (see Lijphart, “Consociation and Federation,” 509-510). Moreover, in a later work, Lijphart observes that “most federal systems are decentralized—in fact, there are no cases in the pure “federal and centralized” category at all—and most unitary systems are centralized.” (see Lijphart, *Patterns of Democracy*, 179).

<sup>135</sup> It is interesting to note that, in a later work, Lijphart used the expression “congruent/incongruent” instead of “symmetry/asymmetry”, since in his opinion the latter is most often used to describe the different degree of distribution of powers, and thus it tends to be confusing (see Lijphart, *Patterns of Democracy*, 184).

<sup>136</sup> Charles D. Tarlton, “Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation,” *The Journal of Politics* 27, no. 4 (1965): 869.

<sup>137</sup> Ivo D. Duchacek, “Consociational Cradle of Federalism,” *Publius: The Journal of Federalism* 15 (1985): 35-48.

<sup>138</sup> Duchacek, “Consociational Cradle,” 47.

<sup>139</sup> Duchacek, “Consociational Cradle,” 35.

<sup>140</sup> Duchacek, “Consociational Cradle,” 47.

prevail in the cases of loose confederations where there is no interest or commitment to building a common sovereign identity.<sup>141</sup>

The second author was Daniel J. Elazar,<sup>142</sup> who observed that “in the latter half of the 1970s, students of both [federalism and consociationalism] began to explore the other’s theories in an attempt to determine points of convergence and difference”.<sup>143</sup> On the one hand, federal scholars referred to consociational arrangements as “non-territorial federalism”; on the other, consociationalists discovered consociational dimensions in federal polities. Aside from Lijphart’s contribution in identifying the links between the two, Elazar argued that one main difference between federalism and consociationalism is that the former involves structures as well as processes of government, while the latter involves processes only, which can be embodied by law but not necessarily in the same way as in federal systems. Nonetheless, Elazar defines both concepts as political and social phenomena, although consociationalism could be considered even more of a social phenomenon than federalism.<sup>144</sup> Indeed, federalism is essentially understood in terms of relations among governments, while consociationalism emphasizes the relations among different ethnocultural groups. Therefore, Elazar’s conclusion concerns the different focus of federalism and power sharing towards the polity: federalism focuses on the form, whereas consociationalism on the regime.<sup>145</sup> When federalism purports to go beyond the mere form towards the character of the regime as well, then federalism and consociationalism “relate to each other on a more symmetrical basis”.<sup>146</sup>

### 1.3.2 Multinational federalism: a viable solution for divided societies?

Perhaps the most evident link between the two scholarships is the debate on the viability of multinational federalism in a context of ethnocultural diversity.<sup>147</sup> Once again, such debate

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<sup>141</sup> Duchacek, “Consociational Cradle,” 46-47.

<sup>142</sup> Elazar, *Exploring Federalism*, 18-26.

<sup>143</sup> Elazar, *Exploring Federalism*, 19.

<sup>144</sup> Elazar, *Exploring Federalism*, 21.

<sup>145</sup> Elazar, *Exploring Federalism*, 22.

<sup>146</sup> Elazar, *Exploring Federalism*, 26.

<sup>147</sup> For some references on federalism as a model of constitutional design to compose and manage internal diversity, see Michael Burgess, and John Pinder, eds., *Multinational Federations* (London ; New York: Routledge, 2011); Gellner Ernest, *Nations and Nationalism* (Hoboken, New Jersey: Blackwell Publishers, 1983); Alain-G. Gagnon, and James Tully, eds., *Multinational Democracies* (Cambridge ; New York: Cambridge University Press, 2001); Anna Mastromarino, *Il Federalismo Disaggregativo. Un Percorso Costituzionale negli Stati Multinazionali* (Milano: Giuffrè, 2010); Wayne J. Norman, *Negotiating Nationalism: Nation-Building, Federalism, and Secession in the Multinational State* (Oxford ; New York: Oxford University Press, 2006); Ferran Requejo, and Kalus-Jürgen Nagel, eds., *Federalism beyond Federations. Asymmetry and Processes of Resymmetrisation in Europe* (Farnham, England: Ashgate, 2011); Michel Seymour, and Alain-G. Gagnon, eds., *Multinational Federalism: Problems and Prospects* (London: Palgrave Macmillan UK, 2012); Alfred Stepan, “Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism,” in *Federalism and Democracy in Latin America*, ed. Edward L. Gibson (Baltimore, Maryland: Johns Hopkins University Press, 2004), 29-84.

originated in the 1990s, after the breakup of three multinational federations: the USSR, Yugoslavia, and Czechoslovakia. For some scholars, the disintegration of these federations served as a demonstration of the nonviability of multinational federalism in diverse societies, as it did not prevent the collapse of the political system. However, it can be argued that the three former ethno-federations did not collapse because the model was unfit to accommodate diversity, but because federalism was not introduced in properly democratic regimes, and it was not followed by political pluralism and guarantees of fundamental rights protection.<sup>148</sup> Critics of multinational federations, as integrationists, also argue that it would encourage secession, since it would provide nationality-based subnational units with incentives and political resources that may eventually lead to secession.<sup>149</sup> Proponents of multinational federalism respond to this critique by not denying the risk of secession,<sup>150</sup> but claiming that sufficient autonomy is a valuable solution to address internal political and ethnocultural divisions, avoiding the risk of secession and therefore the disintegration of the state.<sup>151</sup>

For the purpose of this research and specifically of this section, it is interesting to recall the four different positions identified by McGarry and O'Leary on the value of federalism as a method of accommodating ethnocultural diversity. First, the so-called "Jacobin position" supports unitarism rather than federalism, as the latter would contribute to the rise of ethnocentrism. The "federalism as nation building position" is essentially the solution advocated by liberal integrationists; as previously recalled, they support the creation of national federations rather than multinational federations. Drawing from the Marxist tradition, the "Cosmopolitan position" recognizes the value of federalism as a means to accommodate diversity, but only if accepted in the framework of the realization of global communism. Finally, supporters of multinational federalism believe that federalism can be valuable both in order to accommodate national and ethnic differences, as well as to ensure the preservation of liberal democratic rights. What is even more relevant for the purpose of this thesis is that McGarry and O'Leary also argue that multinational federalists advocate the institutionalization of asymmetric federalism,<sup>152</sup> a nexus that

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<sup>148</sup> John McGarry, and Brendan O'Leary, "Federation as a Method of Ethnic Conflict Regulation," in *From Power Sharing to Democracy*, ed. Sid Noel (Montréal: McGill-Queen's University Press, 2005), 274-281; Micheal Burgess, and Franz Gress, "Symmetry and Asymmetry Revisited," in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos, 1999), 54-55.

<sup>149</sup> Palermo and Kössler, *Comparative Federalism*, 99.

<sup>150</sup> See for example Will Kymlicka, "Federalism and Secession: At Home and Abroad," *Canadian Journal of Law & Jurisprudence* 13, vol. 2 (2000): 207-224.

<sup>151</sup> Palermo and Kössler, *Comparative Federalism*, 98.

<sup>152</sup> McGarry and O'Leary, "Federation," 266-273.

was also highlighted by Alfred Stepan, who claimed that “all of the long-standing multinational federal democracies are constitutionally asymmetrical”.<sup>153</sup>

To conclude, it is worth recalling an observation made by Palermo and Kössler, concerning the impasse now reached by the debate on the viability of multinational federalism, as neither side may find a sound verification of its respective hypothesis. According to these scholars, such verification is impossible, because constitutional design models are too influenced by methodological bias, as well as highly susceptible to variations and extra-legal factors (e.g., socio-economic, cultural, or political factors), to identify “an unambiguous causal link between multinational federalism and secession”.<sup>154</sup>

### 1.3.3 Constitutional asymmetries as the middle ground

While analyzing multinational federations, as well as the link between constitutional design for divided societies and federalism, asymmetric federalism was recalled more than once: Lijphart believes that only asymmetric federal systems can be considered consociations; Horowitz argues that asymmetrical autonomy in federal systems may have conciliatory potential; McGarry and O’Leary recall the institutionalization of asymmetric federalism in multinational federations; Stepan claims that all multinational federal democracies are constitutionally asymmetrical. Therefore, it can be easily argued that asymmetric federalism is a valuable arrangement in order to accommodate diversity,<sup>155</sup> as “federal asymmetries result from the challenge of diversity within federal societies”.<sup>156</sup> However, the theoretical stand of this research aims to go even further, claiming that constitutional asymmetries may be considered an intermediate model of constitutional design,<sup>157</sup> as the middle ground between accommodation and integration.<sup>158</sup>

Perhaps the main reason to support this claim is that constitutional asymmetries allow for more flexibility,<sup>159</sup> often missing in consociations or national federations. In fact, different degrees of constitutional asymmetries were introduced to deal with diversity not only in multinational federations (e.g., Belgium, India), but also in formally unitary states that are “partially divided societies” (e.g., United Kingdom, Spain, Italy) having regional or devolutionary arrangements. As anticipated in the introduction, this research will explore constitutional asymmetries in divided

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<sup>153</sup> See Alfred Stepan, “Federalism and Democracy: Beyond the U.S. Model,” *Journal of Democracy* 10, no. 4 (1999): 29-30; Alfred Stepan, “Towards a New Comparative Politics of Federalism,” 40.

<sup>154</sup> Palermo and Kössler, *Comparative federalism*, 100.

<sup>155</sup> Weller, “Introduction,” 1.

<sup>156</sup> Robert Agranoff, “Power Shifts, Diversity and Asymmetry,” in *Accommodating diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos, 1999), 11.

<sup>157</sup> Popelier and Sahadžić, *Constitutional Asymmetries*, 2.

<sup>158</sup> See also Choudhry, “Bridging,” 32-35.

<sup>159</sup> Stefan Wolff, “Cases of Asymmetrical Territorial Autonomy,” in *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, eds. Marc Weller, and Katherine Nobbs (Philadelphia: University of Pennsylvania Press, 2010), 24.

multi-tiered systems (MTS), as an encompassing term for all those system with multiple tiers of government in which the central level coexists with subnational entities (SNEs) having lawmaking powers.<sup>160</sup> This exemplifies the fact that constitutional asymmetries can be more easily acceptable than the federal model altogether,<sup>161</sup> as a traditional federation can be perceived as a threat to the territorial integrity of the state, encouraging secession or separatism. However, this did not exclude the introduction of constitutional asymmetries in order to accommodate specific national minorities.<sup>162</sup> Moreover, we recalled that liberal integrationists oppose multiethnic federalism and support instead national federations (as the US or Germany), but these federations tend to be symmetrical, meaning that all subnational units have an equal relationship with each other and with the center. The benefits of the federal idea of self-rule and shared rule cannot be denied, but a purely symmetrical solution would reduce those benefits in divided or partially divided societies, since it would not recognize the specific needs of some subnational entities. Conversely, the introduction of constitutional asymmetries in divided multi-tiered systems might preserve the integrity of the state and represent a more efficient application of the principle of self-rule and shared rule among the subnational units and with the center.<sup>163</sup> Another reason why constitutional asymmetries are more widely acceptable is that they can be introduced according to different degrees of intensity,<sup>164</sup> as will become evident in the next chapters.

However, it should not be forgotten that “asymmetry is not a panacea for the resolution of territorial self-determination disputes” and it is thus a “double-edged sword whose application requires careful consideration of potential consequences”.<sup>165</sup> For example, Sahadžić argues that constitutional asymmetries in multinational multi-tiered systems tend to undermine the legitimacy and the stability of the system, working against equality, transparency, and cohesion.<sup>166</sup> Such argument recalls the warning made by Bauböck against the possible downsides of asymmetry, namely that it can negatively affect cohesion, translating into unequal representation of citizens in federal government and thus possibly be considered a violation of a commitment to equal federal

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<sup>160</sup> For more on multi-tiered systems, see Introduction and Patricia Popelier and Maja Sahadžić, eds., *Constitutional Asymmetry in Multinational Federalism* (Cham, Switzerland: Palgrave Macmillan, 2019), 4; Sahadžić, *Asymmetry*, 44-45; Popelier, *Dynamic Federalism*, 50-51.

<sup>161</sup> Wolff, “Cases of Asymmetrical Territorial Autonomy,” 24.

<sup>162</sup> This was the case of Northern Ireland and Scotland in the United Kingdom, of Catalonia and the Basque Country in Spain, and of South-Tyrol in Italy (see Agranoff, “Power Shifts,” 12-13).

<sup>163</sup> Michael Burgess, “The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective,” in *Asymmetries in Constitutional Law*, ed. Francesco Palermo, Carolin Zwillig, and Karl Kössler (Bolzano/Bozen: Accademia Europea di Bolzano, 2009), 25-26.

<sup>164</sup> Burgess, “The Paradox of Diversity,” 24.

<sup>165</sup> Wolff, “Cases of Asymmetrical Territorial Autonomy,” 25.

<sup>166</sup> Sahadžić, *Asymmetry*, 239-241.

citizenship, and a threat to the quality of the democratic debate.<sup>167</sup> However, as pointed out by Martinico, “[...] asymmetry is a game between centripetal and centrifugal forces, and here again one can find interesting clues from comparative studies: indeed, the debate on the possible negative implications of asymmetry leads to the identification of the existence of a constitutional core of principles and values whose respect makes asymmetry sustainable [...]”.<sup>168</sup>

Given these premises, the next chapter, as well as the overall thesis, aim precisely to assess and systematize the degrees of intensity of constitutional asymmetries.

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<sup>167</sup> Rainer Bauböck, “United in Misunderstanding? Asymmetry in Multinational Federations,” *ICE – Working Paper Series*, no. 26 (2001).

<sup>168</sup> Giuseppe Martinico, “Asymmetry as an Instrument of Differentiated Integration: The Case of the European Union,” *European Journal of Law Reform* 18, no. 2 (2016): 143.

#### 1.4 The role of constitutional courts in divided multi-tiered systems

Before delving into a more detailed analysis of constitutional asymmetries in the next chapter, it is worth completing the theoretical background on constitutional design, divided societies, and federalism with a brief overview on the protection of fundamental rights and the role played by constitutional courts in divided multi-tiered systems. For this reason, this last paragraph will start with the problems that rights-based constitutionalism encounters in divided societies, and then it will move to the role played by courts. First, it will focus on constitutional and supranational courts in power-sharing democracies, examining cases as the “Constituent peoples case” of the Bosnian constitutional court and the *Sejdić-Finci* case of the European Court of Human Rights. Then, the analysis will shift specifically to multinational federal systems, exploring the different attitudes of constitutional courts towards a more unitarist or federalist perspective.

##### 1.4.1 Rights and courts in divided societies

Contemporary constitutionalism is characterized, among other features, by the existence of a system of rights defining the political community, even though the catalogue of rights may vary,<sup>169</sup> as well as the degree to which these rights are enforceable by judicial review.<sup>170</sup> Despite these differences, liberal democracies are typically informed by the image of “a consolidated political community of free and equal citizens constituted as such by a system of rights”.<sup>171</sup> However, when it comes to divided societies, this conception of the polity may be more complicated. Harvey and Schwartz see at least two reasons why fragmented societies complicate rights-based constitutionalism. First, the standard model puts the individual at the center of constitutional values, as the goal is to protect the individual against the abuse of public power. Such an individualistic perspective may not effectively address the problems which may arise in divided societies, as we have seen in the previous paragraphs of this chapter. In fact, minority groups may fear that the majority will violate their rights or marginalize their interests. Rights-based constitutionalism registers group-based concerns not as “matters of principle”, but as “matters of policy” to be determined by the majority.<sup>172</sup> The second reason revolves around the

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<sup>169</sup> See Norman Dorsen, Michel Rosenfeld, András Sajó, Susanne Baer, and Susanna Mancini, eds. *Comparative Constitutionalism. Cases and Materials* (Eagan, Minnesota: West Academic, 2016), 33-39.

<sup>170</sup> See Albert HY Chen and Miguel Poirares Maduro, “The Judiciary and Constitutional Review,” in *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (London and New York: Routledge, 2013), 365-411.

<sup>171</sup> Colin Harvey and Alex Schwartz, “Introduction,” in *Rights in Divided Societies*, ed. Colin Harvey and Alex Schwartz (Oxford and Portland: Hart Publishing, 2012), 1.

<sup>172</sup> Harvey and Schwartz, “Introduction,” 2.



communitarian meaning of rights-based constitutionalism, as these may define the nature of a political community. In divided societies, this may not necessarily be the case. If it is true that a common framework of rights might have a unifying effect on the polity, it is also true that the same framework could conflict with recognition of the difference.<sup>173</sup>

In this respect, constitutional courts are of crucial importance.<sup>174</sup> The two examples of South Africa and Bosnia-Herzegovina made by Issacharoff are helpful in shedding light on the role played by constitutional courts in divided societies.<sup>175</sup> During the negotiations leading to the end of apartheid in South Africa, the African National Congress (ANC) proposed the creation of a constitutional court as part of the new Interim Constitution, marking one of the most significant alterations to the prior South African political institutions.<sup>176</sup> More specifically, the South African constitutional court played a unprecedented role in antimajoritarian protection, being entrusted with the power to ensure that the final Constitution was in conformity with the constitutional principles of democratic governance.<sup>177</sup> This arrangement was intended to satisfy the security interest of parties and was considered an integral part of the peaceful transition to constitutional democracy.<sup>178</sup>

Concerning the Bosnian case,<sup>179</sup> the constitutional court decision on the so-called “Constituent Peoples Case”,<sup>180</sup> delivered in 2000, is worth mentioning. The initiative came from the NGO “Serbian Citizen Council”, denouncing the discrimination of Serbs in the Federation of Bosnia-Herzegovina and of Bosniaks and Croats in the Republika Srpska, since they were not listed as constituent peoples in the constitution of the respective entity. As a former Bosniak member of the Presidency and thus eligible to pose a request to the constitutional court at the time, Alija Izetbegović filed a lawsuit on this matter. The court passed four individual judgments, declaring several articles of the entity constitutions in breach of the Dayton constitution. The decisions were passed by a simple majority, namely by the vote of the three international and two Bosniak judges. The Croat and Serb judges voted against the decisions. Thus, the judgment was

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<sup>173</sup> Harvey and Schwartz, “Introduction,” 3.

<sup>174</sup> On the role of constitutional courts in democratic transitions, see Francesco Biagi, *European Constitutional Courts and Transitions to Democracy* (Cambridge: Cambridge University Press, 2020).

<sup>175</sup> Issacharoff, “Constitutionalizing Democracy,” 1870-1890.

<sup>176</sup> Issacharoff, “Constitutionalizing Democracy,” 1871.

<sup>177</sup> Issacharoff, “Constitutionalizing Democracy,” 1875.

<sup>178</sup> Issacharoff, “Constitutionalizing Democracy,” 1877.

<sup>179</sup> On the constitutional court of Bosnia and Herzegovina, see also Sujit Choudhry and Richard Stacey, “Independent or Dependent? Constitutional Courts in Divided Societies,” in *Rights in Divided Societies*, ed. Colin Harvey and Alex Schwartz (Oxford and Portland: Hart Publishing, 2012), 95-104; Dawn Walsh, “Constitutional Courts as Arbiters of Post-Conflict Territorial Self-Government: Bosnia and Macedonia,” *Regional & Federal Studies* 29, no. 1 (2019): 67-90; Alex Schwartz, “International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia,” *Law & Social Inquiry* 44, no. 1 (2019): 1-30.

<sup>180</sup> Bosnian Constitutional Court, “Constituent Peoples Case”, decision U5/98, 1 July 2000.

only possible due to the fact that the constitutional court is one of the few Bosnian institutions that does not make decisions by consensus, nor does it have veto mechanisms in place. It is also significant to notice that the constitutional court had to answer affirmatively whether the preamble of the constitution, as such, can generally have normative character. The court accepted the opinion that some lines of the preamble have normative content. Based on such method of interpretation, the constitutional court derived three general normative principles: the principle of multi-ethnicity; the principle of collective equality of constituent peoples; and the principle of prohibition of *de jure* and *de facto* discrimination.<sup>181</sup> The implementation of these decisions led to the inclusion of Serbs as constituent people in the Federation and of Bosniaks and Croats as constituent peoples in the Republika Srpska. The “Others” (i.e., national minorities) were also recognized as having rights to representation in parliaments and administrative bodies. Through its decisions, the court intended to conceive the state as multi-ethnic, trying to promote the integration and not the segregation of the ethnic groups. These decisions re-defined the principle according to which ethnicity was identified with territory. Thus, the main outcome was that there are three constituent ethnic groups in the entire territory of Bosnia-Herzegovina, ending the discrimination of ethnic groups within the entities.

Therefore, Issacharoff argues that both constitutional courts, in Bosnia-Herzegovina and South Africa, saw in their constitutional authority a “responsibility to mediate the inherent conflict between democratic self-governance and the risk of majoritarian oppression”, helping their societies to “move away from the risk of locking in social fractures that would have been present had the immediate majorities held unfettered power”.<sup>182</sup>

Another interesting aspect to take into account concerns the selection process and the decision-making of the so-called “power sharing courts”,<sup>183</sup> namely those courts whose judge selection and decision-making is corrected to address ethno-cultural cleavages in divided societies. More specifically, Graziadei argues that given the function of apex courts “as forums of arbitration between different constituent communities in divided polities, their composition, organization and decision-making rules reflect the principle of consociational democracy”.<sup>184</sup> Instances of these courts can be found in Belgium, Bosnia, South Tyrol, Cyprus, Canada, and in former constitutional systems such as Yugoslavia and Czechoslovakia, where judges are selected on the basis of their ethnic or linguistic background,<sup>185</sup> and may have to take decisions by consensus, though providing

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<sup>181</sup> Saša Gavrić, Damir Banović, and Mariña Barreiro, *The Political System of Bosnia and Herzegovina: Institutions – Actors – Processes* (Sarajevo: Sarajevo Open Center, 2013), 24-26.

<sup>182</sup> Issacharoff, “Constitutionalizing Democracy,” 1893.

<sup>183</sup> See Stefan Graziadei, “Power Sharing Courts,” *Contemporary Southeastern Europe* 3, no. 2 (2016): 66–105.

<sup>184</sup> Graziadei, “Power Sharing Courts,” 99.

<sup>185</sup> Graziadei, “Power Sharing Courts,” 79-84.

tie-breaking mechanisms.<sup>186</sup> Certainly, power sharing courts have attracted a number of critiques, the most fundamental one being their illegal, undemocratic and unmeritocratic characters.<sup>187</sup> However, Graziadei observes that in divided societies it is essential for the legitimacy of the court that it is an expression of the different constituent communities, and not only of the majority.<sup>188</sup>

#### 1.4.2 Supranational courts and power sharing

A further interesting perspective is provided by the role of supranational courts, such as the European Court of Human Rights (ECtHR), in cases concerning power-sharing constitutional structures in divided societies. One of the most emblematic cases is *Sejdić-Finci v. Bosnia-Herzegovina*,<sup>189</sup> delivered by the ECtHR in 2009, on the discrimination of national minorities running for the highest electoral positions (i.e., the collective Presidency and the second chamber of the Parliamentary Assembly). The two applicants, Dervo Sejdić and Jakob Finci, belonged to the so-called “Others”, a residual constitutional category encompassing all those citizens who are not affiliated to one of the three constituent peoples (i.e., Muslim/Bosniaks, Serbs, Croats) recognized as such by the Bosnian Constitution.<sup>190</sup> The “Others” might be citizens belonging to religious, national, or ethnic minorities, or having a mixed ethnic background, or simply rejecting the system of ethnic affiliation. Since the Bosnian Electoral Code requires those standing for election to the Presidency and the House of Peoples to self-declare their affiliation to one of the three constituent peoples to be eligible, the two applicants (respectively of Roma and Jewish origin) were excluded from the electoral competition. The applicants were held to have been discriminated against on the basis of their ethnic origin after claiming the violation of multiple articles of the European Convention of Human Rights (ECHR), more specifically articles 3 (prohibition of torture), 13 (right to an effective remedy), 14 (prohibition of discrimination), art. 3 Protocol no. 1 (right to free elections) and art. 1 Protocol no. 12 (general prohibition of discrimination).

The Bosnian government justified the differentiated treatment of the two citizens who refused to affiliate to the constituent peoples on the ground that the system of ethnic affiliation guaranteed the peaceful coexistence of ethnocultural communities, as well as the delicate constitutional system designed by the Dayton Peace Agreement. For its part, the ECtHR framed

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<sup>186</sup> Graziadei, “Power Sharing Courts,” 86-87.

<sup>187</sup> Graziadei, “Power Sharing Courts,” 93-96.

<sup>188</sup> Graziadei, “Power Sharing Courts,” 96-98.

<sup>189</sup> European Court of Human Rights (Grand Chamber), Case Nos. 27996/06 and 34836/06, *Sejdić and Finci v. Bosnia and Herzegovina*, 22 December 2009.

<sup>190</sup> See the Preamble of the 1995 Bosnian Constitution: “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows: [...]”.

it as a case of ethnic discrimination against vulnerable peoples,<sup>191</sup> and declared the Bosnian constitutional provisions in breach of art. 14 ECHR, read in conjunction with art. 3 Protocol no. 1, and of art. 1 of Protocol no. 12. Even though the court ruled with a clear majority, worth mentioning is the dissenting opinion of judge Bonello, who argued that the court had no legitimacy in intervening in the national constitutional order, especially an extremely complex and fragile system such as Bosnia. Moreover, he criticized the court's failure to take into account the possible consequences of its judgment, namely the potential threat to peace. For these reasons, Bonello concluded that the court should have granted Bosnia a wider margin of appreciation.

The decision of the ECtHR provoked multiple reactions and triggered a heated debate about the relationship between consociations and human rights standards. McCrudden and O'Leary provided an insightful critique of the court's decision,<sup>192</sup> arguing that there are two particular rights primarily challenged: the right not to be discriminated against on the basis of particular protected characteristics (such as race or ethnicity), and the dilution of a person's right to participate in the political process on equal terms with others.<sup>193</sup> The authors noted that human rights scholars identify not only specific rights that may be endangered by consociations, but also a more general conflict between consociationalism and the foundations of human rights, since consociations may conflict with the liberal individualist paradigm that underpins contemporary international human rights norms, as observed by Wippmann.<sup>194</sup> However, other scholars, such as Choudhry, argue that consociational peace settlements do include mechanisms of human rights protection, an argument that defenders of liberal consociationalism see as a strong safeguard for liberal values.<sup>195</sup> More generally, McCrudden and O'Leary conclude that "the reasoning presented by the Court to justify its decision is surprisingly sketchy and somewhat ambiguous",<sup>196</sup> since key issues such as the timing, modalities and actors involved in the liberalization of the Bosnian constitutional system remain undefined.<sup>197</sup>

Although the ECtHR decision of *Sejdić-Finci* remains unimplemented, it is considered a landmark case for many reasons. First of all, it was the first time that the Strasbourg court found a country's constitution in violation of the Convention, and it was also the first time the court applied Protocol no. 12, the ECHR free-standing equality right. Moreover, with *Sejdić-Finci* and

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<sup>191</sup> Stefan Graziadei, "Democracy v. Human Rights? The Strasbourg Court and the Challenge of Power Sharing," *European Constitutional Law Review* 12, no. 1 (2016): 67.

<sup>192</sup> See McCrudden, and O'Leary, *Courts and Consociations*.

<sup>193</sup> McCrudden, and O'Leary, *Courts and Consociations*, 93-95.

<sup>194</sup> David Wippmann, "Practical and Legal Constraints on Internal Power Sharing," in *International Law and Ethnic Conflict*, ed. David Wippmann (Ithaca: Cornell University Press, 1998), 232.

<sup>195</sup> See Sujit Choudhry, "After the Rights Revolution: Bills of Rights in the Post-Conflict State," *Annual Review of Law and Social Science* 6 (2010): 301-322.

<sup>196</sup> McCrudden, and O'Leary, *Courts and Consociations*, 145.

<sup>197</sup> McCrudden, and O'Leary, *Courts and Consociations*, 146.

subsequent related decisions (*Zornić*,<sup>198</sup> *Pilav*,<sup>199</sup> *Baralija*,<sup>200</sup> *Pudarić*)<sup>201</sup>, the Court seemed to move away from its previous case-law regarding consociations. In fact, in *Mathieu-Mobin and Clerfayt*,<sup>202</sup> the Strasbourg court held that “the exclusion of declaratively French-speaking parliamentarians from the Flemish regional parliament did not amount to discrimination”.<sup>203</sup> This conclusion was justified by the margin of appreciation granted to states, the peculiarities of the Belgian institutional system, the temporary nature of the arrangement, and the wide majority of French- and Dutch-speaking groups supporting such arrangement.<sup>204</sup> In *Mathieu-Mobin and Clerfayt*, the dissenting judges<sup>205</sup> argued that the system of self-classification was in violation of the Convention rights of French-speaking voters and candidates, discriminating against French-speakers solely on the basis of their language. As observed by Graziadei, prior to *Sejdić-Finci*, the ECtHR took a rather prudent approach in its right to vote and elections jurisprudence, neither imposing specific electoral systems nor demanding that “all votes have equal weight”.<sup>206</sup> Moreover, the Court granted states a wider margin of appreciation in the limitation of passive voting rights, compared to a narrower margin in restricting active voting rights.<sup>207</sup> Graziadei also argues that *Sejdić-Finci* and the subsequent cases “raised human rights protection to a higher but more politically sensitive level”,<sup>208</sup> having possible repercussions for other European power-sharing systems.<sup>209</sup>

In conclusion, while state courts in consociations tend to uphold or cautiously extend consociational arrangements,<sup>210</sup> the ECtHR went further and decided on a “first-order challenge”,<sup>211</sup> namely those challenges involving the state constitutional and political structure or the rules determining access to the political community, creating the “legitimacy dilemma” recalled by judge Bonello in his dissenting opinion.<sup>212</sup>

<sup>198</sup> European Court of Human Rights, Case No. 3681/06, *Zornić v. Bosnia and Herzegovina*, 15 July 2014.

<sup>199</sup> European Court of Human Rights, Case No. 41939/07, *Pilav v. Bosnia and Herzegovina*, 9 June 2016.

<sup>200</sup> European Court of Human Rights, Case No. 30100/18, *Baralija v. Bosnia and Herzegovina*, 29 October 2019.

<sup>201</sup> European Court of Human Rights, Case No. 55799/18, *Pudarić v. Bosnia and Herzegovina*, 8 December 2020.

<sup>202</sup> European Court of Human Rights, Case No. 9267/81, *Mathieu-Mobin and Clerfayt v. Belgium*, 2 March 1987.

<sup>203</sup> Graziadei, “Democracy v. Human Rights,” 59.

<sup>204</sup> Graziadei, “Democracy v. Human Rights,” 59.

<sup>205</sup> Judges Cremona, Bindschedler-Robert, Spielmann, and Valticos.

<sup>206</sup> Graziadei, “Democracy v. Human Rights,” 60.

<sup>207</sup> Ibidem

<sup>208</sup> Graziadei, “Democracy v. Human Rights,” 63.

<sup>209</sup> For a more detailed analysis of the Bosnian cases’ implications, see Graziadei, “Democracy v. Human Rights,” 69-72. See also McCrudden, and O’Leary, *Courts and Consociations*, 105-146.

<sup>210</sup> McCrudden, and O’Leary, *Courts and Consociations*, 43-45.

<sup>211</sup> Samuel Issacharoff, “Democracy and Collective Decision Making,” *International Journal of Constitutional Law* 6, no. 2 (2008): 231.

<sup>212</sup> To address this dilemma, Graziadei proposes the “integrative democratic tolerance” approach, reconciling the democracy principle with the protection of fundamental rights (see Graziadei, “Democracy v. Human Rights,” 75-83).

#### 1.4.3 Constitutional courts and multinational federal systems

Shifting the focus away from power sharing democracies, courts also play a pivotal role in federal systems. Indeed, courts act as arbiters of constitutional disputes concerning the distribution of powers and competences among levels of government, and their decisions might steer the constitutional system in a more centralist or decentralist direction.<sup>213</sup> As a result, the literature has observed the interconnection between federalism and judicial review, mutually influencing their development.<sup>214</sup> A number of comparative and in-depth studies have been conducted in order to explore the factors leading to a centralist or decentralist attitude of courts,<sup>215</sup> although interest in the courts' behavior in multinational federal systems has remained limited.

According to Popelier, many institutional features may influence the behavior of courts in federalism disputes, such as the extent of subnational representation in federal policymaking, the degree of integration of the party system, the role of states in the appointment of judges and the composition of the court, the extent of decentralization in the federal system, and the devolutionary and multinational nature of the federation.<sup>216</sup> Even though Popelier did not find conclusive evidence for any of the several hypotheses tested on eleven federations, it is still worth mentioning the trends she identifies. Concerning the factors that might explain a more centralist stance, what emerges is that a low representation of the constituent units in the selection of judges or in the composition of the courts seems to play a significant role in the courts' support for centralization. Conversely, a weak representation of subnational governments at the federal level, a low gradient of centralization, or a context of devolution or multinationalism seem to encourage a non-centralist stance.<sup>217</sup> With specific reference to this last factor, Popelier's hypothesis is that "courts will be more likely to take a non-centralist stance if they operate in a devolutionary and multinational federal system".<sup>218</sup> Even though subsequent analysis of the case studies does not confirm such hypothesis, there still are some elements of interest. For example, it is found that

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<sup>213</sup> Nicholas Aroney, and John Kincaid, "Introduction", in *Courts in Federal Countries*, ed. Nicholas Aroney and John Kincaid (Toronto: University of Toronto Press, 2017), 4.

<sup>214</sup> Aroney and Kincaid, "Introduction," 6; Thomas Hueglin and Alan Fenna, *Comparative Federalism. A Systematic Inquiry* (Toronto: Broadview Press, 2006), 275.

<sup>215</sup> See for example Nicholas Aroney and John Kincaid, eds., *Courts in Federal Countries* (Toronto: University of Toronto Press, 2017); Patricia Popelier, "The Constitutional Court's Impact on Federalism in Belgium: a Weakening of the Centralization Theory," in *Jahrbuch des Föderalismus 2020: Föderalismus, Subsidiarität und Regionen in Europa*, ed. Europäischen Zentrum für Föderalismus-Forschung Tübingen (EZFF), (Baden-Baden: Nomos Verlagsgesellschaft mbH & Co. KG, 2020), 67–92; Patricia Popelier and Samantha Bielen, "How Courts Decide Federalism Disputes: Legal Merit, Attitudinal Effects, and Strategic Considerations in the Jurisprudence of the Belgian Constitutional Court," *Publius: The Journal of Federalism* 49, no. 4 (2018): 587–616; Patricia Popelier, "Federalism Disputes and the Behavior of Courts: Explaining Variations in Federal Courts' Support for Centralization," *Publius: The Journal of Federalism* 47, no. 1 (2016): 27–48.

<sup>216</sup> See Popelier, "Federalism Disputes and the Behavior of Courts," 34–43.

<sup>217</sup> Popelier, "Federalism Disputes and the Behavior of Courts," 44.

<sup>218</sup> Popelier, "Federalism Disputes and the Behavior of Courts," 43.

courts tend to allow for a non-centralist outcome only when the stability of the system is not at stake. Popelier concludes that we might expect that courts in multinational systems tend to be generally “balanced”, whereas they are more centralist when threats to the integrity and stability of the system (e.g., secession claims) are present.<sup>219</sup>

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<sup>219</sup> Ibidem

### *1.5 Concluding remarks*

This introductory chapter had two main objectives. The first was to retrace the origins of the debate on constitutional design for divided societies, tackling the recurrent problems and emphasizing the reasons why it is a topic still relevant today. This was achieved by reviewing the literature on constitutional design in general and on divided societies in particular, so that the peculiarities of the latter could emerge more clearly.

The second objective was to explain why this research frames constitutional asymmetries as the middle ground between the scholarship on constitutional design and that on federalism, as well as between the accommodationist and integrationist models of constitutional design. Federalism and asymmetries are recurrent elements in the theoretical debate on both approaches (i.e., integration and accommodation), and the chapter demonstrates how and why constitutional asymmetries seem to be the most acceptable solution to accommodate internal diversity in a divided multi-tiered system. Indeed, they allow for more flexibility than the consociational or the “fully-fledged” federal model, and they were introduced in federations as well as in regional or devolved states which do not accept the use of federal terminology to describe themselves.

The next chapter will dive deep into the theoretical and operational definition of constitutional asymmetries in divided multi-tiered systems, identifying the legal and extra-legal factors that are distinctive elements of the processes of constitutional design and that are conducive to constitutional asymmetries.



## CHAPTER TWO

### DEFINING ASYMMETRIES IN MULTI-TIERED SYSTEMS

Having reviewed the background on constitutional design for divided societies and identified constitutional asymmetries as an intermediate model of constitutional design, this chapter is dedicated to the definition of constitutional asymmetries in multi-tiered systems. The first paragraph defines asymmetries reviewing the main literature on the topic, from the origins of the concept to its more recent developments, distinguishing between *de jure* (constitutional) and *de facto* (political) asymmetries, and finally providing a framework to “measure” constitutional asymmetries, on the basis of previous research.

Then, the second paragraph delves into the legal factors at the basis of constitutional design which are conducive to constitutional asymmetries, identifying four legal factors: the territorial distribution of constitutional asymmetries; the procedures to introduce constitutional asymmetries; the design of the subnational entities; and the actors involved in the constitution-making process. Each of these factors will be included as the conditions in the model used to conduct the QCA on the 16 cases studies, to assess the impact that these have on the degree of constitutional asymmetry in the constitutional system.

Finally, the third paragraph turns to the extra-legal factors coming into play during the process of constitutional design and which may be conducive to constitutional asymmetries. These factors are of a geopolitical, socio-economic, and historical nature, such as the historical periodization in which asymmetries were introduced, the geopolitical position of the constitutional system (i.e., Global South or Global West), and the distribution of socio-economic resources within the system.

## 2.1 Between theory and practice

### 2.1.1 Introducing the concept

Against the background provided in the previous chapter, we can move to a more in-depth analysis of asymmetries. The origins of the concept of symmetry and asymmetry are in federal theory and can be traced back to the aforementioned article by Charles D. Tarlton, who in 1965 first introduced the notion of symmetry as “the extent to which component states share in the conditions and thereby the concerns more or less common to the federal system as a whole”, while asymmetry “expresses the extent to which component states do not share in these common features”.<sup>220</sup> According to Tarlton, whether the relationship is symmetrical or asymmetrical depends on the participation of federal units in the “pattern of social, cultural, economic, and political characteristics of the federal system”,<sup>221</sup> thus first highlighting a political nature of asymmetry. As Lijphart did in his work, Tarlton also recalled Livingston’s socio-cultural theory of federalism,<sup>222</sup> linking such theory to asymmetric federalism. Indeed, in his opinion, an asymmetric federal government is the one that best corresponds to the real “federal society” beneath political institutions.<sup>223</sup>

While recalling Livingston, Tarlton also makes reference to the constitutional nature of asymmetry, namely to the “varying degrees of autonomy and power”.<sup>224</sup> Up until Tarlton’s essay, the idea of asymmetries in federal systems had only been implicitly mentioned,<sup>225</sup> and symmetry was assumed to be the norm within federations.<sup>226</sup> This was due to the fact that, traditionally, federal states were created as centripetal (or “coming-together”) federations, by pooling together sovereignty. Establishing a symmetric relationship between member states was therefore the priority in order to guarantee federal equality. By the same logic, symmetry was also adopted within specific dimensions, i.e., the division of legislative power.<sup>227</sup> With the shift towards “holding-together” or centrifugal federations, the focus was necessarily on the constitutional provisions

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<sup>220</sup> Tarlton, “Symmetry and Asymmetry,” 861.

<sup>221</sup> Ibidem

<sup>222</sup> Livingston criticized the over-emphasis on legalistic concerns in classic federal theory, pointing out that the institutional design does not necessarily express the social, cultural, and political reality of the society under study.

<sup>223</sup> Tarlton, “Symmetry and Asymmetry,” 869.

<sup>224</sup> Tarlton, “Symmetry and Asymmetry,” 869: “The asymmetrical federal system would be one in which, as Livingston says of federal systems generally, the diversities in the larger society find political expression through local governments possessed of varying degrees of autonomy and power”.

<sup>225</sup> See for example William S. Livingston, “A Note on the Nature of Federalism,” *Political Science Quarterly* 67, no. 1 (1952): 81-95.

<sup>226</sup> Ronald L. Watts, “A Comparative Perspective on Asymmetry In Federations,” *Asymmetry Series - IIGR, Queen’s University* 4 (2005): 1.

<sup>227</sup> Francesco Palermo, “Asymmetries in Constitutional Law – An Introduction,” in *Asymmetries in Constitutional Law*, eds. Francesco Palermo, Carolin Zwillig, and Karl Kössler (Bolzano/Bozen: Accademia Europea di Bolzano, 2009), 12-13.

granting differentiated rights to the subnational units in order to preserve the unity of the state, thus enshrining federal asymmetries in their constitutions. Therefore, it is now considered legally wrong to count asymmetries as the exceptions, as “asymmetry is not less essential to federalism than symmetry”.<sup>228</sup>

Since its first publication, Tarlton’s essay has been revisited by federal scholars. In 1999, Burgess and Gress discussed some of Tarlton’s assumptions,<sup>229</sup> identifying four main objections. First, they argue that the claim made by Tarlton concerning the impossibility of “discern[ing] interests that could be clearly considered mutual or national in scope”<sup>230</sup> is an exaggeration, as the quality of asymmetry does not depend on this “wide-ranging criterion”.<sup>231</sup> Moreover, accepting this kind of assumption would enable a dangerous misconception looming over asymmetry, i.e. the stigma of disloyalty to the national interest,<sup>232</sup> when on the contrary asymmetric federations actually witness a “constant shifting pattern of overlapping interests and concerns”<sup>233</sup>, ensuring overall legitimacy and political stability. The second objection concerns Tarlton’s assertion about the relationship between conflict and asymmetry, and conversely the one between harmony and symmetry. In fact, Tarlton states that “the degree of harmony or conflict within a federal system can be thought as a function of the symmetrical or asymmetrical pattern prevailing within the system”, even though most federal systems are in an intermediate position between the “complete harmony symmetrical model and the complete conflict asymmetrical model”.<sup>234</sup> However, Burgess and Gress believe that this is not helpful, as the nature of such conflict is not further explored, and the center-subnational unit relations that may cause conflict are also dependent on the specific power relations and overall political stability of the federal system.<sup>235</sup> Then, Burgess and Gress question Tarlton’s assumption that a condition of predominant diversity should be a unitary and centralized system, instead of a federal system, in order to control centrifugal forces and the “secession-potential”.<sup>236</sup> As they observe, even though it is not clear what Tarlton actually meant, his suggestion of centralization instead of federalism would be “a quite remarkable preference in the 1990s”.<sup>237</sup> Finally, the last objection concerns Tarlton’s rejection of the politics of recognition,

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<sup>228</sup> Palermo, “Asymmetries in Constitutional law,” 11.

<sup>229</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 44-47. See also Michael Burgess, *Comparative Federalism: Theory and Practice* (London and New York: Routledge, 2006), 211-215.

<sup>230</sup> Tarlton, “Symmetry and Asymmetry,” 869.

<sup>231</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 46.

<sup>232</sup> Burgess, *Comparative Federalism*, 213.

<sup>233</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 46.

<sup>234</sup> Tarlton, “Symmetry and Asymmetry,” 871.

<sup>235</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 46.

<sup>236</sup> Tarlton, “Symmetry and Asymmetry,” 871-873.

<sup>237</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 47.

once again advocating “increased coordination and coercion”,<sup>238</sup> being overall skeptical about the feasibility of federalism while dealing with diversity. As Burgess and Gress highlight, Tarlton “was very much an American author writing from a particular perspective”, and with an overriding concern for the “secession-potential inherent in federations”.<sup>239</sup>

The concept of asymmetry was later refined in the literature<sup>240</sup> with the adoption of a series of distinctions, widening the theoretical framework on federal asymmetries. First of all, Watts<sup>241</sup> introduced the distinction between two types of asymmetries: *de jure* (or constitutional) and *de facto* (or political), further analyzed in the next section. Briefly, the former indicates the asymmetries entrenched in the constitutional and legal framework; the latter refers to the actual asymmetries deriving from social, cultural, and economic differences in a federal system. Next, Burgess<sup>242</sup> distinguished between preconditions leading to asymmetries and the outcomes. The former defines asymmetries as the social reality, and therefore they are “what really exists”. Burgess further distinguished between two categories of preconditions: socio-economic (the regional demographic and socio-economic disparities, and territorial differences); and cultural-ideological (religious, linguistic, territorial, cultural, and ethno-national patterns). Following the same conceptual shift from federalism to federation, the asymmetrical outcomes derive from the preconditions of asymmetries. Another distinction made by Agranoff is the one between vertical asymmetry, referring to the relationship of one level to the others (e.g. national or second-tier government), and horizontal asymmetry, meaning the differentiation of status and rights among component

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<sup>238</sup> Tarlton, “Symmetry and Asymmetry,” 874.

<sup>239</sup> Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 47.

<sup>240</sup> Starting from the recalled essay by Tarlton, the main literature on asymmetric federalism has been founded on (in chronological order): Ivo Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* (Ann Arbor: University of Michigan Press, 1970), 276-309; Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa and London: University of Alabama Press, 1987); Robert Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal States* (Baden Baden: Nomos Verlagsgesellschaft, 1999); Rainer Bauböck, “United in Misunderstanding? Asymmetry in Multinational Federations,” *ICE Working Paper Series*, no. 26 (2002): 1-52; Ronald L. Watts, “A Comparative Perspective On Asymmetry In Federations,” *Asymmetry Series - IIGR, Queen’s University* 4 (2005): 1-7; Michael Burgess, *Comparative Federalism: Theory and Practice* (London and New York: Routledge, 2006), 209-225; John McGarry, “Asymmetry in Federations, Federacies and Unitary States,” *Ethnopolitics* 6, no. 1 (2007): 105-116; Francesco Palermo, Carolin Zwillig, and Karl Kössler, eds., *Asymmetries in Constitutional Law. Recent Development in Federal and Regional Systems* (Bolzano/Bozen: Accademia Europea di Bolzano, 2009); Marc Weller and Katherine Nobbs, eds., *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (Philadelphia: University of Pennsylvania Press, 2010); Ferran Requejo and Kalus-Jürgen Nagel, *Federalism Beyond Federations. Asymmetry and Processes of Resymmetrisation in Europe* (Farnham, England: Ashgate, 2011); Patricia Popelier and Maja Sahadžić, eds., *Constitutional Asymmetry in Multinational Federalism* (London: Palgrave Macmillan, 2019); Maja Sahadžić, *Asymmetry, Multinationalism and Constitutional Law* (London and New York: Routledge, 2020).

<sup>241</sup> See Ronald L. Watts, “The Theoretical and Practical Implications of Asymmetrical Federalism,” in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos, 1999), 24-42; Ronald L. Watts, “A Comparative Perspective on Asymmetry in Federations,” *Asymmetry Series - IIGR, Queen’s University*, no. 4 (2005): 1-7; Ronald L. Watts, *Comparing Federal Systems* (Montréal: McGill-Queen’s University Press, 2008), 125-130.

<sup>242</sup> See Michael Burgess, *Comparative Federalism* (London and New York: Routledge, 2006), 215-217; Burgess, “The Paradox of Diversity”, 24; Burgess, and Gress, “Symmetry and Asymmetry Revisited,” 48-56.

units.<sup>243</sup> However, it could be argued that horizontal asymmetry could always be reframed in terms of vertical asymmetries, as the difference among component units depends on the relationship that they have with the central level. Another interesting aspect to consider is that symmetry and asymmetry must be analyzed in relational terms: “a change toward asymmetry affects overall symmetry”,<sup>244</sup> and “federal systems seek a sort of balance between asymmetry and symmetry”.<sup>245</sup> Finally, as already mentioned, asymmetries can also vary according to different degrees of intensity and different kinds.<sup>246</sup>

### 2.1.2 De facto and de jure asymmetries

As the core of this research involves constitutional asymmetries, it is worth further exploring the distinction between *de facto* and *de jure* asymmetries.<sup>247</sup> As previously mentioned, the former refers to “the actual practices or relationships arising from the impact of cultural, social and economic differences among constituent units within a federation”,<sup>248</sup> while the latter to the asymmetries “embedded in constitutional and legal processes, where constituent units are treated differently under the law”.<sup>249</sup> Multi-tiered systems may present different kinds and degrees of both *de jure* and *de facto* asymmetries, and it has been observed that constitutional asymmetries often result from the incorporation of political asymmetries in the constitution.<sup>250</sup>

### Political asymmetries

Within multi-tiered systems, political asymmetries may take different forms. There may be variations in the size of the territory and of the population, as well as in the wealth of constituent units, within one or more dominant member states, or the “relative powerlessness of particularly small member states”.<sup>251</sup> Differences in wealth can be explained by variations in labor mobility, resources and infrastructures. There may also be variations in the relative power exercised by each unit, identity, and political landscape. Differences in the exercise of power relate to the variety of political culture in different constituent units, the variations in identity refer to the ethnic, cultural, linguistic, and religious differences.<sup>252</sup>

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<sup>243</sup> Agranoff, “Power Shifts,” 17.

<sup>244</sup> Agranoff, “Power Shifts,” 20.

<sup>245</sup> Agranoff, “Power Shifts,” 21.

<sup>246</sup> Watts, “The Theoretical and Practical Implications,” 29.

<sup>247</sup> For a recent overview on *de facto* and *de jure* asymmetries, see Sahadžić, *Asymmetry*, 16-42.

<sup>248</sup> Watts, “A Comparative Perspective,” 2.

<sup>249</sup> Ibidem.

<sup>250</sup> Agranoff, “Power Shifts,” 16; Popelier and Sahadžić, *Constitutional Asymmetries*, 489-492.

<sup>251</sup> Watts, “The Theoretical and Practical Implications,” 30.

<sup>252</sup> Popelier and Sahadžić, *Constitutional Asymmetries*, 5.

### Constitutional asymmetries

As previously mentioned, some multi-tiered systems have translated their political asymmetries into constitutional asymmetries, by entrenching them in their constitutions. Constitutional asymmetries may manifest in different ways. In a broad sense, they may emerge insofar as central level constitutions try to moderate political asymmetries by adjusting the number, size and boundaries of the component units, and the representation in the second chamber, even though asymmetry continues to be significant.<sup>253</sup> In a narrow way, they may emerge as a different distribution of power and competences among the constituent units.<sup>254</sup> In fact, constitutions may do so to recognize significant variations in geographical size and population or their social and cultural composition and economic situation. Generally, the literature identifies three domains in which constitutional asymmetries may be identified: status of the constituent units; distribution of powers and competences; fiscal autonomy.<sup>255</sup>

Starting from the first element (i.e., status), constitutional design may introduce asymmetrical arrangements following asymmetrical territorial features and may delineate subnational entities within a diverse institutional framework. However, Sahadžić observed that the literature has neglected the issue of institutional autonomy in subnational entities, given that they may organize their own legislative and executive bodies.<sup>256</sup> Moreover, representation in central institutions may be subject to constitutional asymmetry, concerning the composition of the central level legislature and voting.<sup>257</sup> Indeed, in chambers where the distribution of seats is weighted by the population of the member states, larger states would have more influence in policy-making and legislation than smaller states. This effect may be moderated by a particular regional basis for coalitions within governing parties or by an equal representation of constituent units in the federal chamber. Along the same logic, other forms of asymmetry may involve the bodies responsible for the conduct of intergovernmental relations among the different levels of government.<sup>258</sup>

Moving to the second domain (i.e., powers), Watts identifies three main constitutional approaches to establishing *de jure* asymmetry in the distribution of powers: by increasing the federal authority; by increasing the jurisdiction of particular member states; by allowing for asymmetry in a formally symmetrical distribution of powers among component units.<sup>259</sup>

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<sup>253</sup> Watts, "The Theoretical and Practical Implications," 36.

<sup>254</sup> Francesco Palermo, "«Divided We Stand»: L'Asimmetria negli Ordinamenti Composti," in *Processi di Devolution e Transizioni Costituzionali negli Stati Unitari (dal Regno Unito all'Europa)*, ed. Alessandro Torre (Torino: Giappichelli, 2007), 159-160.

<sup>255</sup> Palermo, "Asymmetries in Constitutional Law," 12.

<sup>256</sup> Sahadžić, *Asymmetries*, 32-33.

<sup>257</sup> Sahadžić, *Asymmetries*, 34-36; Palermo, "«Divided We Stand»," 161-164.

<sup>258</sup> Watts, "The Theoretical and Practical Implications," 33-40.

<sup>259</sup> Watts, "The Theoretical and Practical Implications," 37.

Then, fiscal autonomy is strictly interconnected with the status and distribution of powers, as “the level of fiscal power may indicate the capacity of subnational entities to define their distinct status”.<sup>260</sup> A higher level of fiscal autonomy would determine the relative autonomy and power of subnational entities, and vice versa.<sup>261</sup> Specifically, fiscal autonomy (and thus constitutional asymmetry) may be displayed in their taxing powers, power to raise revenues, spending capacity, reliance on transfers, and budgetary control.<sup>262</sup> Moreover, multi-tiered systems have often adopted asymmetrical transfers and schemes of redistribution and equalization in order to make the fiscal capacities of the member states more symmetrical.<sup>263</sup>

Finally, another legal expression of asymmetry is linked to the conservation of legal specificities in one or more subnational unit.<sup>264</sup> For example, Palermo recalls the introduction of civil law in otherwise common law legal systems, e.g., Québec, Scotland, Porto Rico, or the presence of peculiar legal institutions, e.g., the *derecho foral* in the Basque Country and in Navarre, or the *geschlossener Hof* in South-Tyrol. As will be further explained in the last chapter, another example of this kind of constitutional asymmetry is provided by Indonesia, where the law 11/2006 on the Governing of Aceh authorizes the province to implement Islamic law.<sup>265</sup> This provision later allowed the enactment of the Islamic Criminal Code in 2014, thus making Aceh the only Indonesian province where Islamic law is directly applied to both Muslim and non-Muslim citizens, and raising concerns over human rights protection.<sup>266</sup>

The reason why this research will focus on constitutional asymmetries rather than on political asymmetries can be found in Weller’s words: *de jure* asymmetries offer “greater clarity” and “the existence or extent of asymmetry can be immediately identified through a study of the formal constitutional and legislative instruments establishing the state”.<sup>267</sup> Therefore, constitutional asymmetries allow for a more precise analysis, functional to the objective of this thesis, i.e., examining and explaining the degrees of asymmetry. However, in order to have a wider perspective on asymmetries, the research will not lose “sight on the reality of their implementation”.<sup>268</sup> Moreover, as already observed in the previous sections and paragraphs, by entrenching political asymmetries in the constitutional and legal processes, *de jure* asymmetries may

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<sup>260</sup> Sahadžić, *Asymmetries*, 41.

<sup>261</sup> Ibidem.

<sup>262</sup> Ibidem.

<sup>263</sup> Watts, “The Theoretical and Practical Implications,” 38.

<sup>264</sup> Palermo, “«Divided We Stand»,” 163.

<sup>265</sup> Law no. 11 of 2006 “On the Governing of Aceh”, art. 125-127.

<sup>266</sup> Simon Butt, “Provincial Asymmetry in Indonesia: What is so ‘Special’ About it? A Country Study of Constitutional Asymmetry in Indonesia”, in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (London: Palgrave Macmillan, 2019), 247-248.

<sup>267</sup> Weller, “Introduction,” 8.

<sup>268</sup> Ibidem.

constitute a way of accommodating ethnocultural diversity in the attempt to preserve the integrity and cohesion of the state.

### 2.1.3 The challenges deriving from constitutional asymmetries

Even though the potential risks deriving from asymmetries have been acknowledged and discussed by some federal scholars,<sup>269</sup> these have not been consistently addressed in the federal literature in order to find a definite answer to the challenges that constitutional asymmetries can give rise to. Above all, the balance between constitutional asymmetries and the principle of equality appears to be one of the most pressing and recurrent issues.<sup>270</sup> As already recalled, Bauböck argues that “unequal powers of constituent units translate into unequal representation of citizens in federal government and thus can be seen to violate a commitment to equal federal citizenship”.<sup>271</sup> However, as held by Kymlicka, equality among individuals does not need to be necessarily translated into equality of power across the federal units.<sup>272</sup> Moreover, when it comes to divided societies, the complexity enshrined in the concept of equality finds its utmost expression in the tension between the individual and collective dimensions, as “equality becomes plural when it needs to provide support for the accommodation of differences”.<sup>273</sup>

When assessing the impact of constitutional asymmetry on equality, Sahadžić argues for example that “a bicameral legislature leaves spaces for discussion about equality, especially with regards to the second chamber”.<sup>274</sup> However, she further observes that the principle of equality is not violated by a weighted representation of subnational entities in the second chamber, as long as the first chamber respects the principle of equal representation. Another aspect linked to representation and inequality concerns the right of a representative to vote on matters that do not concern that entity, or possibly convincing other representatives not to vote on matters that concern only their entity.<sup>275</sup> Then, differences in the application of powers of self-organization can

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<sup>269</sup> See for example Rainer Bauböck, “United in Misunderstanding? Asymmetry in Multinational Federations,” *ICE Working Paper Series*, no. 26 (2002): 1-52.

<sup>270</sup> See Kristin Henrard, “Equality Considerations and their Relations to Minority Protections, State Constitution Law, and Federalism,” in *Federalism, Subnational Constitutions, and Minority Rights*, ed. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport: Praeger, 2004), 25-40; Bauböck, “United in Misunderstanding,” 19-22; Sahadžić, *Asymmetries*, 180-196; Maja Sahadžić, “Constitutional Asymmetry and Equality in Multinational Systems with Federal Arrangements,” in *The Principle of Equality in Diverse States: Reconciling Autonomy with Equal Rights and Opportunities* ed. Eva Maria Belser, Thea Bächler, Sandra Egli, and Lawrence Zünd (Leiden: Brill, 2021), 36-61; Matteo Monti, *Federalismo Disintegrativo. Secessione e Asimmetria in Italia e Spagna* (Torino: Giappichelli Editore, 2021), 77-90.

<sup>271</sup> Bauböck, “United in Misunderstanding,” 19-20.

<sup>272</sup> See Will Kymlicka, *Finding Our Way. Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998).

<sup>273</sup> Sahadžić, *Asymmetries*, 181; Ferran Requejo, “Federalism and the Quality of Democracy in Multinational Contexts: Present Shortcomings and Possible Improvements,” in *Federalism and Territorial Cleavages*, ed. Ugo M. Amoretti and Nancy G. Bermeo (Baltimore: Johns Hopkins University Press, 2004), 263.

<sup>274</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 53.

<sup>275</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 53.



be regarded as a threat to equality,<sup>276</sup> but in this case a different application does not entail different powers, as subnational entities would be given the same powers of self-organization. Thus, the issue concerns differences in the procedures, and not asymmetries in powers. Finally, another potential threat to equality is provided by an uneven distribution of fiscal resources.<sup>277</sup> Indeed, resource-rich and resource-poor subnational entities are likely to be oriented towards different expectations, the former advocating for the return of revenues to the entity that generated them, the latter for proportional revenue sharing. It has been noted that, despite some systems adopting asymmetrical fiscal policies to address differences in wealth, the outcome has sometimes been that the richest subnational entities appear to suffer under such an asymmetrical design.<sup>278</sup>

Strictly interconnected to equality, another two ideas are invoked when dealing with the challenges posed by constitutional asymmetries, namely those of legitimacy and stability.<sup>279</sup> Indeed, these are substantiated by the concepts of equality, transparency, and cohesion,<sup>280</sup> as they are considered to be safeguards to both legitimacy and stability.<sup>281</sup> Specifically, Sahadžić suggests that constitutional asymmetries tend to undermine stability and legitimacy in multinational asymmetrical federal systems,<sup>282</sup> detecting pitfalls in all three concepts (i.e., equality, transparency, cohesion) and in all three dimensions of autonomy and asymmetry, namely status, powers and competences, and fiscal autonomy.<sup>283</sup> To counter such pitfalls and find a sustainable balance, Sahadžić proposes a series of constitutional safeguards, specifically structural-institutional, political, economic, and public safeguards.<sup>284</sup> The impact of constitutional asymmetries on equality still needs to be further explored, but the exploratory research conducted by Sahadžić provides an essential starting point for further developments in the literature.

Overall, it is helpful to frame these potential risks in terms of federal dynamics, providing dynamic answers to potential inequalities arising from constitutional asymmetries.

#### 2.1.4 Constitutional courts and constitutional asymmetries

Before moving to the issue of how to measure constitutional asymmetries, this first theoretical section on asymmetry should be concluded with a brief overview of the role played by courts in deciding disputes between the center and subnational entities, when dealing with matters

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<sup>276</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 54.

<sup>277</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 54.

<sup>278</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 54-55.

<sup>279</sup> See Sahadžić, *Asymmetries*, 179-253.

<sup>280</sup> See also Bauböck, “United in Misunderstanding,” 15-22.

<sup>281</sup> Sahadžić, “Constitutional Asymmetry and Equality,” 39.

<sup>282</sup> Sahadžić, *Asymmetries*, 239.

<sup>283</sup> Sahadžić, *Asymmetries*, 240.

<sup>284</sup> Sahadžić, *Asymmetries*, 241-243.

subject to asymmetry. Indeed, the case law of constitutional courts is a crucial element in the assessment of the degree of constitutional asymmetry in divided multi-tiered systems, as they can have a substantial impact on the degree of asymmetry. A few cases will be addressed to exemplify the role that constitutional and supreme courts can have.

In the Spanish constitutional system, the autonomous status of the subnational entities is recognized in the statutes of autonomy of each nationality or region (i.e., the autonomous communities), which have the potential to establish different levels of self-government. The initial asymmetries among autonomous communities (ACs), which saw the Basque Country and Catalonia in a differentiated position from the other later established ACs, was significantly reduced in a symmetrization process in the 1990s. Reacting to this tendency towards symmetry, in 2004 and 2005 the Basque Country and Catalonia proposed reforms to their autonomy statutes, to re-establish the asymmetrical position, also through the introduction of self-determination clauses. However, both sets of proposals failed, with a strong role played by the Constitutional Court. The Basque 2004 proposal was first rejected by the central parliament given that, among other provisions, in art. 1 the reformed statute would have established a Basque Community “freely associated with Spain”, claiming a “right to decide”. Following the central parliament rejection, the subnational legislative assembly enacted the law 9/2008, intending to hold a referendum on the “right to decide” of the Basque people about whether to remain an integral part of Spain or to form an independent Basque Community. The Spanish Constitutional Court declared the Basque law unconstitutional in judgment 103/2008, upholding the position of the central government. The Catalan case is slightly different as, even though the process for the adoption of the reformed Statute had been legally completed through parliamentary agreement and ratification through popular referendum, many of the amendments introduced by the 2006 Statute of Autonomy were overruled and neutralized by the Constitutional Court in judgment 31/2010. The Court’s decision to deactivate some core elements of the new Statute of Autonomy, legally agreed and passed in both central and subnational parliaments, and approved by referendum, is said to have played a significant role in re-igniting the pro-secession movements already present in Catalonia.<sup>285</sup> These two briefly recalled judgments are an indication of the tendency of the Spanish Constitutional Court to uphold the symmetrization legislation enacted at

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<sup>285</sup> Pau Bossacoma Busquets and Marc Sanjaume-Calvet, “Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations. A Country Study on Constitutional Asymmetry in Spain”, in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 443.

the central level, and the inevitable diversity deriving from the different powers enshrined in the different autonomy statutes which became secondary.<sup>286</sup>

In another European regional system, Italy, the Constitutional Court played a crucial role in resolving disputes of competences between the central and regional governments.<sup>287</sup> This was prompted in particular by the 2001 constitutional reform, substantially re-designing Title V of the Italian constitution, and reducing the asymmetries between special and ordinary regions. The revisitation of the distribution of competences between the state and the regions enacted by the 2001 reform led to an increase in constitutional adjudication by the Italian Constitutional Court, as both levels of government sought clarifications over their powers and competences. In many instances, the Court justified the expanding role of the central level, regarding it as the “guardian of the national interest”<sup>288</sup> and thus supporting a centralizing interpretation. This became even more evident during the global economic crisis of the early 2010s and during the covid-19 pandemic, when the austerity and emergency measures that were enacted by the central government were deemed to fall legitimately within the scope of its competences.<sup>289</sup> In both cases, the Italian Constitutional Court tended towards expanding the competences of the central level, at the expense of the regions. A particularly significant case concerning asymmetry is judgment 37/2021, when the Court struck down a regional law of a special region, i.e., Aosta Valley, which provided for anti-pandemic measures. In this case, although health is a concurrent competence between the state and the regions under art. 117.3 of the Italian constitution, the Court framed the anti-pandemic measures as international prophylaxis, and thus as an exclusive competence of the central state. This judgment came in a particularly complex phase of the pandemic, when a delicate equilibrium between the central and subnational governments had been reached through a renewed impetus of intergovernmental relations, and such a centralizing interpretation of competences deeply affected that equilibrium.

An interesting (and paradoxical) case where a court upheld asymmetries is provided by a symmetrical constitutional system, namely the Russian Federation. As the body entitled to resolve disputes of competences between central and subnational governments as well as between subnational governments, and to rule over the constitutionality of national and subnational laws, the Russian Constitutional Court played a vital role in the period of political decentralization that

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<sup>286</sup> Bossacoma and Sanjaume, “Asymmetry as a Device for Equal Recognition,” 450.

<sup>287</sup> See Giacomo Delledonne, “Federalism and Regionalism in Constitutional Adjudication,” in *Federalism and Constitutional Law. The Italian Contribution to Comparative Regionalism*, ed. Erika Arban, Giuseppe Martinico and Francesco Palermo (London and New York: Routledge, 2021), 48-64.

<sup>288</sup> Francesco Palermo, and Alice Valdesalici, “Irreversibly Different. A Country Study of Constitutional Asymmetry in Italy,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 298.

<sup>289</sup> Ibidem.

ran from 1993 to the early 2000s. Especially in the years from 1994 to 2004, the Russian Constitutional Court had to review a considerable number of cases challenging the constitutionality of subnational laws, resulting from the previous years of “wild federalism” dominated by bilateral agreements between subnational entities and the central government. Many of these cases resulted in the invalidation of these subnational laws, and despite such outcomes some republics continued to apply unconstitutional laws, for instance in Tatarstan and Chechnya. With specific regard to constitutional asymmetries, the case law of the Russian Constitutional Court confirmed the equality of subnational entities, but also acknowledged the existence of asymmetries between “subjects of the federation” (as defined by art. 5 of the Russian constitution), on the grounds of their historical, geographic, and economic characteristics.<sup>290</sup> Specifically, in its decision of 14 July 1997, the Constitutional Court confirmed the constitutionality of the status of those subnational entities in which one subnational entity constitutes part of another (so-called *matreshka*), by stating that “considering traditions and the specificities of legal regulation, the Constitution permits that specific legal status is granted to some subnational entities. In particular, article 66 of the Constitution illustrates this fact by permitting autonomous region to be part of the territory of another subnational entity”.<sup>291</sup> This position was later upheld in a following case in 1998,<sup>292</sup> stressing that asymmetry is “permitted under exceptional cases, directly prescribed by law, and with due consideration for the territorial principles of federation, differentiation of economic and geographic differences among subnational entities and the preservation of state integrity”.<sup>293</sup> Paradoxically, in a constitutionally symmetrical system as the Russian Federation, the Constitutional Court defends the exceptionality of asymmetries, without ruling them out altogether.

Moving to South-East Asia, in Indonesia there are two judicial bodies that have the power to resolve disputes between the central and subnational levels, namely the Supreme Court and the Constitutional Court. The Constitutional Court can review the constitutionality of central legislation to assess their compliance with the Indonesian constitution, but not of subnational legislation. The constitutionality of subnational legislation can be reviewed only by the Supreme Court, which has broad powers to review secondary legislation and ensure its compliance with national legislation. Despite these powers and its unique position in reviewing subnational legislation, the case law of the Indonesian Supreme Court is particularly poor, raising considerable

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<sup>290</sup> Elena A. Kremyanskaya, “Constitutional Asymmetry in Russia: Issues and Developments. A Country Study of Constitutional Asymmetry in the Russian Federation,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 418.

<sup>291</sup> Russian Constitutional Court, Resolution N 12-P, 14 July 1997.

<sup>292</sup> Russian Constitutional Court, Resolution N 26-P, 17 November 1998.

<sup>293</sup> Kremyanskaya, “Constitutional Asymmetry in Russia,” 419.

doubts about its reliability when dealing with disputes between the central and subnational levels.<sup>294</sup> For its part, the Constitutional Court is considered to be reasonably professional and has played a significant role in defining the relative areas of jurisdictions between the central and subnational levels, at times confirming the existing asymmetries. For example, in the *Papua gubernatorial election case* in 2013,<sup>295</sup> the Court held that the practice of the traditional *Noken* voting system used in the special region of Papua is a legitimate expression of the local customs and as such is protected by art. 18B(2) of the Indonesian constitution, which provides that the state “recognizes and respects the *adat* [customary] law communities and their traditional rights”.<sup>296</sup> Even though this decision upheld asymmetry and had received praise from those who seek broader recognition of customary law and practices in the subnational entities, these local voting processes can be highly problematic from a democratic perspective, as they do not ensure free and fair elections, nor the transparency of the electoral process.<sup>297</sup>

In India, the arbiter of disputes among tiers of government is the Supreme Court, as art. 131 of the Indian constitution provides that the Supreme Court has original jurisdiction to decide on any dispute. Interpreting its role, the Court was often criticized as being too active and intrusive in the domains reserved to the legislative and executive. Despite such criticisms, the Indian Supreme Court often defended the rights of the subnational entities, especially in matters related to the destabilizing attempts of the central government to weaken state governments.<sup>298</sup> Concerning the role of the Supreme Court on interpreting asymmetries, it should be noted that its judgment on the dramatic re-design of the status of Jammu and Kashmir in 2019 is much awaited. Despite the 2019 Jammu and Kashmir (Reorganization) Act being challenged shortly after its enactment, the issue has been pending for over two years now. Such legislation, which followed a Presidential Order, significantly changed the autonomy of the state of Jammu and Kashmir, originally being the only Indian state entitled to its own constitution. The 2019 legislation turned Jammu and Kashmir into two separate union territories, and as such they now enjoy much less autonomy than was granted to them at the time of accession to the Indian Union and entrenched in art. 370 of the Indian constitution. Therefore, the awaited decision of the Supreme Court will

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<sup>294</sup> Simon Butt, “Provincial Asymmetry in Indonesia: What is so “Special” About it? A Country Study on Constitutional Asymmetry in Indonesia,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 243.

<sup>295</sup> Decision of the Constitutional Court No. 14/PHPU.D-XI/2013.

<sup>296</sup> Indonesian constitution, art. 18B(2).

<sup>297</sup> Butt, “Provincial Asymmetry in Indonesia,” 245-246.

<sup>298</sup> Rajendra Kumar Pandey, “Accommodating Diversity, Consolidating Nationhood. A Country Study of Constitutional Asymmetry in India,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 219.

be extremely relevant as it has the potential to re-establish the greatest source of constitutional asymmetry in India.

In conclusion, this brief overview shows how courts are a relevant factor in (a)symmetrization processes, as they can facilitate or hinder their development.<sup>299</sup> Despite their great significance, in this research it was decided not to include the role of courts among the legal factors that are expected to have an impact on the degree of constitutional asymmetry. This choice mainly derived from the fact that courts appear to impact more on the dynamics of asymmetries (i.e., on their development over time), rather than on a specific degree of asymmetry that came by design. As will be further explained in the rest of the thesis, the analysis conducted in this study provides for a static picture of the current constitutional arrangements in the case studies, therefore it would be challenging to include a dynamic element as the role played by courts. Moreover, in methodological terms, the inclusion of courts would have required further specification on how to detect the impact, and how to define it, in order to allow meaningful and coherent comparisons across cases. It would also have required framing the role of courts in terms of constitutional design, since the legal factors identified in the research are all linked to distinctive elements of constitutional design. For example, courts could be framed in terms of composition of the bench or competences of courts, but the relevance that these elements have on the behavior of courts in decisions concerning asymmetries should be first tested. For the purpose of this research, it was important to point out as a contextual element that constitutional and supreme courts do play an important role as they can shape the degree of asymmetry and this should be considered when dealing with constitutional asymmetries, but in analytical and methodological terms it was not possible to include this aspect as well in this stage. Future research could explore possible pathways to include the role of courts in assessing the dynamics of asymmetries.

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<sup>299</sup> Patricia Popelier and Maja Sahadžić, “Conclusion. A Country Studies-Based Deliberation on Constitutional Asymmetry in Multi-tiered Multinational Systems,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 501.

## 2.2 Measuring constitutional asymmetry

Having theoretically defined constitutional asymmetries, we can now shift towards a more “operational” definition. As already recalled in the previous pages, constitutional asymmetries can emerge to different degrees, and yet in the literature there are no systematic comparative analyses on what the causes of such differences in intensity are. Nonetheless, the literature provides some meaningful attempts to measure the degree of federalism and decentralization, such as those by Lijphart and Requejo, who both develop their own set of indicators. On the one hand, Lijphart mixed the dichotomies federal/unitary states and decentralized/centralized states, showing the close link between the two sets, as most federal systems are decentralized, and most unitary systems are centralized.<sup>300</sup> Moreover, Lijphart identified a few indicators to measure the degree of federalism: the cameral structure,<sup>301</sup> the flexibility of the constitution and the existence of judicial review,<sup>302</sup> the independence of the central bank.<sup>303</sup> On the other hand, Requejo conceptualized federalism along four axes: uninational/plurinational; unitarianism/federalism; centralization/decentralization; symmetry/asymmetry.<sup>304</sup> For each axis, Requejo developed a set of indicators. Regarding the symmetry/asymmetry axis, the author does not make any distinction between the degrees of asymmetry, but simply between states which clearly display a number of asymmetries and those which do not,<sup>305</sup> thus reinforcing the claim that a systematic study on the degree of asymmetry is yet to be undertaken. However, it is interesting to recall Requejo’s conclusion regarding the link between plurinational federal systems and asymmetries, that “plurinational federations/regional states are more asymmetrical in constitutional terms than uninational federations”.<sup>306</sup>

Moving more specifically to the measurement of constitutional asymmetries, a range of previous research can be identified.

### 2.2.1 Palermo: the application of game theory

A fascinating perspective on how to determine the extent of asymmetry in multi-tiered systems is offered by Palermo, who applied game theory to asymmetries in federal systems and identified three different scenarios: zero sum games (cooperative theories); positive/negative sum

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<sup>300</sup> The only exceptions of unitary and decentralized states are Japan and the Nordic countries (see Lijphart, *Patterns of Democracy*, 177-179).

<sup>301</sup> Lijphart, *Patterns of Democracy*, 201-203.

<sup>302</sup> Lijphart, *Patterns of Democracy*, 218-219.

<sup>303</sup> Lijphart, *Patterns of Democracy*, 236-238.

<sup>304</sup> Ferran Requejo, “Federalism and Democracy,” in *Federal Democracies*, ed. Michael Burgess and Alain G. Gagnon (London and New York: Routledge, 2010), 284-291.

<sup>305</sup> Requejo, “Federalism and Democracy,” 286.

<sup>306</sup> Requejo, “Federalism and Democracy,” 289.

games (prisoner paradox), and equilibrated outcomes (Nash equilibrium).<sup>307</sup> In the first case, as the overall level of asymmetry in the constitutional system is constant, then the increase of the degree of asymmetry of one constituent unit leads to the decrease of the degree for another unit, as it is a zero-sum game. In other words, the asymmetry granted to one unit is translated into the loss of asymmetry by another unit, since it is considered a limited resource. Palermo recalls the example of the Italian regional system, where the failed constitutional reform of 2016 would have reduced the autonomy of ordinary regions to increase that of the special regions.<sup>308</sup> The second scenario provides that the final sum of asymmetry may be positive (overall gain for the system) or negative (overall loss for the system). In a complex system such as the European Union, the territorial competition for resources, in the absence of cooperation, may lead to a great advantage for some at the expense of others, as in the prisoner paradox<sup>309</sup>. Finally, the third scenario leads to a more equilibrated and efficient outcome for all units, in which asymmetry is at the minimum level.

Even though this approach does not systematize or quantify the degrees of constitutional asymmetry in a multi-tiered system, it does provide an example of a theoretical framework that applies a quantitative discipline (i.e., mathematics) to the legal field, as the current research intends to achieve with the adoption of the Qualitative Comparative Analysis in a project within comparative constitutional law.

### 2.2.2 Sahadžić: a first measure of constitutional asymmetry

A more precise measure of constitutional asymmetry can be found in Sahadžić's research. In her comparative study, she confirmed that constitutional asymmetries are more likely to occur in multinational multi-tiered systems than in non-multinational frameworks,<sup>310</sup> as previously argued by Requejo<sup>311</sup> and Stepan.<sup>312</sup> To explore this link, Sahadžić measures the degree of constitutional asymmetry (mild, moderate, strong)<sup>313</sup> on the basis of three indicators (status, powers and competences, fiscal autonomy), each having several sub-indicators.<sup>314</sup> To assign scores to each indicator and sub-indicator, Sahadžić relied on qualified respondent's questionnaires designed following a Likert scale and distributed to a number of national experts.

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<sup>307</sup> Francesco Palermo, "Asimmetria come Forma e Formante dei Sistemi Composti," *Istituzioni del Federalismo*, vol. 2 (2018), 268-271.

<sup>308</sup> Palermo, "Asimmetria come Forma e Formante," 270.

<sup>309</sup> Palermo, "Asimmetria come Forma e Formante," 271.

<sup>310</sup> Sahadžić, *Asymmetry*, 83.

<sup>311</sup> Requejo, "Federalism and Democracy," 289.

<sup>312</sup> Stepan, "Federalism and Democracy," 29-30.

<sup>313</sup> Sahadžić, *Asymmetry*, 80-84.

<sup>314</sup> Sahadžić, *Asymmetry*, 76-79.



For the distinct status of a subnational entity, namely “the power of the subnational entity to define its specific position at the central level”,<sup>315</sup> Sahadžić explored whether the status of a specific subnational entity is recognized in constitutional or legal acts at the central level; whether the subnational entity has institutional autonomy; whether a subnational entity enjoys the guarantees of representation in central level institutions that put them in a different position; whether a subnational entity is favored with a specific scheme of involvement in constitutional reform procedures and decision-making in the central institutions; whether a subnational entity benefits from veto powers in central level institutions; whether there are specific locks for the protection of autonomy at the central level; and whether the central government has the power to supervise the content of decisions made by a subnational entity.<sup>316</sup>

Concerning the distribution of powers and competences, Sahadžić intends to track “the extent, type, and nature of assigned powers and allocated competences”.<sup>317</sup> She examines whether a specific subnational entity enjoys a broader or narrower set of competences; whether difference exists in the techniques of allocation of powers for a specific subnational entity; whether there is a distinction between different sets of competences for specific subnational entities; whether a subnational entity is allowed to opt-in or opt-out with regard to specific competences; whether a subnational entity has an opportunity to exercise autonomy at a different speed; and whether a subnational entity has the power to formulate measures enforced in the subnational entity.<sup>318</sup>

Finally, in regard to fiscal autonomy, Sahadžić analyzes whether “tax-raising and expenditure autonomy of the subnational entity is restricted, substantial, or the same compared with the other subnational entities”.<sup>319</sup> To do so, she explores whether a subnational entity has the power to raise its own taxes; whether a subnational entity has the discretion to set bases and rates for major taxing powers; whether a subnational entity has the power to raise revenues; whether a subnational entity is responsible for spending capacity when budgetary power is delegated to the entity; whether a subnational entity relies on transfers; and whether a subnational entity is subject to budgetary control over borrowing.<sup>320</sup>

Sahadžić’s work is extremely helpful because she set a foundation against which constitutional asymmetry can be measured, even though the choice of a Likert scale allows for a degree of subjectivity, hindering the potential for cross-country comparability of results.

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<sup>315</sup> Sahadžić, *Asymmetry*, 76.

<sup>316</sup> Sahadžić, *Asymmetry*, 77.

<sup>317</sup> Ibidem

<sup>318</sup> Sahadžić, *Asymmetry*, 77-78.

<sup>319</sup> Sahadžić, *Asymmetry*, 78.

<sup>320</sup> Ibidem

Nonetheless, thanks to her comparative analysis, Sahadžić provided for a descriptive analysis of strong and weak asymmetries,<sup>321</sup> as summarized in the following table.

| <i><b>Intensity</b></i> | <i><b>Qualitative indicators</b></i>                                                                                                                                                                                                                                                          |                                                                                |                                                                                                                                 |
|-------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------|
|                         | <b>Status of constituent units</b>                                                                                                                                                                                                                                                            | <b>Distribution of powers</b>                                                  | <b>Fiscal powers</b>                                                                                                            |
| <b>Weak</b>             | <ul style="list-style-type: none"> <li>Representation/involvement in decision-making varies but not to the extent that under-empowered subnational entities cannot weigh in on central decision-making;</li> <li>Central oversight is in place with some detailed differentiation.</li> </ul> | Subnational entities have different sets of powers, but only in detail.        | All subnational entities have more or less the same fiscal powers, even if variations are noticeable as to conditions or forms. |
| <b>Strong</b>           | <ul style="list-style-type: none"> <li>The privileged status results in a quasi-veto power;</li> <li>Central oversight is absent with regard to privileged entities, but preponderant towards others.</li> </ul>                                                                              | Some subnational entities have substantially more (or less) power than others. | Some subnational entities have substantial fiscal autonomy, whereas others have (almost) none.                                  |

Table 3: Descriptive definition of strong or weak constitutional asymmetry<sup>322</sup>

### 2.2.3 Popelier: the autonomy and cohesion index

As already mentioned, the objective of this research is not only to describe, but also to measure constitutional asymmetry producing comparable cross-country results. To do so, Popelier's model for measuring autonomy of subnational entities will be taken as reference.<sup>323</sup> Indeed, this model allows for a measurement of the autonomy of component units according to the same three dimensions used by Sahadžić (status, powers, fiscal arrangements), assigning a score for each indicator to each subnational unit. According to Popelier, "status" refers to the identification of the subnational entities; "powers" concern the allocation of legislative, executive, administrative and judicial powers to the central and subnational entities; and "fiscal arrangements" refer to the financial relations between the central and the subnational levels of authority.<sup>324</sup>

<sup>321</sup> Sahadžić, *Asymmetry*, 84-88.

<sup>322</sup> Source of the table: Sahadžić, *Asymmetry*, 84-88.

<sup>323</sup> See Patricia Popelier, *Dynamic Federalism. A New Theory for Cohesion and Regional Autonomy* (London and New York: Routledge, 2021).

<sup>324</sup> Popelier, *Dynamic Federalism*, 54.

The scores are then all converted to a value between 0 and 1, and the systems are then qualified as low (0 to 0.33), medium (0.34 to 0.66), and high (0.67 to 1) degree of autonomy. This allows for the evaluation of autonomy for each indicator, as well as on an overall basis (obtained as a mean of the three values). The measurement of autonomy is the essential first step in order to measure constitutional asymmetry, as the value of constitutional asymmetry is obtained by the subtraction of the values of autonomy previously calculated, in terms of every single dimension or in the overall spread. Once all the autonomy scores for the case studies are calculated, it will be possible to evaluate whether or not it is possible to use the same intervals to qualify a low, medium or high degree of constitutional asymmetry as in the case of the degree of autonomy.<sup>325</sup>

|                     | Autonomy Flemish<br>community | Autonomy German<br>community | <b>Constitutional<br/>asymmetry</b> |
|---------------------|-------------------------------|------------------------------|-------------------------------------|
| Status              | 0.74                          | 0.61                         | <b>0.13</b>                         |
| Powers              | 0.97                          | 0.76                         | <b>0.21</b>                         |
| Fiscal arrangements | 0.82                          | 0.54                         | <b>0.28</b>                         |
| <b>Overall</b>      | 0.84 (high)                   | 0.64 (medium)                | <b>0.20</b>                         |

Table 4: Example of measurement of autonomy and asymmetry in Belgium<sup>326</sup>

Since Popelier's indexes are widely comprehensive, a selection had to be made to conduct a feasible measurement of autonomy (and then asymmetry), which is briefly summarized below, and is displayed in detail in Appendix 2. Besides, Popelier also suggests that, while she adopts a maximalist approach, her index may be reduced "to a more practical toolbox",<sup>327</sup> taking a minimalist approach. Indeed, the indexes were selected on the basis of the objective of this research, i.e., those aspects that were more likely to highlight asymmetry.

For "status", the selected categories were constitutional self-definition, subnational constitutional autonomy, legislative level, executive level, and organization of courts. More precisely, Popelier constructed the category of constitutional self-definition along two sets of indicators. The first examines "whether the tier is recognized as a constituent unit of the entire system",<sup>328</sup> while the second measures the power to secede. Similarly, to measure subnational constitutional autonomy, the index focused on the strength of the power to adopt subnational constitutions through the adoption of two indicators. The first measured the scope of constitutional autonomy, namely to what extent subnational entities can decide how to organize

<sup>325</sup> As also argued by Popelier in *Dynamic Federalism*, 84-85.

<sup>326</sup> Source of the table: Popelier, *Dynamic Federalism*, 268.

<sup>327</sup> Popelier, *Dynamic Federalism*, 69.

<sup>328</sup> Popelier, *Dynamic Federalism*, 92-93.

themselves, while the second assessed the extent to which SNEs can take these decisions autonomously.<sup>329</sup> Moreover, Popelier identified four categories of constitutional matters: identity clauses, representative structures and the organization of public authority, fundamental rights, and policy principles.<sup>330</sup> Then, concerning the legislative level, autonomy was represented by two indicators: one for shared rule, namely the representation of SNEs in the central lawmaking body, and another for self-rule, namely the presence of a subnational lawmaking body. A similar approach was taken at the executive level as well, taking into account the representation of SNEs in the central executive body and at the subnational level.<sup>331</sup> Finally, the index on the organization of courts examined whether subnational entities can organize their own courts, with additional scores if the SNE is represented in central supreme courts.<sup>332</sup>

Moving to the “powers” indicator, the selected subcategories were the scope of powers, the allocation techniques, the political federalism dispute resolution, and the judicial dispute resolution. To measure the scope of powers, Popelier identified five categories: economic purposes, political control, multinational conflict management, territorial management, or the residual category.<sup>333</sup> The allocation techniques refer to whether SNEs enjoy administrative or implementation powers, concurrent powers, and exclusive powers.<sup>334</sup> Concerning political federalism dispute resolution, from an autonomy perspective, the issue revolves around the extent to which the subnational entity has control over the management of political conflict,<sup>335</sup> while the index on judicial federalism dispute resolution examines the representation of the particular subnational entity in the appointment procedure of judges.<sup>336</sup>

Finally, for the “fiscal arrangements” dimension, the selected category was subnational taxes, namely whether SNEs have tax autonomy.<sup>337</sup> It should be clarified that Popelier’s indexes on fiscal arrangements are much more comprehensive, including the assessment of borrowing powers, shared tax revenues, conditional grants, and fiscal discipline rules. Despite offering a complete picture of subnational autonomy in the fiscal domain, in terms of feasibility the present research decided to focus on only one of these indexes. The choice to select the index on subnational taxes has to do with the fact that having taxing powers makes subnational entities “less dependent on decisions adopted by the central government”,<sup>338</sup> irrespective of their actual use of such powers,

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<sup>329</sup> Popelier, *Dynamic Federalism*, 105.

<sup>330</sup> Ibidem

<sup>331</sup> Popelier, *Dynamic Federalism*, 116.

<sup>332</sup> Popelier, *Dynamic Federalism*, 134-135.

<sup>333</sup> Popelier, *Dynamic Federalism*, 140-141.

<sup>334</sup> Popelier, *Dynamic Federalism*, 148-151.

<sup>335</sup> Popelier, *Dynamic Federalism*, 165-166.

<sup>336</sup> Popelier, *Dynamic Federalism*, 169-170.

<sup>337</sup> Popelier, *Dynamic Federalism*, 182-183.

<sup>338</sup> Popelier, *Dynamic Federalism*, 182.

and thus is used as a proxy of subnational autonomy and asymmetries in fiscal relations. Therefore, the index on subnational taxes measures whether subnational entities have taxing powers, and if so if they can set the base and/or rate of only minor taxes or also of major taxes, such as personal income, value-added, or corporate taxes. Another aspect that is assessed is whether subnational entities can raise taxes with or without substantial limitations from the central authority. Moreover, the index measures whether subnational entities can introduce new taxes and set reliefs. As already mentioned, asymmetries in the subnational taxing powers are used as a proxy for asymmetries in the fiscal domain. However, for a complete picture on the asymmetries in fiscal arrangements it would be necessary to assess subnational autonomy in all indexes of the fiscal dimension, as this would offer greater clarity on the asymmetries actually in place.

In conclusion, there are a number of additional reasons that led to the adoption of Popelier's autonomy indexes, which all relate to this attempt to build a new theory of dynamic federalism. Starting from Friedrich's approach on federalism as a process rather than as a fixed design,<sup>339</sup> Popelier developed a theory based on the balance between both autonomy and cohesion,<sup>340</sup> as well as on the notion of flexibility as "essential to respond to the exigencies of the moment".<sup>341</sup> In such a theory, the idea of constitutional asymmetries as a flexible solution to accommodate diversity in divided societies fits quite easily. Moreover, Popelier justifies the legal-institutional approach of her theory by arguing that "institutional instruments and procedures can be subjected to constitutional engineering",<sup>342</sup> the same reason that led this research to focus on legal factors rather than on extra-legal factors creating asymmetry.

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<sup>339</sup> See Carl J Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Waltham: Blaisdell Publishing Company, 1968); Carl J Friedrich, "New Tendencies in Federal Theory and Practice," *Jahrbuch des Öffentlichen Rechts* 14 (1965); Carl J Friedrich, *Trends of Federalism in Theory and Practice* (New York: Frederick A. Praeger, 1968).

<sup>340</sup> Popelier, *Dynamic Federalism*, 52.

<sup>341</sup> Popelier, *Dynamic Federalism*, 56.

<sup>342</sup> Popelier, *Dynamic Federalism*, 57.

### *2.3 Legal factors conducive to constitutional asymmetries*

As anticipated in the introduction, the objective of the research is to determine what legal factors<sup>343</sup> determine a high, medium, or low degree of constitutional asymmetry in divided multi-tiered systems. More precisely, since constitutional asymmetries are considered a specific model of constitutional design, this paragraph explores the legal factors that normally have an impact on the process of constitutional design and that are conducive to constitutional asymmetries as well. The paragraph defines four legal factors influencing the introduction of constitutional asymmetries, that will be later translated into the conditions of the Qualitative Comparative Analysis (QCA)<sup>344</sup> to determine the extent to which these factors lead to a certain degree of constitutional asymmetry, whether high, medium, or low, or conversely to constitutional symmetry. In particular, the factors seek to unpack four main dynamics: how many SNEs enjoy differentiated autonomy (i.e., the territorial distribution of asymmetry); how differentiated autonomy can be granted to SNEs (i.e., the legal procedures); how SNEs are designed (i.e., the internal distribution of ethnonational groups); and how international and subnational actors influence the degree of asymmetry (i.e., the impact of the actors involved in the constitution-making process). Certainly, the number of legal factors identified in this paragraph is not imagined to be exhaustive, and follow-up research may discover other factors that would further enrich the analysis and sharpen the understanding of constitutional asymmetries. For example, other interesting elements that could be further explored are the presence of judicial review and the design of constitutional courts, the representation of subnational entities in the central level legislature, the mechanisms for intergovernmental relations, the presence of eternity clauses in the constitution, the degree of flexibility in the constitution.<sup>345</sup>

#### 2.3.1 Territorial distribution of constitutional asymmetries

The first legal factor takes into account how constitutional asymmetries are distributed within the territory, as they may involve one or more of the subnational entities constituting the federal system, or only some peripheral political entities.<sup>346</sup> Comparative federal studies show that differentiated autonomy can be potentially granted to all the subnational units (e.g., Belgium, Spain); to almost all component units but one (e.g., England in the UK); to more than one unit, but not all units (e.g., the special regions in Italy); to only one unit (e.g., the Kurdistan Region in Iraq). This categorization shifts the focus from the type of territorial settlement to the number of

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<sup>343</sup> By “legal factors”, I will make reference to those external factors which refer to how the law affects the constitutional system, and more specifically the degree of constitutional asymmetry.

<sup>344</sup> The criteria for the calibration of the conditions will be laid down in the chapter 3, on the basis of the theoretical foundations explored in this paragraph.

<sup>345</sup> See also Simeon, “Constitutional Design,” 246-248.

<sup>346</sup> Watts, “The Theoretical and Practical Implications,” 28.

subnational entities involved in the negotiation for more autonomy. Indeed, the literature tends to classify asymmetrical settlements by making reference to the unitary/federal dichotomy,<sup>347</sup> a distinction that is superfluous once we refer to multi-tiered systems, i.e., those systems which present forms of decentralization in even one subnational unit within the territory.<sup>348</sup> In this research, what matters is whether differentiated autonomy is concentrated in a specific part of the territory (one or few entities) or institutionalized among all the component units, leading to certain degrees of constitutional asymmetry. The Qualitative Comparative Analysis will explore how many subnational entities are involved (e.g., only one; a few; or (almost) all), and whether this produces a high, medium, or low degree of constitutional asymmetry, or else constitutional symmetry.

The expectation is that a higher degree of constitutional asymmetry will be found in countries that limit differentiated autonomy only to one or a small number of component units (e.g., Italy designing the five special regions), rather than institutionalizing them over the entire territory. In fact, if substantive autonomy is granted to all the subnational entities, then it is unlikely that the asymmetry between the entities will be high. Moreover, Simeon argues that the number and character of the constituent units is especially relevant for divided societies, since a small number of units could lead to instability, possibly resulting in secession, while a large number may be conducive to the opposite condition, i.e., subnational governments subordinate to the central level.<sup>349</sup>

### 2.3.2 Procedures to introduce constitutional asymmetries

The second legal factor, strictly related to the number of subnational entities enjoying differentiated autonomy, concerns the procedures to introduce asymmetries in the legal framework. Constitutional asymmetries may be pre-determined and codified in the constitution or may be allowed by providing for a general procedure,<sup>350</sup> leaving the opportunity to the constituent units to self-determine themselves.<sup>351</sup> For example, the Italian constitution grants special status to

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<sup>347</sup> Generally, the literature identifies four main types of asymmetrical settlements: a unitary state may grant autonomy status to just one unit (the so-called “federacy”); a unitary state may grant different degrees of autonomy to more than one unit; a multi-tiered system may grant a differentiated status to one or more of its constituent units; a multi-tiered system may institutionalize asymmetry among its constituent units (see John McGarry, “Asymmetry in Federations, Federacies, and Unitary States” *Ethnopolitics* 6, no. 1 (2007): 105-116; Weller, “Introduction”, 8-9).

<sup>348</sup> For terminology references, see Introduction (n 5).

<sup>349</sup> Simeon, “Constitutional Design,” 246.

<sup>350</sup> Palermo, “«Divided We Stand»,” 164-165.

<sup>351</sup> Such logic recalls the concepts of pre-determination and self-determination of groups entitled to share power in a consociation made by Lijphart. In the first case, entitled groups are specified in the constitutional text (e.g., the so-called “constituent peoples” in the Bosnian constitutional preamble); in the other case, entitled groups may manifest themselves in a later stage, after the adoption of the constitution, thus resulting in a more flexible and inclusive arrangement (see Lijphart, “The Wave,” 50-51; Lijphart, *Thinking about Democracy*, 66-74).

five specific regions (art. 116.1),<sup>352</sup> while providing a general procedure to ordinary regions that might want more autonomy in specific sectors (art. 116.3).<sup>353</sup> Palermo observes that the second procedure allows further development of the flexible and functional characteristics of the asymmetrical process, and most interestingly this approach relies on a strong culture of cooperation, founded on asymmetrical cooperation between the center and the peripheries.<sup>354</sup> Moreover, constitutional asymmetries are often introduced by bilateral acts,<sup>355</sup> as in the case of South Tyrol with the De Gasperi-Gruber Agreement in 1946, later to be integrated in the constitution. This was also the case of Russia during the period of “wild federalism” between 1985 and 1993, when many bilateral agreements were negotiated between some subnational entities and the central government.<sup>356</sup> On this point, Popelier argues that bilateral agreements have the potential to give SNEs the opportunity to negotiate for more autonomy, thus leading to higher asymmetry.<sup>357</sup> The QCA will determine what procedure produces a low, medium, or high level of constitutional asymmetry, and possibly allow for determination of whether the number of actors is closely related to the adopted procedure. In this respect, the expectation is that a formal entrenchment of asymmetries in the constitution would enhance the degree of asymmetry in the system, given the strong form of recognition provided by constitutional provisions.

Another interesting aspect that could be explored is whether a more or less rigid constitution has a different impact on the degree of constitutional asymmetries. As mentioned in the previous pages, constitutional asymmetries were introduced both by states with a written constitution (e.g., Belgium, Italy, Spain), as well as through ordinary legislation by states that do not have a single homogeneous constitutional text (e.g., United Kingdom). As recalled in the previous paragraph, this element was also analyzed by Lijphart concerning the degree of federalism depending on the rigidity or flexibility of the constitution. According to Lijphart, the more rigid the constitution (i.e., the more difficult it is to amend), the higher the degree of federalism and decentralization.<sup>358</sup> Despite the great interest, this last aspect was not included as an explanatory factor in this research, since the categories of “rigid” and “flexible” tend to be blurry and would require further analysis

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<sup>352</sup> “Il Friuli Venezia Giulia, la Sardegna, la Sicilia, il Trentino-Alto Adige/Südtirol e la Valle d’Aosta/Valleé d’Aoste dispongono di forme e condizioni particolari di autonomia, secondo i rispettivi statuti speciali adottati con legge costituzionale.”

<sup>353</sup> “Ulteriori forme e condizioni particolari di autonomia, concernenti le materie di cui al terzo comma dell’articolo 117 e le materie indicate dal secondo comma del medesimo articolo alle lettere l), limitatamente all’organizzazione della giustizia di pace, n) e s), possono essere attribuite ad altre Regioni, con legge dello Stato, su iniziativa della Regione interessata, sentiti gli enti locali, nel rispetto dei principi di cui all’articolo 119. La legge è approvata dalle Camere a maggioranza assoluta dei componenti, sulla base di intesa fra lo Stato e la Regione interessata.”

<sup>354</sup> Palermo, “Divided We Stand,” 165.

<sup>355</sup> Palermo, “Divided We Stand,” 167-169.

<sup>356</sup> See Kremyanskaya, “Constitutional Asymmetry in Russia,” 403-405.

<sup>357</sup> Popelier, *Dynamic Federalism*, 223-224.

<sup>358</sup> Lijphart, *Patterns of Democracy*, 204-225.



in order to develop a classification. However, it could be included as a separate condition in follow-up research.

### 2.3.3 Design of the subnational entities

The third legal factor concerns the internal distribution of ethnocultural groups in the subnational entities, namely whether the SNEs are designed as homogeneous or heterogeneous. As also confirmed by the literature on constitutional design, this is a relevant aspect. Horowitz suggested that homogeneous units may foster intra-group competition at the expense of an exclusive inter-group competition, while the groups in heterogeneous units have more experience in political socialization, as politicians from different groups become used to dealing with each other at the lower level before they need to do so at the center.<sup>359</sup> For his part, Lijphart observed that territorial autonomy (and thus federalism) is desirable where there is a homogeneous distribution of groups, while non-territorial autonomy in sectors such as education and culture is more appropriate where the distribution of groups is heterogeneous.<sup>360</sup> Moreover, Simeon observed that the “drawing of borders is a much-neglected issue in comparative federalism; but it is a critical issue in the design of new federations”,<sup>361</sup> since once they are drawn, borders can be difficult to change as “interests and identities coalesce around them”.<sup>362</sup> Multi-tiered systems present a variety of designs when it comes to the internal composition of subnational entities. Some systems may establish homogeneous units (e.g., Belgium), others heterogeneous (e.g., Nigeria),<sup>363</sup> and some others a mixture of both (e.g., Bosnia-Herzegovina, with a heterogeneous Bosniac-Croat entity and a homogeneous Serb entity).

The QCA will determine whether a specific design of the subnational entities is conducive to a certain degree of constitutional asymmetry. The related expectation is that the presence of homogeneous subnational entities would lead to stronger asymmetries within the system, and conversely the presence of heterogeneous entities would decrease the degree of asymmetry.

### 2.3.4 Actors involved in the constitution-making process

The fourth factor revolves around the constitution-making process,<sup>364</sup> and in particular around the actors involved in this. Indeed, the involvement of international actors, rather than

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<sup>359</sup> Horowitz, “Constitutional Design,” 25.

<sup>360</sup> Lijphart, “The Wave,” 51.

<sup>361</sup> Simeon, “Constitutional Design,” 246.

<sup>362</sup> Simeon, “Constitutional Design,” 246.

<sup>363</sup> See Rotimi Suberu, “Federalism in Africa: The Nigerian Experience in Comparative Perspective,” *Ethnopolitics* 8, no. 1 (March 2009): 67–86.

<sup>364</sup> For more on this issue, see also Simeon’s discussion on the role played by citizens, politicians, experts, international actors, and courts (Simeon, “Constitutional Design,” 252–254).

national or even subnational actors in the process might substantially influence the model of constitutional design adopted in the system, since the international community might endorse one model rather than another,<sup>365</sup> as mentioned in the previous paragraphs. Moreover, the role of international actors in the processes of constitution making in divided societies was particularly meaningful in cases such as Bosnia-Herzegovina and Northern Ireland, where power-sharing arrangements were strongly supported by the United States and the rest of the international community. Generally, this research will make reference to four main constitution-making processes,<sup>366</sup> depending on the actors involved: written constitutions “imposed” by international actors on another state (i.e., external process);<sup>367</sup> constitutions written by national actors with the direct involvement of international actors (i.e., internationally assisted process);<sup>368</sup> constitutions written by national actors involving subnational actors (i.e., participatory process);<sup>369</sup> constitutions written only by national actors within the constituent assembly (i.e., internal process).

The QCA will explore whether the presence of international and subnational actors in the constitution-making process determines a high, medium, or low degree of constitutional asymmetry, or conversely constitutional symmetry. Since this aspect has not widely explored by the literature on asymmetric federalism, there are no clear expectations. However, it will be of great interest to assess the role played by “other” actors, i.e., international and subnational actors, to determine whether they enhance the degree of constitutional asymmetry.

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<sup>365</sup> See Will Kymlicka, “The Internationalization of Minority Rights,” in *Constitutional Design for Divided Societies*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008); Simeon, “Constitutional Design,” 254.

<sup>366</sup> de Vergottini, *Diritto Costituzionale Comparato*, 241-272.

<sup>367</sup> Comparatively speaking, this is the case of Japan after WWII and of former colonies, see Richard Albert, Xenophon Contiades, and Alkmene Fotiadou, *The Law and Legitimacy of Imposed Constitutions* (London and New York: Routledge, 2020).

<sup>368</sup> As in the case of Bosnia and Herzegovina, previously recalled.

<sup>369</sup> See for example Francesco Palermo, “Participation, Federalism and Pluralism: Challenges to Decision-Making and Responses by Constitutionalism,” in *Citizen Participation in Multilevel Democracies*, ed. Cristina Fraenkl-Haeberle (Leiden and Boston: Brill Publishing, 2015), 31-47; Palermo and Kössler, *Comparative Federalism*, 111-122.

## 2.4 Extra-legal factors conducive to constitutional asymmetries

Since this research is determined to always keep an eye on reality, we will briefly take into account a series of extra-legal factors which may be conducive to constitutional asymmetries, even though they will not become conditions in the QCA analysis. This is as societal and political factors are an essential part of the contexts introducing constitutional asymmetries to deal with divided societies, and as such they might be considered as control factors in the analysis.<sup>370</sup>

### 2.4.1 Historical reasons and periodization

A first factor to consider is the role played by history in the introduction of asymmetrical arrangements. Indeed, having different foci in mind, both Huntington and Elster coined two similar and inter-related expressions, respectively “waves of democratization”<sup>371</sup> and “waves of constitution-making”,<sup>372</sup> to look at world political and constitutional history. On the one hand, in Huntington’s periodization the focus is on democratization, identifying three waves of democratization and corresponding counter-waves of authoritarian backsliding. In Huntington’s theorization,<sup>373</sup> the first wave started in 1828 and lasted until 1922, followed by a counter-wave characterized by the rise of Nazism and Fascism (between 1922 and 1942). The second wave occurred between 1943 and 1962, followed by a second counter-wave dominated by the rise of authoritarian regimes in Latin America, Asia, Africa and South-Eastern Europe (between 1958 and 1975). Finally, the third wave began in 1974 with the fall of Salazar in Portugal and lasted until the mid-1990s, with the dissolution of the USSR and Yugoslavia. As already mentioned in the previous chapter, the third wave of democratization marked a turning point in the renewed interest in constitutional design, especially in cases of deeply divided societies.<sup>374</sup>

On the other hand, the focus of Elster’s seven waves is on the process of constitution making, understood as the drafting and adoption of new constitutions. According to such periodization, the first wave occurred in late eighteenth century, with the written constitutions of the US, Poland, and France. The second broke out after the 1848 revolutions in Europe, where many countries adopted new constitutions. Then, the next two waves occurred in the aftermath of the World Wars, with the adoption of the Weimar constitution, the new constitution of Poland

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<sup>370</sup> This paragraph reflects mainly on the role played by history, geopolitics and wealth, but other significant extra-legal factors might be the power ratio, autocracy, and separatism, as observed by Sahadžić (see Sahadžić, *Asymmetry*, 89-95).

<sup>371</sup> Samuel P. Huntington, “Democracy’s Third Wave,” *Journal of Democracy* 2, no. 2 (Spring 1991): 12-34.

<sup>372</sup> Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” *Duke Law Journal* 45: 368-373.

<sup>373</sup> For a critical perspective, see Renske Doorenspleet, “Reassessing the Three Waves of Democratization,” *World Politics* 52, no. 3 (2000): 384-406.

<sup>374</sup> See Chapter 1.1.2.

and of Czechoslovakia after the First World War, and the new constitutions in Italy, Germany and Japan which were adopted under the influence of the Allied Powers after the Second World War. The fifth wave followed the process of decolonization between the 1940s and 1960s, with the break-up of the British and French colonial empires, beginning with the new constitutions of India and Pakistan and of many African countries, closely modeled on those of the previous colonial powers.<sup>375</sup> Then, a sixth wave of constitution making occurred in the mid-1970s with the fall of dictatorships in Portugal, Spain and Greece. Finally, the last wave of constitution making is linked to the fall of communist regimes in Eastern Europe in the aftermath of the fall of the Berlin Wall and the break-up of the Soviet Union, Yugoslavia and Czechoslovakia. It is also worth noticing that Elster believed that some of these waves were spurious or accidental, such as the temporal proximity of the new constitutions drafted in the first or sixth waves, while others are nonspurious, being triggered by the same event (e.g., the end of the two World Wars, the process of decolonization) or by a chain reaction (e.g., the fall of communist regimes after 1989).<sup>376</sup>

It is interesting to recall such “waves” because, in the case of constitutional asymmetries, Weller observes that “asymmetrical state-building is a feature of the ongoing second wave of post-Cold War settlements to secessionist conflicts”.<sup>377</sup> Indeed, the end of the Cold War and the dissolution of the ethno-federation brought about a dramatic change in the international arena, with the formation of new states in Central and Eastern Europe, and it can be observed how some “waves” (i.e., the third/seventh wave, depending on the authors’ periodization) brought more asymmetries than others. Furthermore, Sahadžić confirmed that historical reasons seem to contribute significantly to constitutional asymmetries in multinational multi-tiered systems, in all three dimensions of *de jure* asymmetries (status, powers and competences, fiscal autonomy).<sup>378</sup> Therefore, history should be an element which is taken into account when analyzing the introduction of constitutional asymmetries, since it could be a significant explanatory factor.

#### 2.4.2 Process of formation

Strictly linked to history is the formation process of the multi-tiered system. Indeed, according to federal scholarship, until roughly World War I federal systems were formed following a “coming-together” process, by uniting previously sovereign entities.<sup>379</sup> After the 1920s, due to

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<sup>375</sup> See also Simeon, “Constitutional Design,” 249.

<sup>376</sup> Elster, “Forces and Mechanisms,” 371.

<sup>377</sup> Weller, “Introduction,” 7.

<sup>378</sup> In particular, she recalls examples such as Bosnia and Herzegovina with the signing of the post-conflict Dayton Agreement; Northern Ireland with the signing of the Belfast Agreement; Iraq with the drafting of a new constitution under international influence and supervision; Pakistan with its reshuffling of the British colonial rule (see Sahadžić, *Asymmetry*, 89-95).

<sup>379</sup> Palermo and Kössler, *Comparative Federalism*, 42-43.

the reconfiguration of the geopolitical landscape, most of federal settlements were “holding-together” systems, resulting from a transfer of power from a unitary state.<sup>380</sup> Regarding the latter process of formation, Stepan argued that political systems with strong unitary features might decide that the best way to preserve democracy in a country would be to “devolve power constitutionally”, turning the politics into a federal settlement.<sup>381</sup> This is especially true for systems where centrifugal forces threatened the integrity of the state, often on the basis of ethnocultural identity markers.<sup>382</sup>

As already mentioned in the previous chapter, Stepan established a link between the features of coming-together/holding-together and symmetry/asymmetry, holding that coming-together federal systems tend to be symmetrical, while holding-together federal systems tend to be multinational and asymmetrical.<sup>383</sup> Therefore, as Palermo and Kössler conclude, “historical origins are indeed very relevant in shaping the constitutional features of federal states. [...] It is important to identify historical cycles that have determined the ways of forming federations”.<sup>384</sup> Thus, the process and dynamics leading to the formation of a multi-tiered system should be taken into account while analyzing the system, in order to better frame and explain the introduction of asymmetries.

### 2.4.3 Geopolitical position

Related to the previous aspects is also the geopolitical position of the country in which constitutional asymmetries were introduced. In fact, in the literature on constitutional design, the bias of the divide between “the West” and “the rest” remains noticeable. Issacharoff argued this point while comparing Bosnia-Herzegovina and South Africa.<sup>385</sup> In both cases the adoption of a consociational model (transitional or permanent) was strongly influenced by the Western orientation or influence, even though neither country is properly in a Western geopolitical position. As previously mentioned, Lijphart’s critics have argued that the consociational model would work only in Western countries, while he responds with consociational experiences of non-Western countries such as Lebanon, Malaysia, Colombia, and South Africa.<sup>386</sup> Another interesting perspective is the one offered by Horowitz, who talks about “bias and distortions”,<sup>387</sup> and the relative attractiveness of alternative constitutional models across states and the interpretation of

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<sup>380</sup> Palermo and Kössler, *Comparative Federalism*, 43.

<sup>381</sup> Stepan, “Federalism and Democracy,” 22.

<sup>382</sup> See, for example, the cases of India, Belgium and Spain also recalled by Stepan.

<sup>383</sup> Stepan, “Federalism and Democracy,” 29-30.

<sup>384</sup> Palermo and Kössler, *Comparative Federalism*, 44.

<sup>385</sup> Issacharoff, “Constitutionalizing democracy,” 1881-1883.

<sup>386</sup> Lijphart, “The Wave,” 45.

<sup>387</sup> Horowitz, “Constitutional Design,” 31.

constitutional experiences within states. More specifically, the colonial impact of France and Britain had a deep impact on post-colonial conditions, that can and indeed do change, but powerful networks, habits, and pressures can stunt this. Horowitz also suggested that divided societies have to look to other divided societies in other regions of the world, rather than less divided societies.<sup>388</sup> Inter-regional boundaries also constitute powerful impediments to constitutional borrowings, again in a logic of West/the rest, and Horowitz concluded that there is not yet completely free trade in constitutional innovations.

Therefore, the geopolitical position of the multi-tiered system could be taken into account in the analysis as a control factor, assessing the impact of its belonging to the so-called “Global South” or “Global North”.

#### 2.4.4 Wealth

The last and perhaps most obvious extra-legal factor to take into account is the wealth of subnational entities within a multi-tiered system. Sahadžić observed that wealth emerges as a decisive factor in the intensity of constitutional asymmetry, since particularly wealthy subnational entities might use it to push for more autonomy, thus resulting in more asymmetry in the system. This is reflected in asymmetries in status, powers and competences, and fiscal autonomy,<sup>389</sup> and several examples might be recalled, such as Catalonia and the Basque Country in Spain, Flanders in Belgium, Scotland in the United Kingdom, the Kurdistan Region in Iraq. Moreover, Burgess also identified socio-economic factors as one of the preconditions of asymmetry, as “large regional economic disparities that lead inevitably to differential demands and expectations within federations”.<sup>390</sup>

In conclusion, wealth will be considered as a crucial control factor for the introduction of constitutional asymmetries in a multi-tiered system, especially in relation to asymmetries in fiscal arrangements.

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<sup>388</sup> For example, Lijphart suggested that Nigeria should have looked at the experience of Switzerland rather than the US, since the author considers the former a divided society. However, it is hard to define Switzerland as a “divided society”, as even if there are diverse identities these do not give rise to political conflict or autonomy claims. Aside from this debatable issue, it should be noted that Lijphart equally suggested that a non-Western country should have looked at the experience of a Western country.

<sup>389</sup> Sahadžić, *Asymmetry*, 89-95.

<sup>390</sup> Burgess, *Comparative Federalism*, 216.

## 2.5 Concluding remarks

This chapter sought to dive deeper into the analysis of asymmetries in multi-tiered systems to provide a sound theoretical and operational framework for the Qualitative Comparative Analysis conducted in Part II. More specifically, it recalled the distinction between *de facto* and *de jure* asymmetries and explored the different dimensions of constitutional asymmetries (status, powers, fiscal arrangements) that will be taken into account in the analysis of the case studies in the next chapters. As anticipated in the first paragraph, this research will focus on constitutional (rather than political) asymmetries since they offer greater analytical clarity and can be measured more effectively.

Moreover, by reviewing the scholarship on asymmetries in federal theory, a second task of this chapter was to highlight the gaps still present in the literature, namely the lack of systematic analysis of the degrees of constitutional asymmetries in divided multi-tiered systems, as well as consideration of the explanations of such differences in intensity. Furthermore, it was possible to identify the legal and extra-legal factors which are distinctive elements of constitutional design and conducive to the introduction of constitutional asymmetries. This was instrumental to the construction of the conditions of the QCA which will be conducted in Part II. Similarly, relying on previous research, it was also possible to define how constitutional asymmetries will be measured in Part II, making specific reference to Popelier's autonomy indexes.

## **PART TWO: METHOD AND RESULTS**

Part II constitutes the very core of the thesis, as it translates into practical terms the foundations provided in the previous part. First, chapter three is dedicated to the theoretical reasoning behind the choice of QCA as an alternative framework to explain the degrees of constitutional asymmetries. Therefore, the chapter first revives the debate on the role played by methodology in comparative constitutional law and of the interplay with the instruments of the social sciences, and then it moves to the choice of Qualitative Comparative Analysis and to the explanation of how it is conducted. The last part of the chapter is dedicated to the model that is developed in the next chapters, namely how the conditions and the outcome were constructed and calibrated. It also deals with the selection of the 16 cases used to conduct the QCA. Then, chapter four tackles in detail the methodology adopted in the research, i.e., QCA in all its stages (truth table and logical minimization), and examines the results of the QCA: the solution formulas, the parameters of fit, and the logical remainders. At the end of the chapter, it is possible to reach conclusions on the extent to which the 16 cases present the conditions, as well as how these conditions produce the outcome, i.e., a low/medium/high degree of constitutional asymmetry. Moreover, it is possible to observe whether some conditions (or a combination of conditions) are sufficient to achieve this outcome. Finally, chapter five carries out a comparative overview of the case studies, dividing them by each outcome, namely each degree of constitutional asymmetry (high, medium, and low), and constitutional symmetry. Each paragraph of the last chapter first comments on the autonomy scores of each constitutional system and the resulting asymmetry scores, and subnational autonomy is then reviewed in detail at the subnational entity level followed by the average at the country level. Then, the paragraphs address whether constitutional asymmetries “in the books” actually reflect the asymmetries “in action”.



### CHAPTER THREE

#### APPROACHING THE METHOD

This chapter is dedicated to the theoretical reasoning behind the choice of Qualitative Comparative Analysis (QCA) as an alternative framework to explain the degrees of constitutional asymmetry. Since QCA is not a methodology usually adopted in legal studies, the chapter goes rather deep into the technique and functioning of the method, so that it will be easier to follow its application in the following chapters.

First, the chapter revives the debate on the role played by methodology in comparative constitutional law, reviewing the classical approaches to comparison (classificatory, historical, normative, functional, contextual). Moreover, the first paragraph briefly explores the use of comparison by legislators and constitutional adjudicators. Then, the focus shifts towards the concept of causality in comparative constitutional law, reviewing the current debate on the potential use of social science methods, highlighting in particular the relevance of causal inference in comparative analysis.

In the second paragraph, the attention moves to the choice of Qualitative Comparative Analysis and the explanation of how it is conducted. First, QCA is framed as a set-theoretic method, exploring the main features of set-theoretic methods in general and of QCA in particular. Then, the different steps in the QCA are explained, so that it is possible to anticipate how the analysis will take place in the following chapters. Moreover, the paragraph reviews previous research adopting QCA in the legal field, more specifically in a related work on constitutional asymmetries in multi-tiered systems.

The third paragraph is dedicated to the model that will be developed in the next chapters, specifically how the conditions and the outcome were constructed.

Then, the fourth paragraph deals with the systematic case selection criteria that were adopted in order to select the 16 case studies on which the QCA will be conducted. According to such criteria, in order to be included in the target population, case studies have to be classified as divided societies and as multi-tiered systems.

Finally, the fifth paragraph explores the calibration process for the conditions and outcomes. The QCA will be conducted along three 4-value fuzzy sets and two crisp sets. The paragraph explains in detail the criteria for assigning set membership scores, to the five conditions as well as to the outcomes. As will be mentioned at the end of the paragraph, to validate the process of calibration a number of national experts were invited to participate in the research study, through a series of interviews.

### 3.1 Beyond the comparative method

#### 3.1.1 The classical approaches to the comparative method in constitutional law

Traditionally, the issue of methodology (or, more correctly, methodologies) in comparative constitutional law has been explained through the argument that “methods vary in what they *aim* to do and in *who* is engaged in comparisons”.<sup>391</sup> In fact, different actors have different goals and reasons to compare: scholars, adjudicators, and legislators are set in distinctive roles and contexts, which influence their respective methodological orientations while engaging in comparisons.<sup>392</sup> For instance, legal scholars may be interested in advancing research by drafting a “systematic taxonomical account of all forms and manifestations of a given constitutional phenomenon”,<sup>393</sup> judges may look at other jurisdictions to address a case, while constitutional drafters may engage in comparison to explore relevant alternatives when seeking effective solutions to a problematic context.

To such distinctions based on the subjects and aims involved in comparison, Hirschl adds another basic distinction regarding the comparative aspects of three interrelated branches of constitutional scholarship, namely constitutional law, constitutional theory, and constitutional studies, and their respective comparative elements. Taking them into account separately, Hirschl defines the first as the study of constitutional texts, provisions, and principles; the second as the exploration of the “foundational principles and normative considerations that ought to guide the constitutional domain and its various stakeholders”;<sup>394</sup> while the third is a domain which “complements legal and normative approaches to the study of constitutions, by deploying more social-scientific approaches and method to the study of constitutions and constitutional developments”.<sup>395</sup> In relation to the current research, this last expanding body of literature in constitutional scholarship appears to be the one that better fits the purpose and method of this thesis, since “the constitutional domain is perceived as extending beyond constitutional texts, constitutional principles or constitutional jurisprudence, to encompass historical trends, political interests, economic incentives, strategic choices and power struggles that affect and are shaped by constitutional institutions”.<sup>396</sup> On this note, it should be emphasized that Hirschl makes specific

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<sup>391</sup> Vicki C. Jackson, “Comparative Constitutional Law: Methodologies,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 54.

<sup>392</sup> See also Giuseppe de Vergottini, “Constitutional Law and the Comparative Method,” in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Cham: Springer International Publishing, 2020), 1–42.

<sup>393</sup> Ran Hirschl, “Comparative Methodologies,” in *The Cambridge Companion of Comparative Constitutional Law*, eds. by Roger Masterman, and Robert Schütze (Cambridge: Cambridge University Press, 2019), 17.

<sup>394</sup> Hirschl, “Comparative Methodologies,” 14.

<sup>395</sup> *Ibidem*.

<sup>396</sup> Hirschl, “Comparative Methodologies,” 15.

reference to the study of constitutional design, namely the core of this thesis, as a significant thread within this body of scholarship, since it combines “social-scientific empirical research with an explicit normative outlook”.<sup>397</sup> As it will be further explained in the next section, Hirschl recommends that social-science research methods are employed in the attempt to better grasp constitutional phenomena in their broader context. Aside from these wider considerations, Hirschl suggests that the addition of the “comparative element” to these three branches of scholarship has created a broader catch-all category of comparative constitutional law, defined as “the study of constitutional systems or their various components across time and place, with an aim of generating some kind of analytical yield by the act of comparison”.<sup>398</sup>

On these premises, five broad (and sometimes overlapping) classes of methodological approaches in comparative constitutional law scholarship will be briefly analyzed, concluding with a short mention of the use of comparison by constitutional courts and legislators.

#### *Classificatory approach*

The first and most classic approach is the one concerned with the classification of different legal systems into the so-called “families” of law, exploring for instance the divide between civil and common law legal systems, or between centralized and decentralized constitutional review.<sup>399</sup> A distinct contribution to the process of classification is provided by “area studies”, and insofar a key issue is “whether there are distinctive features of constitutional development in a region”,<sup>400</sup> due to prior occupation or colonization, shared ethno-cultural heritage, or other geopolitical reasons. Legal scholars are not the only ones interested in legal comparison for classificatory purposes. In fact, political scientists also conduct classificatory studies focusing on particular elements of constitutional systems, e.g., electoral systems, parliamentary and presidential systems, federal and consociational forms of state organization, which bring about new categories of constitutional systems or phenomena.<sup>401</sup> Moreover, in addition to works on “structural” issues, an emerging body of classificatory studies explore the trends in doctrinal and interpretative methodology, comparing the methodological approach of proportionality or balancing and formalism or originalism.<sup>402</sup>

As observed by Jackson, classificatory scholarship can be “backward-looking” in historical or intellectual ways, being concerned mainly with defining a framework for classification and

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<sup>397</sup> Hirschl, “Comparative Methodologies,” 15.

<sup>398</sup> Hirschl, “Comparative Methodologies,” 16.

<sup>399</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 55.

<sup>400</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 56.

<sup>401</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 57.

<sup>402</sup> *Ibidem*.

analysis, or “forward-looking”, being interested in identifying and analyzing new constitutional phenomena.<sup>403</sup>

### Historical approach

Closely related to classificatory studies, the main focus of the historical approach is to understand the development of constitutional law or constitutional systems over time, engaging in so-called “diachronic comparisons”.<sup>404</sup> Jackson distinguishes between “genetic” and “genealogical” forms of connections among systems. The former is based on the influence that one system has on the development of another, while in the latter one or more constitutional systems grew out of another, typical of countries with a colonial past.<sup>405</sup> Scholars may examine how two or more systems originated from a common legal system, developing in similar or different ways over time. Moreover, they may also explore how legal concepts that exist in one legal system influence or migrate to another, focusing on the path of ideas as well as on how they are transmitted and received.<sup>406</sup>

The framework built by historical analyses seeks both to understand the development and functioning of a particular system (or set of systems) internally, and to make it accessible to readers from other systems.<sup>407</sup> In this respect, a comparison may be implicit or explicit, since the analysis can be drawn either from the description of other legal systems or by implicit normative or functional conclusions.<sup>408</sup>

### Normative approach

The third class of methodological approach has a distinct normative aspiration. According to Kommers, “the study of comparative constitutional law can be the search for principles of justice and political obligation that transcend the culture-bound opinions and conventions of a particular political community”,<sup>409</sup> leading to a universalist and normative approach to comparative constitutional law. Such a normative category may overlap with the other categories, since classificatory, historical, or functional approaches may be motivated by the search for transcendent constitutional principles. Having such an aspiration in mind, scholars examine foreign legal sources which aim to construct a general theory, employing these sources to refine, support, or clarify their

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<sup>403</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 58.

<sup>404</sup> See de Vergottini, “Constitutional Law and the Comparative Method,” 19-21.

<sup>405</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 58.

<sup>406</sup> This last kind of historical work refers to Choudhry’s concept of “migration of constitutional ideas” (see Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2009)).

<sup>407</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 59.

<sup>408</sup> Ibidem.

<sup>409</sup> Donald P. Kommers, “The Value of Comparative Constitutional Law,” *John Marshall Journal of Practice and Procedure*, vol. 9 (1976): 692.

analysis. Recalling Hirschl's previous distinction, the normative approach falls within the domain of constitutional theory, where comparative analysis may be used to answer crucial jurisprudential or philosophical questions, such as the concept of rule of law in different legal traditions, or the nature of constitutionalism.<sup>410</sup> Moreover, it should be added that being mainly concerned with fundamental rights, universalist scholarship tends to bring together constitutional law and international law, especially international human rights and humanitarian law.

### Functional approach

The functional approach is perhaps the dominant method in comparative analysis.<sup>411</sup> According to functionalism,<sup>412</sup> the main focus of the comparison is (and should be) the function(s) of a particular institution or set of institutions in different constitutional systems. As observed by Jackson, functional work can be positive, not being concerned with normative questions but with "how different institutions may perform roughly equivalent roles, or how differences in institutional design may correspond with broader differences in political societies or behavior".<sup>413</sup> Sometimes, it can be normative, when scholars aim to identify what model of constitutional design or doctrine is the most suitable for producing normatively valuable consequences. However, the difference between the functional and the previously mentioned normative approach is in the technique of comparison, since functionalism is mainly focused on the functions of institutions or constitutional principles, and the questions of causation, rather than the purely moral and philosophical questions of the normative approach.

The techniques through which it is possible to carry out functional comparisons may vary considerably. Jackson identifies three main techniques: conceptual functionalism, detailed case studies, and large-N studies.<sup>414</sup>

The first form of analysis (i.e., conceptual functionalism) partly overlaps with the classificatory approach, since scholars advance hypotheses about the reasons and ways constitutional institutions or doctrines function as they do, and about what categories or analytic criteria better explain these functions, referring to a limited number of systems to further conceptualize their hypotheses. These studies may also include economic or behavioral models of constitutional design, models that can be entirely theoretical or capable of being tested in reality against comparative examples. This point further explains why, in the first chapter of this thesis,

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<sup>410</sup> Jackson, "Comparative Constitutional Law: Methodologies," 61.

<sup>411</sup> Jackson, "Comparative Constitutional Law: Methodologies," 62.

<sup>412</sup> See Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), 339-382.

<sup>413</sup> Jackson, "Comparative Constitutional Law: Methodologies," 62.

<sup>414</sup> Jackson, "Comparative Constitutional Law: Methodologies," 63.

the field of constitutional design was described as “comparative in its nature”.<sup>415</sup> For instance, legal scholars and constitutional drafters may engage in comparison to explore the relationship between different constitutional design models and the protection of fundamental rights, such as minority rights, by looking at different constitutional systems.

The second technique is detailed case studies, an in-depth analysis of how constitutional institutions or doctrines actually work in practice, by analyzing one or more systems. Case studies analyses (should) involve a reasoned case selection process, as also suggested by Hirschl. More specifically, Hirschl suggested five “logics” to select cases in comparative analysis.<sup>416</sup> The first is the “most similar cases” logic, initially proposed by Mill and later defined by the social sciences. According to this logic, “researchers should compare cases that have similar characteristics, [...] but vary in the values on the key independent and dependent variables”,<sup>417</sup> thus isolating the significance of the key variable. This is especially suited to diachronic, cross-time comparisons within the same system. The other side of the coin is the “most different logic”, which takes the opposite perspective: researchers should select cases that vary in all variables that are not central to the study, but have matching key variables, thus “emphasizing the significance of consistency of the key independent variable in explaining the similar reading on the dependent variable”.<sup>418</sup> Then, the “prototypical cases logic” provides that scholars should compare cases that serve as a “representative exemplar of other cases exhibiting similar pertinent characteristics”.<sup>419</sup> This logic is supposed to strongly support the arguments advanced by scholars since the cases that pass the tests posed by the selected prototypical cases are more likely to apply widely to others.<sup>420</sup> Moving to the “most difficult cases” principle, this is based on an overall idea that in formal logic would be considered as *ad absurdum*. In this way, “the confidence in the validity of a given claim is enhanced once it has proved to hold true in a case that is the most challenging or least favorable to it”.<sup>421</sup> Finally, the “outlier cases” principle is designed to offer a new explanation for a phenomenon through the negation of valuable alternative explanations for that phenomenon.<sup>422</sup> Overall, a benefit of a detailed case study is the capacity to explore the ways in which different features of the system may interact with and affect the other institutions or doctrines, as well as appreciate these features in action.<sup>423</sup>

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<sup>415</sup> See chapter 1.1.1.

<sup>416</sup> See Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” *American Journal of Comparative Law*, no. 11 (2003): 125-155.

<sup>417</sup> Hirschl, “The Question of Case Selection,” 134.

<sup>418</sup> Hirschl, “The Question of Case Selection,” 139.

<sup>419</sup> Hirschl, “The Question of Case Selection,” 142.

<sup>420</sup> Ibidem.

<sup>421</sup> Hirschl, “The Question of Case Selection,” 145.

<sup>422</sup> Hirschl, “The Question of Case Selection,” 147.

<sup>423</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 64.

Finally, the third and increasingly popular technique involves large-N studies<sup>424</sup> designed to examine causal or collective patterns between constitutional features and other socio-political phenomena.<sup>425</sup> These kinds of studies rarely focus on doctrine or reasoning and are mainly conducted by political scientists, even though examples of large-N studies also exist in legal scholarship.<sup>426</sup> This technique is still under-developed, and, as will be further explored in the next section, draws from both qualitative and quantitative social-science methods.

It should be noted that although functionalism represents one of the dominant approaches in comparative constitutional law, it has attracted a number of critiques. For instance, Frankenberg suggested that “it is all too easy” since the researcher tends to be unable to grasp the conceptual or socio-political foundations of legal orders other than the ones the researcher is familiar with.<sup>427</sup> Similarly, Bomhoff warns against the perils of pure formalism, since doctrines with similar names and seemingly similar functions may actually mean different things in the reality of particular contexts.<sup>428</sup>

### Contextual approach

The core of the contextual approach to comparative inquiry is driven by the critiques moved against functionalism. Since public law has been described as particularly path dependent on initial institutional choices, this requires close attention to specific systems operating in their own context.<sup>429</sup> Therefore, contextualism aims to uncover more about the context of a particular constitutional system, being concerned not only with the functions of constitutional features but also with its “socio-legal self-understanding or self-reflection”.<sup>430</sup> Thus, contextual scholarship tries to problematize the sense of “false necessity” that may emerge from functional or universalist-normative approaches, seeking to elicit a more intense understanding of how particular paradigmatic social or political phenomena shape or are reflected in constitutional law.<sup>431</sup>

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<sup>424</sup> See also Hirschl, “Comparative Methodologies,” 30-34.

<sup>425</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 65.

<sup>426</sup> See for example the large-N study on constitutional longevity, by Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009); Josephine De Jaegere, *Judicial Review and Strategic Behavior* (Cambridge: Intersentia, 2019); Patricia Popelier and Samantha Bielen, “How Courts Decide Federalism Disputes,” *Publius: The Journal of Federalism* 49, no. 4 (2019): 587-616.

<sup>427</sup> See Günter Frankenberg, “Critical Comparisons: Re-Thinking Comparative Law,” *Harvard International Law Journal* 26, no. 1 (1985): 411-456.

<sup>428</sup> See Jacco Bomhoff, “Balancing the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law,” *Hastings International and Comparative Law Review* 31, no. 2 (2008): 555-588.

<sup>429</sup> See John Bell, “Comparing Public Law,” in *Comparative Law in the 21st Century*, ed. by Andrew Hardy and Esin Örücü (London and New York: Kluwer Academic, 2002), 235-248.

<sup>430</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 67.

<sup>431</sup> *Ibidem*.

Courts and legislators and comparative constitutional law

Aside from legal scholars, other two actors may engage in comparison, namely constitutional judges, and legislators. As mentioned at the beginning of this section, these have different goals and are set in different roles and contexts than legal scholars, thus influencing their use of comparative analysis.

On the one hand, since the end of the Second World War courts have increasingly engaged in dialogue with each other, at a national and supranational level, encouraging references to foreign law in their understanding and interpretation of constitutional law and principles,<sup>432</sup> and engaging in comparison at two separate moments: in the process of reasoning (comparative reasoning) and at the moment of decision (comparative judgment).<sup>433</sup> It should be also noted that not all constitutional courts rely on comparative analyses in the same way and with the same intensity. There are exceptional cases, such as the Constitutional Court of South Africa, which has developed an interpretative practice strongly oriented towards comparison based on a specific constitutional provision,<sup>434</sup> or the Supreme Courts of Canada, Israel and Brazil, which often made use of foreign law while deciding on cases concerning fundamental rights (e.g., discriminations on the ground of sexual orientation, or freedom of expression).<sup>435</sup> On the opposite side, there are instances such as the US Supreme Court, which traditionally opposed the use of comparison in constitutional adjudication, deeming the reference to foreign law as highly problematic.<sup>436</sup> Then, in an intermediate position, there are Courts that are receptive to foreign law despite not explicitly incorporating it in the *ratio decidendi*, such as the French *Conseil Constitutionnel* and the Italian Constitutional Court.<sup>437</sup> Finally, the “comparative courts” of excellence tend to be supranational

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<sup>432</sup> See de Vergottini, “Constitutional Law and the Comparative Method,” 25-32.

<sup>433</sup> See de Vergottini, “Constitutional Law and the Comparative Method,” 29.

<sup>434</sup> Art. 35.1 of the Interim Constitution included explicit authorization for the use of comparison (especially in the interpretation of the Bill of Rights). Although with a less explicit formulation, art. 39 of the current Constitution provides for the use of foreign law, and the South African Constitutional Court has continuously operated in such direction (a systematic analysis of the extra-systemic parameters adopted by the South African Constitutional Court when engaging in comparison is provided by Andrea Lollini, “La Circolazione degli Argomenti: Metodo Comparato e Parametri Interpretativi Extra-Sistemici nella Giurisprudenza Costituzionale Sudafricana,” *Diritto Pubblico Comparato ed Europeo* 1(2007): 479-523).

<sup>435</sup> See de Vergottini, “Constitutional Law and the Comparative Method,” 26-27.

<sup>436</sup> On this issue, the arguments against comparison by former Justice Scalia in *Lawrence v. Texas* are well-known in the debate within the USSC and in the academic and political spheres. Although, it should be noted that Hirschl argues that the attitude of the Court towards comparison is less antagonistic than in the past, and that the Court has “hesitantly joined the comparative reference trend”, although in an a-systematic, result-driven fashion (see Hirschl, “Comparative Methodologies”, 21). For other arguments in favor of comparative analyses in the US constitutional system, see Mark Tushnet, “The Possibilities of Comparative Constitutional Law,” *The Yale Law Journal* 108, no. 6 (1999): 1225-1309.

<sup>437</sup> See de Vergottini, “Constitutional Law and the Comparative Method,” 28.



courts, such as the European Court of Human Rights and the Court of Justice of the European Union, which make use of comparison while referring to the law of their Member States.<sup>438</sup>

On the other hand, constitutional legislators may engage in comparison in the process of constitution-making and amendment, in the drafting of national or subnational constitutions and legislations, or in the process of harmonization of legislation. As repeatedly mentioned before, the use of comparative analyses is common while addressing constitutional and institutional design in divided societies, drawing on other experiences, and seeking the “best model” to adopt.<sup>439</sup> This can entail reviewing the different expressions of federalism, consociationalism, and other forms of accommodation of diversity in other divided societies, to be adapted and translated in the specific context.

### 3.1.2 Causality and comparative constitutional law

The comparative method in constitutional law comes with a number of challenges,<sup>440</sup> which Jackson links to the goals of comparison. According to the author, these goals are: to develop a better understanding of constitutional systems; to enhance capacity for self-reflection and to develop a better understanding of one’s own system; to develop an understanding of normatively preferable “best practice”; and to answer questions asked by domestic constitutional doctrine.<sup>441</sup> These goals entail a series of obstacles, such as the time needed to develop expertise, language barriers, the difficulties in establishing normative concepts, and the risk of “cherry-picking”. Jackson concludes that a good way to face these challenges could be a comparative analysis combining functionalism and contextualism (contextualized functionalism), in order to reconcile the strengths and weaknesses of both approaches.

However, the overarching challenge that comparative constitutional law faces is the lack of a solid theoretical framework on the methodological aspects of comparative analyses (e.g., its research design, case selection criteria, and data analysis), as already pointed out in the literature.<sup>442</sup>

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<sup>438</sup> For more on courts and the comparative method, see Giuseppe de Vergottini, *Oltre il Dialogo tra le Corti. Giudici, Diritto Straniero, Comparazione* (Bologna: Il Mulino, 2010); Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013); Christopher McCrudden, “Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared,” in *Cambridge Yearbook of European Legal Studies*, ed. Catherine Barnard, vol. 15 (Cambridge: Cambridge University Press, 2015), 383–415.

<sup>439</sup> Stephen Gardbaum, “How Do and Should We Compare Constitutional Law?,” in *Comparing Comparative Law*, ed. Samantha Besson, Lukas Heckendorn, and Samuel Jube (Lausanne: Swiss Institute of Comparative Law, 2017), 126.

<sup>440</sup> On the challenges of comparative constitutional law, especially in constitutional adjudication, see also Cheryl Saunders, “The Use and Misuse of Comparative Constitutional Law,” *Indiana Journal of Global Legal Studies* 13, no. 1 (2006): 37–76.

<sup>441</sup> Jackson, “Comparative Constitutional Law: Methodologies,” 69–70.

<sup>442</sup> For some reference see Ran Hirschl, “Comparative Methodologies,” in *The Cambridge Companion of Comparative Constitutional Law*, ed. by Roger Masterman, and Robert Schütze (Cambridge: Cambridge University Press,

In this respect, while acknowledging the value of the classical approaches to comparative inquiry, Hirschl<sup>443</sup> argues that comparative constitutional law should be directed towards the “next level” of comparative analysis, namely “causal inference through controlled comparison”,<sup>444</sup> allowing the researcher to make causal claims and better grasp the causes and the consequences of constitutional phenomena.<sup>445</sup> This approach thus aspires to build a theory through causal inference, as also suggested by King, Keohane, and Verba, and is based on the notion that a solid theory requires not only the clarification and decription of concepts but also the development of causal explanations for that phenomenon.<sup>446</sup> The present research has been inspired by such principles. In fact, the underlying conviction is that the understanding of a complex and multi-faceted phenomenon such as constitutional asymmetries in divided multi-tiered systems can be achieved by combining the description of its manifestation in different contexts, and the explanation of what the causes and the factors that produce such an outcome. This entails focusing on the interplay among factors, advancing claims of sufficiency and necessity, and taking into account direct and controlling factors. To accomplish such an aspiration, the instruments traditionally provided by comparative constitutional law methodologies appear to be partly unsatisfactory, thus leading to the need to also refer to the qualitative and quantitative methods employed in the social sciences. In the case of this thesis, the choice was made to adopt qualitative methods such as Qualitative Comparative Analysis, as will be further explained in the following sections.

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2019), 11-39; Ran Hirschl, “The Question of Case Selection in Comparative Constitutional Law,” *American Journal of Comparative Law*, no. 11 (2003): 125-155; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014); Mathias Reimann, “The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century,” *The American Journal of Comparative Law* 50, no. 4 (2002): 671–700; Cheryl Saunders, “The Use and Misuse of Comparative Constitutional Law,” *Indiana Journal of Global Legal Studies* 13, no. 1 (2006): 37–76. For some attempts at systematizing the comparative method, see Giuseppe de Vergottini, “Constitutional Law and the Comparative Method,” in *Encyclopedia of Contemporary Constitutionalism*, ed. Javier Cremades and Cristina Hermida (Cham: Springer International Publishing, 2020), 1–42; Stephen Gardbaum, “How Do and Should We Compare Constitutional Law?,” in *Comparing Comparative Law*, ed. Samantha Besson, Lukas Heckendorn, and Samuel Jube (Lausanne: Swiss Institute of Comparative Law, 2017), 109–26; Christopher McCrudden, “What Does It Mean to Compare, and What Should It Mean?,” in *Comparing Comparative Law*, ed. Samantha Besson, Lukas Heckendorn, and Samuel Jube (Lausanne: Swiss Institute of Comparative Law, 2017), 61–84; John C. Reitz, “How to Do Comparative Law,” *The American Journal of Comparative Law* 46, no. 4 (1998): 617-636; Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II),” *The American Journal of Comparative Law* 39, no. 1 (1991): 1-34.

<sup>443</sup> In particular, Hirschl refers to three main types of comparative inquiry: freestanding, single-country studies; comparative reference aimed at self-reflection through analogy, distinction and contrast; comparative research aimed at concept generation and thinking tools through multi-faceted descriptions. Applied to constitutional law, Hirschl proposed eight types of constitutional comparison: research on a foreign legal order; genealogical or taxonomical classification; comparison to find the best solution to a given problem (functional comparative law); comparative law to serve as a reflection on one’s legal order; comparative law to illustrate theoretical assumptions; small-N analyses in a social-scientific style to find causal relationships; large-N analyses which find correlations based on statistical analysis (see Hirschl, “Comparative Methodologies,” 18-19).

<sup>444</sup> Hirschl, “The Question of Case Selection,” 126.

<sup>445</sup> Hirschl, “Comparative Methodologies,” 18.

<sup>446</sup> See Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, N.J.: Princeton University Press, 1994).

A fascinating criticism of Hirschl's approach has been advanced by von Bogdandy, based on a Hegelian understanding of the law as an expression of "objective spirit". According to this understanding, legal scholarship is concerned with phenomena characterized by intersubjectivity and normativity.<sup>447</sup> Therefore, the main elements at the core of legal research are the understanding of normative validity, and the construction and maintenance of normative meaning, whereas Hirschl argues that a social-scientific explanation should occupy center stage in the analysis. By contrast, von Bogdandy raises doubts about the effective contribution of causal inference and causal explanations since these are perceived as playing only a limited role in the understanding, interpretation, and application of the law.<sup>448</sup> Moreover, another element of disagreement between the two scholars concerns the leadership role attributed by Hirschl to comparative politics, at the expense of comparative constitutional law, since, in Hirschl's view, only political science methods formulate theoretical models and reach concrete and generalizable findings. For his part, von Bogdandy observes that this constitutes a limited perspective of the discipline and raises questions about the applicability of the methods proposed by Hirschl to the domain of comparative constitutional law.<sup>449</sup>

However, the most fundamental point of divergence concerns the very aim of the comparative approach in constitutional law. If according to Hirschl such aim should be to explain, von Bogdandy claims that this would mean denying other forms of knowledge that go beyond mere description and classification and sit alongside causal explanations, namely the "hermeneutical understanding of intersubjective phenomena".<sup>450</sup> Therefore, he supports a hermeneutical procedure of comparative law, which aims to reach an understanding arising "from a synthesis of a multiplicity of elements in their manifold relationships".<sup>451</sup> What is interesting to note is that such an approach is not viewed in opposition to causal inference, but it warns against the perils of making causality the "supreme aim of research".<sup>452</sup>

In reference to the debate on the centrality of causality, this research has been guided by the principle of striking a balance between on the one hand the need for a clear research design, oriented towards reasoned and controlled comparisons and interested in explaining a complex phenomenon, and on the other hand the interplay among causal factors, and the importance of describing the concrete application of the findings in different contexts, to better grasp the

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<sup>447</sup> Armin von Bogdandy, "Comparative Constitutional Law as a Social Science? A Hegelian Reaction to Ran Hirschl's Comparative Matters," *MPIL Research Paper Series* 09 (2016), 2.

<sup>448</sup> von Bogdandy, "Comparative Constitutional Law as a Social Science," 5.

<sup>449</sup> von Bogdandy, "Comparative Constitutional Law as a Social Science," 8-9.

<sup>450</sup> von Bogdandy, "Comparative Constitutional Law as a Social Science," 10.

<sup>451</sup> Ibidem.

<sup>452</sup> Ibidem.

meaning of such phenomena. Therefore, the two perspectives were not seen as mutually exclusive, but as reinforcing and complementary.<sup>453</sup>

Finally, the work of Meuwese and Versteeg is worth mentioning, as they advanced some proposals on the use of quantitative methods in comparative constitutional law. In particular, the authors argue that comparative constitutional scholars might benefit from the methodological toolkit proper of comparative politics and comparative political economy, consisting of statistical rules of inference. This would allow researchers to “describe the law, engage in systematic comparisons of legal systems, and, if used properly, make causal claims”.<sup>454</sup> Although they are aware that the use of quantitative methods in constitutional scholarship might be controversial, they advance three reasons to support their proposal. First, the use of such methods has the potential to test empirically the validity of causal claims that already permeate constitutional scholarship.<sup>455</sup> Second, quantitative methods might be able to manage the global dimension of the (global) challenges addressed by constitutional law. According to the authors, traditional methods, such as detailed case studies, are unable to “fully capture the globalizing nature of constitutional systems around the world”.<sup>456</sup> Once again, they recall the example of constitutional design in the post-Cold War era, arguing that a systematic empirical study<sup>457</sup> on the impact of constitutions on government behavior is still needed, and could be realized through a large-N study using quantitative methods. Third, Meuwese and Versteeg observe that large quantitative legal datasets are increasingly available, and they would allow researchers to approach legal systems they are not completely familiar with.<sup>458</sup> Finally, the authors clarify that they do not believe that quantitative analysis is the only way to establish causality, but that it is a valuable way to explore constitutional phenomena and to test causal claims in constitutional scholarship, supporting the use of “mixed methods” to enhance legal understanding.<sup>459</sup>

In conclusion, even though this research does not adopt a purely quantitative approach, it builds on the literature in support of mixed methods in order to explain and describe causality and

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<sup>453</sup> On this perspective, see also the “advanced interdisciplinary research” taxonomies proposed by Siems in Mathias Siems, “The Taxonomy of Interdisciplinary Legal Research: Finding the Way Out of the Desert,” *Journal of Commonwealth Law and Legal Education* 7, no. 1 (2009): 5-17.

<sup>454</sup> Anne Meuwese, and Mila Versteeg, “Quantitative Methods for Comparative Constitutional Law”, in *Practice and Theory of Comparative Law*, ed. by Maurice Adams, and Jacco Bomhoff (Cambridge: Cambridge University Press, 2012), 233.

<sup>455</sup> Meuwese and Versteeg, “Quantitative Methods,” 233-234.

<sup>456</sup> Meuwese and Versteeg, “Quantitative Methods,” 234.

<sup>457</sup> On the field of empirical legal studies, see for example Peter Cane and Herbert M. Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford; New York: Oxford University Press, 2010); Holger Spamann, “Empirical Comparative Law,” *Annual Review of Law and Social Science* 11 (2015): 131-153; Kees van den Bos, *Empirical Legal Research* (Cheltenham, UK: Edward Elgar Publishing, 2020).

<sup>458</sup> Meuwese and Versteeg, “Quantitative Methods,” 235-236.

<sup>459</sup> Meuwese and Versteeg, “Quantitative Methods,” 256-257.

develop a clearer understanding of constitutional dynamics. As will be explained in the next paragraph, Qualitative Comparative Analysis was theorized as a mixed qualitative-quantitative method,<sup>460</sup> interested in complex causality and in understanding the dynamic engagement between explanatory factors, without losing sight of the cases. For this reason, and in light of the overall aspirations previously mentioned, QCA was deemed the most appropriate method to explain a complex and multifaced constitutional phenomenon as constitutional asymmetries.

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<sup>460</sup> It should be noted that Schneider and Wagemann observe that by putting so much emphasis on the mixed nature of Qualitative Comparative Analysis, its distinctive characters as a set-theoretic method are overlooked (see Carsten Q. Schneider and Claudius Wagemann, *Set-Theoretic Methods for the Social Sciences: A Guide to Qualitative Comparative Analysis* (Cambridge: Cambridge University Press, 2012), 10). Indeed, the aim in this thesis is not to downplay the potential of QCA as a distinctive method, but also to appreciate its “double” nature.

### 3.2 Qualitative Comparative Analysis (QCA)

#### 3.2.1 QCA as a set-theoretic method and its basic functioning

Qualitative Comparative Analysis (QCA) was introduced as a new research approach in 1987 by Charles Ragin, when he published *The Comparative Method*.<sup>461</sup> The aim of the new proposed approach was to be both comparative and case-oriented in nature, combining the strengths of qualitative and quantitative research methods.<sup>462</sup> In particular, it should be noted that QCA is considered to be the “methodological tool most directly associated with set theory”.<sup>463</sup> Before reviewing the basic functioning of QCA, it is crucial to first define what set-theoretic methods are, since they are at the core of the understanding of QCA as an approach and as a technique.

According to Schneider and Wagemann, all set-theoretic methods share three main features. First, set-theoretic methods work on data which are membership scores of cases in sets. This is the first crucial point to underline, since sets and variables are not synonyms. On the one hand, a set is a collection of objects (or cases) sharing a common property which allows definition of the membership of that set in terms of inclusion and exclusion, establishing both a qualitative and quantitative difference in data.<sup>464</sup> A variable is a characteristic that may assume different values, that can generally be measured through standard mathematical operations.<sup>465</sup> To exemplify such a difference, we could refer to the distinction between the set of “rich countries” and the variable of “wealth”. In fact, in the set “rich countries”, membership of the set is established on the basis of a threshold which determines the inclusion or exclusion from the set, whereas “wealth” refers to a property that can be measured and assumes different values, but is not defined in terms of inclusion-exclusion. When referring to the notion of sets, it would be easy to perceive set membership as binary, or crisp sets, in which cases are assigned full membership or non-membership. For example, France is clearly a member of the set “European countries”, whereas the US is a non-member of the same set. However, not all phenomena can be described in such dichotomic terms. For example, could Turkey or Belarus be considered as members of the set “European countries”? In this case, partial set membership, or fuzzy set, is needed to fully capture the complexity of reality.

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<sup>461</sup> Charles C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (Berkeley: University of California Press, 1987).

<sup>462</sup> Axel Marx, Benoît Rihoux, and Charles Ragin. 2014. “The Origins, Development, and Application of Qualitative Comparative Analysis: The First 25 Years,” *European Political Science Review* 6 (1): 115.

<sup>463</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 8.

<sup>464</sup> Ioana-Elena Oana, Carsten Q. Schneider, and Eva Thomann, *Qualitative Comparative Analysis Using R: A Gentle Introduction* (Cambridge: Cambridge University Press, 2021), 28-35.

<sup>465</sup> See Yadolah Dodge, ed., *The Oxford Dictionary of Statistical Terms* (Oxford: Oxford University Press, 2006).

The second feature of set-theoretic methods is that social phenomena are conceptualized in terms of set relations, and more specifically in terms of necessity and sufficiency. Recalling Schneider and Wagemann's example,<sup>466</sup> NATO members are democracies, but not all democracies are NATO members (e.g., Japan is not part of NATO). In other words, being a democracy is necessary to be a NATO member but not sufficient. Therefore, in set-theoretic terms we can establish that the set of NATO members is a subset of the set of democratic countries, while in turn the set of democratic countries is a superset of the set of NATO members.

Finally, the third feature is that the main focus of set-theoretic methods is on causal complexity, namely the analysis of set relations. Causal complexity can be understood in terms of equifinality (i.e., alternative factors can produce the same outcome), conjunctural causation (i.e., the combination of various sets produces the outcome), and asymmetry (i.e., the non-occurrence of the outcome cannot be derived from the explanation of the occurrence of the outcome).<sup>467</sup>

More specifically, QCA as a set-theoretic method combines the presence of three elements: causal interpretation of social phenomena; the use of truth tables to visualize and analyze central features of causal complexity (such as equifinality, conjunctural causation, necessity, sufficiency); and the principle of logical minimization to express the empirical information in a more parsimonious manner.<sup>468</sup> Moreover, it is crucial to distinguish between two functions of Qualitative Comparative Analysis, as a data analysis technique and as a research approach.<sup>469</sup> As a research approach, QCA refers to the process before and after the so-called "analytic moment",<sup>470</sup> involving the collection of data, the definition of case selection criteria, and the specification of concepts, in an iterative process between ideas and evidence.<sup>471</sup> When referring to QCA as a technique, we refer to the aforementioned analytic moment, namely the data analysis based on the truth table and the process of logical minimization. If QCA as an approach is time- and energy-consuming, because it involves the structuring of the research design and the interpretation of the results of the analysis in terms of causal complexity and causal inference, QCA as a technique is considerably less time-consuming since it is performed by the appropriate software.<sup>472</sup>

Moving to the functioning of QCA, three steps are identified, and they will be briefly analyzed separately.

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<sup>466</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 4.

<sup>467</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 5-6.

<sup>468</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 8-9.

<sup>469</sup> See Charles C. Ragin and Benoit Rihoux, *Configurational Comparative Methods: Qualitative Comparative Analysis (QCA) and Related Techniques* (Thousand Oaks, California: Sage Publications, 2009).

<sup>470</sup> See Charles C. Ragin, *Fuzzy-Sets Social Science* (Chicago: University of Chicago Press, 2000).

<sup>471</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 11.

<sup>472</sup> Specific software has been developed to perform QCA analyses, such as fsQCA and TOSMANA, but also R and STATA have developed appropriate packages. In this research, I mainly used the "SetMethods" and "QCA" packages on R studio.

### Before the analytic moment

The first steps in QCA involve the building of the research design, defining the research question(s) in the framework of set theory. This means defining the conditions and the outcome as sets, so that the universe of cases can be crafted, and raw data can be collected. However, the most important step before the analytic moment is the so-called calibration of the conditions and the outcome. Calibration is the process of assigning set membership scores to cases using empirical information.<sup>473</sup> Schneider and Wagemann suggest that in order to be fruitful, calibration requires a series of elements: “(1) a careful definition of the relevant population of cases; (2) a precise definition of the meanings of all concepts (both the conditions and the outcome) used in the analysis; (3) a decision on where the point of maximum indifference about membership versus non-membership is located (signified by the 0.5 anchor in fuzzy sets and the threshold in crisp sets); (4) a decision on the definition of full membership (1) and full non-membership (0); (5) a decision about the graded membership in between the qualitative anchors”.<sup>474</sup>

Once the process of calibration is concluded, the resulting data matrix will be used in the analytic moment.

### Analytic moment

The analytic moment consists of the search for necessary and sufficient conditions or combinations of conditions to produce the outcome, making use of Boolean algebra. A condition X is defined as necessary if, whenever the outcome Y is present, the condition is also present.<sup>475</sup> Put differently, the outcome cannot be achieved without the condition (“Y implies X” or “X is a superset of Y”). As a mirror image of necessity, a condition X is considered sufficient if, whenever it is present across cases, the outcome Y is also present in these cases.<sup>476</sup> This means that there should not be a case that shows the condition but not the outcome (“X implies Y” or “X is a subset of Y”). More often than not, in applied QCA subset relations are less-than-perfect, and this requires a number of parameters of fit<sup>477</sup> to evaluate the degree of deviation and assess the strength of set relations. The two main parameters are consistency and coverage, and they can be calculated both for necessity and for sufficiency. In general terms, consistency provides “a numerical expression for the degree to which the empirical information deviates from the perfect subset

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<sup>473</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 32.

<sup>474</sup> Ibidem

<sup>475</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 69.

<sup>476</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 57.

<sup>477</sup> See Schneider and Wagemann, *Set-Theoretic Methods*, 119-150.



relation”.<sup>478</sup> Coverage, on the other hand, expresses “how much of the outcome is covered (explained) by the condition in question”.<sup>479</sup>

Another crucial step during the analytic moment is the representation of empirical evidence in the so-called truth table, namely the matrix in which each row expresses logically possible configurations of conditions. The truth table is constructed following three steps. First, the logically possible configurations of conditions (i.e., the rows of the table) are equal to  $2^k$ , where  $k$  is the number of conditions (e.g., in case of 4 conditions, the table will have  $2^4 = 16$  rows). Second, each case is assigned to a truth table row in which it has the highest membership scores, denoting the presence of the conditions. In case of crisp sets this is straightforward because each case is either full member or full non-member, while for fuzzy sets usually the anchor to define membership to the truth table row is set at any score higher than 0.5. Third, for each row the outcome value is defined, and it is 1 for all rows that are sufficient for the outcome, and 0 otherwise.<sup>480</sup>

Once the truth table is constructed, it is possible to identify the sufficient conditions by logically minimizing the truth table. Using Boolean algebra, the process of logical minimization ensures that the configurations of conditions are simplified while remaining logically equivalent to more comprehensive formulas, differing only in the degree of complexity.<sup>481</sup> These formulas are called “solutions” and three types can be distinguished: conservative, intermediate, most parsimonious. The conservative (or complex) solution is the most comprehensive formula, which does not make any assumption about logical reminders<sup>482</sup> and is guided only by the empirical evidence.<sup>483</sup> The most parsimonious solution is the least complex solution resulting from logical minimization.<sup>484</sup> The intermediate solution includes directional expectations, while dropping any other conditions that do not appear in the most parsimonious solution.<sup>485</sup> These solutions have the potential to depict reality in a spectrum of complexity, from most complex (i.e., conservative) to least complex (i.e., most parsimonious), depending on the objective of the analysis.

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<sup>478</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 129.

<sup>479</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 139.

<sup>480</sup> See Schneider and Wagemann, *Set-Theoretic Methods*, 91-103.

<sup>481</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 115.

<sup>482</sup> Logical reminders are truth table rows without enough cases in them that have a membership of higher than 0.5 in that row. The presence of logical reminders is called limited diversity, a universal phenomenon in comparative social sciences (see Schneider and Wagemann, *Set-Theoretic Methods*, 151-177).

<sup>483</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 162.

<sup>484</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 166-167.

<sup>485</sup> Schneider and Wagemann, *Set-Theoretic Methods*, 175.

### After the analytic moment

After having completed the analytic moment, the moment comes to interpret the results. The necessity and sufficiency statements resulting from the analysis are assessed and explained on the basis of the theoretical framework, checking whether they confirm or contradict the previous expectations. Then, it is possible to perform additional robustness tests, to check for relevant unaccounted structures in the data, and to do within-cases analyses both for typical and deviant cases.

### 3.2.2 Possible shortcomings of QCA

Since the publication of *The Comparative Method*, QCA has spawned a lively methodological debate around its limitations and possibilities. Marx, Rihoux and Ragin identified five main issues that were criticized by opponents. The first concerned case sensitivity, namely the fact that QCA is too sensitive to individual cases, as the inclusion or exclusion of a single case could change the results. Conversely, while critics see this as a weakness, proponents of QCA interpret it as a unique strength since this means that each case matters and can lead to the discovery of another causal explanation of social phenomena.<sup>486</sup> Then, another crucial issue revolved around the use of dichotomic variables, deemed a measurement too crude for many social sciences concepts. This criticism was met by the argument that working with crisp sets had the main advantage of “the elegance of simplicity”,<sup>487</sup> and that gradualism should not be pursued at all costs. Nonetheless, as already recalled, fuzzy sets were later introduced to facilitate a more nuanced understanding of set membership. Another methodological debate focused on the limitations on the number of conditions that QCA can reasonably take into account. This is due to the fact that a large number of conditions implies an even larger number of truth table rows, leading to a situation in which no reduction is possible. However, proponents of QCA replied that this argument is also applicable to other research approaches, with equal restrictions on the number of variables.

The fourth debate concerned the static nature of QCA, namely its inability to include a time dimension or sequence of variables in the analysis. The lack of longitudinal perspective on the analysis meant that conditions were measured at a precise moment in time, as in traditional cross-sectional research. However, proponents of QCA responded to this criticism by arguing that the time dimension could be “injected” into the conditions themselves.<sup>488</sup> Moreover, it should be further added that QCA theory has been later refined with the development of a so-called temporal

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<sup>486</sup> Marx, Rihoux, and Ragin, “The Origins,” 121.

<sup>487</sup> Marx, Rihoux, and Ragin, “The Origins,” 122.

<sup>488</sup> Marx, Rihoux, and Ragin, “The Origins,” 123.

Qualitative Comparative Analysis (tQCA),<sup>489</sup> which is adopted precisely to include time in the analysis. Regarding the inability to include a sequence of conditions, techniques were developed in order to allow for a sequencing of conditions. Finally, another issue involved the assumption of case independence, namely that cases do not influence each other. However, this assumption is not unique to QCA, but is present in all variable-oriented techniques. The relevance of case independence depends largely on the research question, and there are a few ways to proceed. For example, conditions taking into account interrelatedness can be included, or further in-depth follow-ups can be done to reveal the nature and significance of the interrelatedness between cases.<sup>490</sup>

### 3.2.3 The use of QCA in the legal field

QCA has been applied in a variety of research areas. According to a bibliometric analysis, the majority of QCA studies are published in the areas of comparative politics, business and economics, and sociology.<sup>491</sup> However, other disciplines are starting to make use of this approach, including legal studies.

A particularly relevant application of QCA for this study is the one realized by Sahadžić in *Asymmetry, Multinationalism and Constitutional Law*.<sup>492</sup> Sahadžić adopted a crisp-set QCA to investigate the interaction between constitutional asymmetries and a number of congruent factors. As mentioned in chapter two, the author conceptualized constitutional asymmetries along three dimensions: status, powers and competences, and fiscal autonomy. These three dimensions are framed as outcomes of the QCA, while the congruent factors are the conditions. These are: power ratio, autocracy, history, separatism, and wealth.<sup>493</sup> After performing the analysis, Sahadžić found different solutions for each outcome. Starting from constitutional asymmetries in status, the most frequent factors contributing to constitutional asymmetries are the absence of vertical power management or one-party dominance, historical reasons, and wealth. Moreover, the analysis displays the trends in how congruent factors influence each other. For example, when historical reasons, separatist claims and wealth are present, it is either the absence of vertical power management, one-party dominance or an unbalanced power ration among subnational entities that determines constitutional asymmetries in status. The author also analyzed the two parsimonious

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<sup>489</sup> See Schneider and Wagemann, *Set-Theoretic Methods*, 269- 274.

<sup>490</sup> Marx, Rihoux, and Ragin, "The Origins," 123.

<sup>491</sup> Norat Roig-Tierno, Tomas F. Gonzalez-Cruz, and Jordi Llopis-Martinez, "An Overview of Qualitative Comparative Analysis: A Bibliometric Analysis," *Journal of Innovation & Knowledge* 2 (2017): 19.

<sup>492</sup> I already made reference to Sahadžić's work when addressing ways to measure constitutional asymmetries. See chapter 2.1.3.

<sup>493</sup> Sahadžić, *Asymmetry*, 88.

solutions. The first solution indicates that wealthy systems with a specific historical framework and in which separatist threats are present will be prone to constitutional asymmetries in status. The second shows that systems with a balanced power ratio will result in more asymmetry in status, because there is no vertical power management or one-party dominance to prevent competition among entities and because these entities use their wealth to push for more autonomy.<sup>494</sup>

Moving to the occurrence of constitutional asymmetry in powers and competences, the most frequent congruent factors are the same three as for status, namely absence of vertical power management or one-party dominance, historical reasons, and wealth. What emerged from the analysis of the interaction among factors is that when the absence of vertical power management or one-party dominance is combined with wealth, there are three options that can produce the outcome: unbalanced power ratio combined with specific historical reasons; historical reasons combined with separatist claims; a balanced power ratio in absence of historical reasons and separatist claims. Further possibilities producing asymmetries in powers and competences include wealthy systems with the absence of vertical power management or one-party dominance and historical reasons, or unbalanced power ratio, historical reasons, and separatist claims. Coming to the most parsimonious solutions, the QCA identified two options. The first indicates that historical reasons and separatist claims are the most obvious factors producing asymmetries in powers and competences. The second shows that the absence of vertical power management or one-party dominance and separatist claims combined with wealth contribute to constitutional asymmetries in powers and competences.<sup>495</sup>

Finally, concerning constitutional asymmetries in fiscal autonomy, the most frequent factors are the unbalanced power ratio among subnational entities, historical reasons, and wealth. Regarding the mutual influence that congruent factors have, it emerged that when unbalanced power ratios and historical reasons are present, it will be either the absence of vertical power management or one-party dominance combined with wealth, or the presence of vertical power management or one-party dominance combined with separatist claims that will produce constitutional asymmetries in fiscal autonomy. The parsimonious solutions indicate that wealthy systems with an unbalanced power ratio among subnational entities will be more likely to show asymmetries in fiscal autonomy, as well as systems with vertical power management or one-party dominance combined with historical reasons and separatist claims. Finally, wealthy systems, even

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<sup>494</sup> Sahadžić, *Asymmetry*, 89-91.

<sup>495</sup> Sahadžić, *Asymmetry*, 92-93.

in the absence of separatist claims and vertical power management or one-party dominance, are more likely to display asymmetries in fiscal autonomy.<sup>496</sup>

In conclusion, by adopting QCA, Sahadžić confirmed the importance of the influence of social, economic, cultural, and ideological factors on the emergence of constitutional asymmetries. Similarly, this thesis aims to explore the importance of the legal (rather than solely extra-legal) factors in producing a low, medium, or high degree of constitutional asymmetry.

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<sup>496</sup> Sahadžić, *Asymmetry*, 93-94.

### *3.3 Exploring the model: outcomes and conditions*

As already mentioned in the previous paragraph, QCA is conducted along a series of conditions which are expected to produce an outcome. The interaction between the conditions and the outcome allows the construction of a model able to assess the causal complexity of what conditions or combination of conditions are likely to produce the outcome. For the purposes of the present research, the conditions are derived from the legal factors defined in the previous chapter, while the outcome is a different degree of constitutional asymmetry, as shown in Table 5. In order to fit the legal factors in the QCA, they needed to be framed as sets (and not mere variables). In this way, it is possible to determine the set membership of cases as “in” or “out” of the sets.

As explained in chapter two, the first legal factor concerns the distribution of constitutional asymmetries within the territory, namely it accounts for whether differentiated autonomy is granted to only one subnational entity, to a few, or whether autonomy is generalized to all subnational entities (and therefore all SNEs have the same degree of autonomy). In this first case, the first condition is called “DISTRIBUTION”, and to be in the set, cases must present limited distribution of differentiated autonomy. This is derived from the expectation that differentiated autonomy which is limited to only one part of the territory will have a greater impact on the degree of constitutional asymmetry.

The second legal factor is related to the procedures introducing constitutional asymmetries (constitutional provisions, bilateral agreements, ordinary legislation). The corresponding condition is called “RECOGNITION”, and it provides that to be in the set, cases should present constitutional provisions establishing asymmetry. This derives from the expectation that constitutional recognition of asymmetry has a stronger impact on its degree.

The third legal factor concerns the design of subnational entities, namely whether the entities are ethnically homogeneous or heterogeneous. The related condition is called “HOMOGENEITY”, as to be in the set cases should present ethnically homogeneous subnational entities. This was decided on the basis of the expectation that homogeneous units generate a stronger demand for autonomy, and thus stronger constitutional asymmetry.

The fourth and last legal factor involves the actors participating in the constitution-making process introducing asymmetries within the constitutional system. From this legal factor, two separate conditions were derived, respectively named “INTERNATIONAL”, to investigate the impact of the participation of international actors in the process, and “SUBNATIONAL”, to explore the relevance of the participation of the subnational entities in the process.

Concerning the outcome, the research aims to explore the explanations for different degrees of constitutional asymmetry and identifies three degrees: low, medium, and high.

The first version of the model provided for three separate outcomes to analyze through QCA, one for each degree (i.e., low, medium, high constitutional asymmetry). That would have entailed performing three separate QCAs. In this first model, the outcomes were expressed in binary terms (i.e., “in” or “out” of the set). However, the limited number of case studies and the relatively high number of conditions made it impossible for the model to work or to produce valuable causal explanations.<sup>497</sup> For this reason, the model was adapted, and the different degrees were incorporated into one single outcome, namely a high degree of constitutional asymmetry (“HIGH\_CA”). As will be further explained in the following paragraph on calibration, the different set-membership scores assigned in the fuzzy-set of the outcome to the cases indicated whether they have a low, medium, or high degree of constitutional asymmetry, or else are constitutionally symmetrical.

| Conditions                                                                                                                                                                                                                                                                                                                                                                                  | Outcome                                                      |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------|
| <ol style="list-style-type: none"> <li>1. Limited distribution of differentiated autonomy (DISTRIBUTION)</li> <li>2. Constitutional recognition of asymmetries (RECOGNITION)</li> <li>3. Ethnically homogeneous subnational entities (HOMOGENEITY)</li> <li>4. Involvement of international actors (INTERNATIONAL)</li> <li>5. Involvement of subnational entities (SUBNATIONAL)</li> </ol> | <p>High degree of constitutional asymmetry<br/>(HIGH_CA)</p> |

*Table 5: Conditions and outcome*

To realize the core goal of the research, namely exploring what the legal factors (i.e., the conditions) are that explain the different degrees of constitutional asymmetry, it was necessary to look at the outcome from two different perspectives.

Specifically, to assess the high and medium degrees, the QCA looked at the presence of the outcome. In this way, this first perspective captures all the cases that are considered members of

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<sup>497</sup> In other words, this means that the results did not pass the cut off to fall within the parameter of fit’s benchmark. These are vital to ensure the soundness of the causal claim. Lowering the benchmarks would have produced explanations, but with a non-meaningful causality. Since this research is primarily interested in exploring complex causality, the model had to be adapted.

the outcome set, thus all those cases that are considered “in” (i.e., high degree) and “more in than out” (i.e., medium degree) the set. Conversely, to assess the low degree and constitutional symmetry, the QCA looked at the absence of the outcome. This derives from the fact that in QCA set relations are asymmetrical, and thus we cannot derive conclusions on the absence of the outcome from its presence, and it is necessary to perform a separate analysis. The absence of the outcome refers to all the cases that are “more out than in” (i.e., low degree) and “out” (i.e., constitutional symmetry) the set.

The choice to abandon the three separate outcomes in favor of a single “nuanced” outcome can be justified on two grounds. First, from a mathematical perspective, the aim to establish which factor is linked to a specific outcome would have been more achievable through a linear regression model than Qualitative Comparative Analysis. However, if using a regression model would have indeed established a relationship between the legal factors and the specific degree of constitutional asymmetry, it would have made it impossible to assess complex causality, i.e., the interplay among factors in producing the outcome, since regressions do not produce causal claims.<sup>498</sup> Also, to have some statistical significance, a regression model would have required a significantly higher number of cases. This would have meant abandoning the more detailed analysis of countries’ specificities. Since this research is more interested in understanding and explaining complex causality than providing a mathematical answer to the relationship between legal factors and the degrees of constitutional asymmetry, the possibility of employing a regression model was not considered.

The second reason why it is reasonable to analyze both symmetrical and low cases together, as well as medium and high degree cases, is provided by the values of constitutional asymmetry. As shown in Figure 2, there is a significant difference in terms of constitutional asymmetry between the lowest and highest scores of asymmetry (e.g., 0 for South Africa or 0.2 for Canada versus 0.47 for the UK and 0.48 for Iraq). Explaining this difference between the extremes is of primary interest to this project. Moreover, the intermediate asymmetry values, namely those between the extremes, can be easily “assimilated” to one of the two extremes, given their limited difference in terms of values between one another. Therefore, it is reasonable to consider symmetrical and low cases together (i.e., the absence of the outcome), as well as medium and high cases together (i.e., the presence of the outcome). Nonetheless, it is still interesting to differentiate them instead of defining the outcome simply in binary terms (“in” or “out” the set), because in this way it is still possible to grasp the underlying differences between symmetrical and low asymmetry on the one hand, and between medium and high asymmetry on the other.

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<sup>498</sup> Barbara G. Tabachnick and Linda S. Fidell, *Using Multivariate Statistics* (Boston: Allyn & Bacon, 2007), 122.



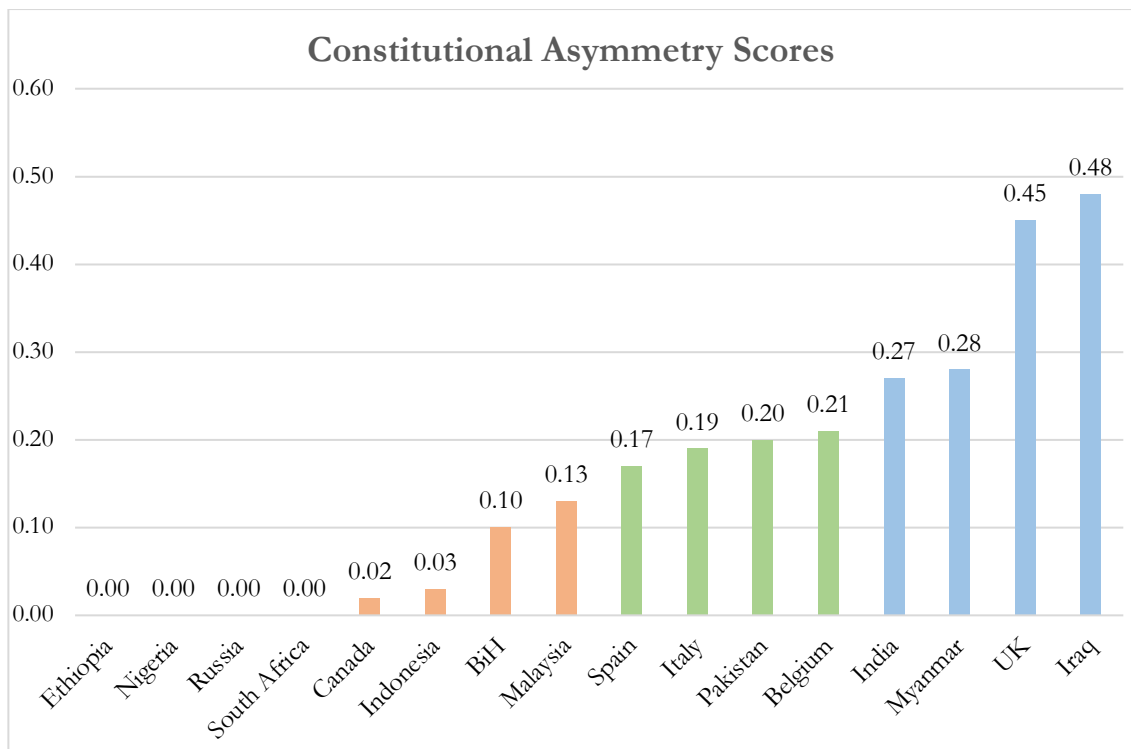


Figure 2: Constitutional asymmetry scores

### 3.4 Case selection criteria

To systematically select the 16 cases on which the QCA will be conducted, two main selection criteria were taken into account.

The first criterion was that cases had to be classified as divided or partially divided societies. As anticipated in the introduction and in the first part of the thesis, a divided or partially divided society is considered as such not just where it is ethnoculturally diverse but only if these differences also become markers of political mobilization and translate into political fragmentation.<sup>499</sup> Therefore, societies that do not present both these features were excluded, as, for the purpose of this research, their being multicultural or diverse becomes irrelevant if it has no institutional or constitutional translation (e.g., the US). Moreover, it could be argued that most countries are now classifiable as multicultural or at least diverse to some extent, due to the effect of migration processes. As Choudhry observes, “the age of the ethnoculturally homogeneous state, if there ever was one, is long over”.<sup>500</sup>

Aside from the conceptual clarifications, the main issue was how to detect a divided society. To this end, three elements were identified. The first and most obvious element is the presence of differences based on language, ethnicity, culture, religion. Then, a rather evident indicator of a divided society is the presence of political parties<sup>501</sup> reflecting the political claims of distinct ethnocultural identities (e.g., the Bosniak-Muslim SDA in Bosnia-Herzegovina, the Irish-Catholic Sinn Fein in Northern Ireland, the Flemish N-VA in Belgium). The third element that was taken into account was whether the political conflict that arose from ethnocultural differences spurred a process of constitutional design. In Bosnia-Herzegovina, Belgium, and Iraq, just to name a few, processes of constitutional design or constitutional engineering were established to accommodate diverging political claims (as in Belgium) or even to re-design a post-conflict settlement (as in Bosnia and Iraq). After all, this element recalls the very root of the literature of constitutional design for divided societies reviewed in the first chapter, namely the need to face the challenges posed by divided societies through a process of constitutional design. In conclusion, the three sub-properties to detect divided societies are: the presence of ethnocultural differences; the presence of (regional) political parties reflecting ethnocultural identities; and processes of constitutional design spurred by the political conflict among ethnocultural groups.

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<sup>499</sup> See Introduction; Choudhry, “Bridging,” 4-5.

<sup>500</sup> Choudhry, “Bridging,” 5.

<sup>501</sup> See Choudhry, “Bridging,” 17-18; Donald Horowitz, “Ethnic Conflict Management for Policymakers,” in *Conflict and Peacemaking in Multiethnic Societies*, ed. Joseph V. Montville (Lexington : Lexington Books, 1990), 116; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven and London: Yale University Press, 1977), 3.

The second criterion to select cases was that they needed to be multi-tiered systems (MTS).<sup>502</sup> Given the flexibility of this definition, which could potentially include any constitutional system with any form of decentralization, the present research will take into account MTS granting legislative powers to its subnational entities. In this respect, a country such as Cyprus had to be excluded, since though the six districts provided by the constitution do form a level of local government which is implicitly granted administrative autonomy, the constitution does not give any indication of the specific competences attributed to the district-level. Moreover, the two parts in which the island is divided are not constitutionally recognized. As in this research autonomy is constructed along the indicators of status, powers, and fiscal arrangements, Cyprus could not be meaningfully included in the analysis. However, the Cypriot ethnically divided society and its unresolved territorial reunification make it a perfect case study for a possible future application of the model resulting from this research.

In conclusion, the case studies meeting the two selection criteria are the ones shown in the following table (in alphabetical order):

|                        |           |          |                    |
|------------------------|-----------|----------|--------------------|
| Belgium                | India     | Malaysia | Russian Federation |
| Bosnia and Herzegovina | Indonesia | Myanmar  | South Africa       |
| Canada                 | Iraq      | Nigeria  | Spain              |
| Ethiopia               | Italy     | Pakistan | United Kingdom     |

Table 6: List of case studies

It should be noted that the list closely resembles the one of Popelier and Sahadžić's research on constitutional asymmetries in multinational multi-tiered systems.<sup>503</sup> Given the fact that the two studies are closely related, from both a theoretical and methodological perspective, it seemed reasonable to make reference to the same countries, not least to compare the respective outcomes of the analysis. However, some adjustments were necessary, leading to the exclusion of China and the European Union from the case studies. Indeed, China does not qualify as a divided society as defined in this chapter, since despite internal ethnocultural differences localized in some entities, China is a one-party system and therefore such diversity does not translate into the political system. Moreover, even though the European Union could classify as a divided system, it would have been the only supra-national system in the universe of cases, therefore for the purpose of this

<sup>502</sup> See Introduction (n 5).

<sup>503</sup> See Patricia Popelier and Maja Sahadžić, *Constitutional Asymmetries in Multinational Federalism* (Cham: Palgrave Macmillan, 2019).

exploratory study it was left out of the analysis.<sup>504</sup> In their place, Nigeria and South Africa were included, since they both meet the selection criteria and qualify as divided multi-tiered systems.

Based on the outcome of the selection process, three group of countries can be identified for further specification: fully divided societies, partially divided societies, and formerly divided societies.

The fully divided societies are Belgium, Bosnia and Herzegovina, Ethiopia, Iraq, Malaysia, and Myanmar, since they display all three sub-properties across their entire territory: they encompass internal ethno-cultural diversity, have regional or identity based political parties, and experienced processes of constitutional design to address their internal diversity.

Then, the second group of case studies is composed of what this research calls “partially divided societies”. This was necessary to include more cases in the research, even though it meant adding a further level of specification to the selection process. Partially divided societies are considered those cases presenting the three sub-properties of divided societies only in limited parts of the territory and not necessarily in its entirety. This choice allowed me to include constitutional systems such as Italy, where internal diversity is concentrated in the subalpine regions (i.e., Aosta Valley, Trentino/South Tyrol, Friuli Venezia-Giulia); the United Kingdom, where distinctive identities are present especially in Northern Ireland and Scotland; and Spain, where constitutional arrangements were introduced to accommodate the Catalan and Basque nationalities. In these three cases, regional ethno-cultural diversity is reflected in respective regional parties, such as the *Südtiroler Volkspartei* in South Tyrol and the *Union Valdôtaine* in Aosta Valley, the Scottish National Party in Scotland, and the Democratic Unionist Party and Sinn Féin in Northern Ireland, the *Esquerra Republicana de Catalunya* in Catalonia, and Basque Nationalist Party in the Basque Country. Another partially divided society is India, where the situation is slightly different because ethno-cultural diversity is widespread in the territory, but there is still a degree of specificity limited to some parts of the country. For example, the Muslim minority is concentrated in only few subnational entities, such as Jammu and Kashmir, Uttar Pradesh, and West Bengal, and there are also only a small number of regional parties, such as Shiromani Akali Dal (in Punjab), Jammu and Kashmir National Conference (in Jammu and Kashmir), DMK (in Tamil Nadu). Then, the other two partially divided societies are Indonesia and Canada. In Indonesia, even though internal diversity is deeply entrenched in the history and demography of the country, regional political parties are only allowed in Aceh, one of the five regions enjoying special autonomy. In Canada,

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<sup>504</sup> Nonetheless, the European Union would be a perfect case study for future applications of the model emerging from this thesis, since it can be considered as a multi-tiered system having to deal with internal diversity.

linguistic diversity is limited to Québec, home of the *Coalition Avenir Québec* and *Parti Québécois* which embody the autonomy and identity claims of the French-speaking province.

Finally, the third group of countries derives from the choice to consider a temporal perspective and include states that can be described as “formerly divided societies”, i.e., constitutional systems that were divided societies but do not qualify as such anymore. This is the case with four countries in particular: Nigeria, South Africa, Russia, and Pakistan. Indeed, Nigeria qualified as a divided society up until the introduction of a constitutionally entrenched ethnic party ban,<sup>505</sup> which made it impossible to satisfy the second sub-property of presence of regional ethnic parties, and thus means it does not currently qualify as divided society. However, Nigeria is an extremely interesting case, since it was a divided society and the ethnic party ban, as well as the choices of constitutional design, were adopted precisely to address the challenges arising from internal diversity. The same reasoning is applicable to South Africa and Pakistan, where internal diversity still exists but no longer translates into political fragmentation as in the past. However, as for the Nigerian case, in the two countries such diversity was addressed through constitutional engineering and therefore they are still relevant for purpose of this thesis. Indeed, the transitional and then permanent constitution in South Africa introduced the necessary changes to end the apartheid regime, while present-day Pakistan emerged after a civil war and the secession of East Pakistan, i.e., present-day Bangladesh. Then, Russia is another extremely interesting case, since regional ethnic or religious parties are not allowed according to the 2001 Russian Law on Political Parties, and even prior to that did not exist in Soviet times. However, what can be said is that identity and region-based political claims were at the core of the phase of “wild federalism” (1985-1993), with numerous bilateral agreements negotiated between the central government and some subnational entities, e.g., Chechen Republic and the Tatarstan Republic. For this reason, even though regional political parties are not allowed and therefore this sub-property is not met, it is still relevant to include Russia as formerly divided societies because some political claims during the phase of “wild federalism” were based on identity when negotiating differentiated autonomy. Further research would be required to compare the dynamics of constitutional change concerning constitutional asymmetries in these four countries, analyzing not only the constitution currently in force, but also the constitutions that were in force when these countries fully qualified as divided societies. As will be discussed in the final chapter, currently these countries tend to display constitutional symmetry (with the exception of Pakistan), even though constitutional asymmetry was higher in the past.

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<sup>505</sup> See Matthijs Bogaards, “Ethnic Party Bans and Institutional Engineering in Nigeria,” *Democratization* 17, no. 4 (2010): 730–49.

### 3.5 Calibration

#### 3.5.1 csQCA v. fsQCA

Once selected the case studies to include in the analysis, the process of calibration in QCA involves assigning a membership score to the cases, to establish whether or to what extent they are members of the sets of a given outcome and conditions. Calibration is done for each case separately, in order to build a data-matrix that will be used for the rest of the analysis. Depending on the objective of the QCA, there are two ways to do the calibration. The first is the so-called crisp set QCA (csQCA), through which it is determined whether the cases are in or out the set, with no intermediate positions. In this research, for example, a crisp set will be used to determine whether international actors were present (in) or not (out) in the constituent process introducing constitutional asymmetries. However, the purpose of the research is also to determine the extent to which the cases present the outcome (i.e., the degree constitutional asymmetry) and some of the conditions. To this end, a fuzzy set QCA (fsQCA) is more appropriate, namely a set used to determine the degree of case set memberships for the outcome and for some of the conditions.

| Crisp set     | 3-value fuzzy set              | 4-value fuzzy set       | 6 value fuzzy set      | 'Continuous' fuzzy set  |
|---------------|--------------------------------|-------------------------|------------------------|-------------------------|
| 1 = fully in  | 1 = fully in                   | 1 = fully in            | 1 = fully in           | 1 = fully in            |
|               |                                |                         | 0.9                    | 0.9                     |
|               |                                |                         | 0.8 = mostly in        | 0.8                     |
|               |                                | 0.67 = more in than out |                        | 0.7                     |
|               |                                |                         | 0.6 = more in than out | 0.6                     |
|               | 0.5 = neither fully in nor out |                         |                        | 0.5 = maximum ambiguity |
|               |                                |                         | 0.4 = more out than in | 0.4                     |
|               |                                | 0.33 = more out than in |                        | 0.3                     |
|               |                                |                         | 0.2 = mostly out       | 0.2                     |
|               |                                |                         |                        | 0.1                     |
| 0 = fully out | 0 = fully out                  | 0 = fully out           | 0 = fully out          | 0 = fully out           |

Figure 3: Examples of different ways to distinguish between set-membership scores.<sup>506</sup>

More specifically, the analysis employs three 4-value fuzzy sets for three conditions (limited distribution of differentiated autonomy, constitutional recognition of asymmetry, ethnically homogeneous subnational entities – SNEs), and two crisp sets for the remaining two conditions (involvement of international and subnational actors in the constituent process). It should be noted that the choice of a binary outcome (presence v. absence) for the involvement of international and

<sup>506</sup> Source of the figure: Ragin and Rihoux, *Configurational Comparative Methods*, 91.

subnational actors derives from the lack of consensus in the literature on the role that these actors play, especially the international actors. Framing these conditions in non-binary terms (i.e., as fuzzy sets) would have required a level of specification of the role played by these actors (e.g., funding of local civil society organizations, technical support to constitutional drafters) that is not of primary interest for what concerns the degrees of constitutional asymmetry. For the purpose of this research, the focus was mainly on their presence (or absence) as an indication of the constitution-making process that led to the introduction of constitutional asymmetries.<sup>507</sup> This allows to assess whether the role played by “other” actors in the constitution-making process could serve as an explanatory factor for the degree of constitutional asymmetry. Certainly, a deeper exploration of the role played by international and subnational actors could be addressed in future research, adding an additional layer of complexity to the analysis.

Concerning the outcome, as previously discussed, the QCA employs a 4-value fuzzy set to grasp the different degrees of constitutional asymmetry.

The following tables display the criteria for assigning the scores to each case, for the outcomes and the conditions.

| Outcome                                           | Set membership scores                   |                                           |                                        |                         |
|---------------------------------------------------|-----------------------------------------|-------------------------------------------|----------------------------------------|-------------------------|
|                                                   | 1                                       | 0.67                                      | 0.33                                   | 0                       |
| High degree of constitutional asymmetry (HIGH_CA) | High degree of constitutional asymmetry | Medium degree of constitutional asymmetry | Low degree of constitutional asymmetry | Constitutional symmetry |

Table 7: Calibration criterion for the outcomes

| Conditions                                                             | Set membership scores                           |                                                                                        |                                                                        |                                     |
|------------------------------------------------------------------------|-------------------------------------------------|----------------------------------------------------------------------------------------|------------------------------------------------------------------------|-------------------------------------|
|                                                                        | 1                                               | 0.67                                                                                   | 0.33                                                                   | 0                                   |
| Limited distribution of differentiated autonomy (DISTRIBUTION)         | Differentiated autonomy granted to only one SNE | Differentiated autonomy granted to more than one SNE, but not all                      | Differentiation in only some (and not all) dimensions of autonomy      | Same autonomy granted to all SNEs   |
| Constitutional recognition of constitutional asymmetries (RECOGNITION) | Asymmetries pre-determined by the constitution  | Asymmetries introduced through constitutional procedure and self-determination of SNEs | Asymmetries introduced by bilateral agreements or ordinary legislation | No legal recognition of asymmetries |

<sup>507</sup> Internationally assisted process in the case of international actors, or participatory process in the case of subnational actors.

| Ethnically homogeneous subnational entities (HOMOGENEITY)                      | Homogeneous SNEs              | More homogeneous than heterogeneous SNEs | More heterogeneous than homogeneous SNEs | Heterogeneous SNEs                |
|--------------------------------------------------------------------------------|-------------------------------|------------------------------------------|------------------------------------------|-----------------------------------|
| Involvement of international actors in the constituent process (INTERNATIONAL) | International actors involved |                                          |                                          | International actors not involved |
| Involvement of subnational entities in the constituent process (SUBNATIONAL)   | Subnational entities involved |                                          |                                          | Subnational entities not involved |

*Table 8: Calibration criteria for the conditions*

It should be noted that the criteria for assigning the scores in the process of calibration is different for the conditions and the outcomes. In fact, while for the conditions the calibration is conducted on the basis of mere qualitative/descriptive indicators, for the outcomes it is based on the scores obtained from the measure of constitutional asymmetries.<sup>508</sup> Ideally, it would have been more appropriate to assign sub-scores to measure the qualitative indicators for the conditions as well, as was done for the outcome to measure constitutional asymmetry. However, this would have required further empirical refinement of the indicators, and due to feasibility issues it was decided to explore this aspect in follow-up research.

### 3.5.2 The calibration of the conditions

Due to the qualitative nature of the indicators used for the calibration, a series of choices had to be made in intermediate cases, so that it was possible to univocally assign one specific score rather than another. As a general rule, when a case would have fit into multiple scores, the highest possible score was assigned to that case, as it was considered to be the more encompassing indicator. For example, a specific choice was made for Italy concerning condition RECOGNITION. Italy would potentially fit into almost all the scores, as constitutional asymmetries were pre-determined in the constitution (i.e., the five special regions, ex art. 116.1), but can also be introduced through a general constitutional procedure (ex art. 116.3), and in the case of South Tyrol they were introduced by a bilateral agreement (the 1946 De Gasperi-Gruber Agreement). However, in the calibration process, Italy was assigned the score of 1, as the procedure ex art. 116.3 has not yet brought in any relevant changes, and the provisions of De Gasperi-Gruber Agreement on South Tyrol were included later in the 1947 constitution.

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<sup>508</sup> See chapter 2.1.3.



### 3.5.3 The calibration of the outcomes

Concerning the outcomes, the process of calibration was conducted following three steps. First, for each case study two subnational entities (SNEs) had to be selected, and it is appropriate to explain the reasoning behind such selection.<sup>509</sup> As a general principle, the selection of subnational entities followed a “most different cases” logic,<sup>510</sup> to grasp the wider divide in terms of autonomy and thus asymmetry. Such difference was mainly displayed in terms of size and population density, comparing the biggest/smallest and most/least populous subnational units. Additionally, in case of the presence of different types of subnational units, the most and least autonomous type were taken as units of analysis. For example, for Italy the two selected SNEs were Aosta Valley, since it is the smallest and least populous unit, and it is a special region, and Lombardy, since it is the most populous ordinary region, and one of the biggest in terms of territorial size.

Then, once the two subnational entities were selected, the second step involved calculating the degree of autonomy for each SNE, following Popelier’s selected autonomy index.<sup>511</sup> Specifically, the measure of autonomy relied on three indicators (status, powers, fiscal arrangements) and on a series of sub-categories, briefly displayed in the following table.

| Indicator           | Categories                              |
|---------------------|-----------------------------------------|
| Status              | Self-definition                         |
|                     | Subnational constitutional autonomy     |
|                     | Legislative level                       |
|                     | Executive level                         |
|                     | Organization of courts                  |
| Powers              | Scope of powers                         |
|                     | Allocation techniques                   |
|                     | Political federalism dispute resolution |
|                     | Judicial federalism dispute resolution  |
| Fiscal arrangements | Subnational taxes                       |

*Table 9: Selected indexes for the measure of autonomy*

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<sup>509</sup> See Appendix 1.

<sup>510</sup> Hirschl, “The Question of Case Selection,” 139-142.

<sup>511</sup> See chapter 2.1.3 and Appendix 2.

Finally, as anticipated in chapter two, the scores for constitutional asymmetry were derived by subtracting the autonomy scores of the two selected SNEs. Given that the highest value was 0.48 (see Figure 2 in paragraph 3.3), a series of intervals were identified in order to establish the degree of constitutional asymmetry.

| CA values   | Set-membership score | Degree      | Cases                                   |
|-------------|----------------------|-------------|-----------------------------------------|
| 0.24 - 1    | 1                    | High        | Iraq, India, UK, Myanmar                |
| 0.15 – 0.23 | 0.67                 | Medium      | Belgium, Italy, Pakistan, Spain         |
| 0.01 – 0.14 | 0.33                 | Low         | BiH, Canada, Indonesia, Malaysia        |
| 0           | 0                    | Symmetrical | Ethiopia, Nigeria, South Africa, Russia |

*Table 10: Scores intervals for each degree of constitutional asymmetry and relative case studies*

A more detailed comment on the autonomy and asymmetry score will be provided in chapter five, analyzing the case studies for each degree of constitutional asymmetry and constitutional symmetry.

### 3.5.4 Collection and validation of data

In order to build up the data matrix on which the QCAs will be conducted, I relied on primary and secondary sources. In particular, I relied on the constitutions currently in force,<sup>512</sup> as well as subnational statutes, national legislation, and doctrine. Specifically regarding the calibration of the homogeneity condition, I relied on the demographic data on the ethnocultural composition of the population and its distribution within the system.<sup>513</sup>

For each case, I assigned the relevant scores for the five conditions on the basis of the calibration choices explained in the previous paragraphs and, for the calibration of the outcome, I calculated the autonomy scores in order to obtain the score for constitutional asymmetry.

Given that the case studies involved a variety of jurisdictions I was not specifically familiar with, I deemed a validation of the scores necessary. Therefore, I invited a number of national experts<sup>514</sup> to participate in the research study through a series of interviews. National experts were selected on the ground of their expertise in constitutional law and their direct knowledge of the case study. Such interviews were crucial in confirming the scoring in the calibration process and considerably increased the precision of the overall analysis.

<sup>512</sup> To access the English translation of each constitution, I relied on the online platform of Constitute Project, available at <https://www.constituteproject.org>.

<sup>513</sup> Two main platforms were used to retrieve this data, namely Statista and the CIA World Factbook, respectively available at <https://www.statista.com> and <https://www.cia.gov/the-world-factbook/>.

<sup>514</sup> See Appendix 1 for the complete list of the national experts involved in the study.

The data collection and the interviews were conducted in the period between 1 June 2021 and 15 July 2022. Despite taking into consideration the primary and secondary sources currently available, any constitutional development that occurred after this date had to be excluded from the analysis.

The validation of the data through interviews was performed according to the following plan. First, for each case I completed a so-called “autonomy sheet”,<sup>515</sup> consisting of the analysis of subnational autonomy according to Popelier’s indexes and a brief comment justifying the scores I assigned. Then, the autonomy sheet was sent to the national expert previously identified and later discussed during the interview. In this way, the national experts did not have to complete *ex novo* the autonomy sheet but rather simply check the validity of my results. Finally, the autonomy sheet was reviewed after the interview and the final data matrix completed.

As expected, the interviews with the national experts proved to be essential to soundly performing the analysis and strengthening the research. Certainly, this does not mean that the inevitable margin of error was eliminated, but, overall, it can be argued that the analysis is as sound as it can possibly (and humanly) be.

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<sup>515</sup> See Appendix 2 for the model of the autonomy sheet employed to conduct the analysis of subnational autonomy on the basis of Popelier’s indexes and then sent to each national expert.

### *3.6 Concluding remarks*

The goal of this chapter was to trace the methodological framework in which this thesis is grounded. From the review of the classic approaches to comparison in constitutional law it became apparent that it is increasingly popular (albeit sometimes with a good degree of skepticism) to refer to methods typical of the social sciences, such as quantitative methods in large-N studies. The interest towards causal inference is significant and has the potential to expand the knowledge of constitutional phenomena beyond the traditional borders of legal scholarship. However, some scholars, such as von Bogdandy, warn against the primacy given to causality at the expense of a hermeneutical understanding of reality. This research seeks to trace a middle way, pursuing causal paths without losing sight of the peculiarities of the constitutional systems involved. The ultimate aim would be to test these causal paths against concrete applications in specific contexts, recalling what Jackson called “contextualized functionalism”. Therefore, this study is guided by the conviction that comparative constitutional law would benefit from the social sciences methods, especially when concerned with the structure of the research design, the systematic case selection, and the controlled comparison techniques. Nonetheless, these methods should not be adopted uncritically and should not be considered to be the end of the analysis, at the expense of a deeper examination of constitutional systems.

Precisely for this reason, this research adopts QCA only as the first step in the study, identifying what the necessary and sufficient legal factors are to produce a low, medium, or high degree of constitutional asymmetry. Once the QCAs are performed in the next chapter, the results will be brought back to the “context”, so that the identified causal paths can be appreciated in the reality of the constitutional systems, further sharpening the understanding of constitutional asymmetries. The choice of QCA was made precisely because it allows for integration of the quantitative interest towards generalization and causality and the qualitative analysis of case studies. Moreover, QCA allows for exploration of the interplay among causal factors, as constitutional asymmetries are unlikely to be explained by a single determinant factor, but rather by multiple concurrent factors. The QCA of this study aims to display such interplay, taking into account the complexity of factors conducive to constitutional asymmetries, and framing the results in terms of necessity and sufficiency.

Alongside the legal factors identified in chapter two, the QCA that will be performed in this thesis is constructed along five conditions, i.e., a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetries, ethnically homogeneous subnational entities, and the involvement of international as well as subnational actors in the constituent process. The analysis will provide some explanation about which of these features are more likely

to produce a high, medium, or low degree of constitutional asymmetry, or conversely constitutional symmetry.

## CHAPTER FOUR

### HOW TO EXPLAIN CONSTITUTIONAL ASYMMETRIES

The result of the calibration process outlined in the previous chapter is a raw data matrix<sup>516</sup> that is later processed by software<sup>517</sup> to perform the Standard Analysis of Qualitative Comparative Analysis (QCA), analyzing necessity and sufficiency.<sup>518</sup>

As already explained in the previous chapter (paragraph 3.3), the Standard Analysis is performed two times, to explain both the presence and the absence of the outcome, namely the presence of a high degree of constitutional asymmetry and its absence. This allows for exploration of the high and medium degree of constitutional asymmetry on the one hand, and the low degree of asymmetry and constitutional symmetry on the other.

This chapter addresses the analysis for the presence of the outcome in paragraph 4.1, while paragraph 4.2 will focus on its absence. Each paragraph will first analyze necessity, then move to the analysis of sufficiency and the truth table, before finally reviewing the solution formulas (conservative, most parsimonious, intermediate). The concluding paragraph draws together the results of the QCA and frames them in terms of constitutional design for divided multi-tiered systems.

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<sup>516</sup> See Appendix 4 for the complete data matrix resulting from the calibration process.

<sup>517</sup> In this research, the QCA and SetMethods packages on R were used to conduct the standard analysis.

<sup>518</sup> Ideally, for a more nuanced analysis addressing the potential pitfalls of QCA, after the Standard Analysis (SA) an Enhanced Standard Analysis (ESA) could be performed. Given the advanced nature of ESA, this is something that could be performed in further research.

#### *4.1 Standard Analysis for the presence of the outcome*

The case studies that display the presence of the outcome are eight: India, Myanmar, the UK, and Iraq have a high degree of constitutional asymmetry (thus are “fully in” the set), while Spain, Italy, Pakistan, and Belgium have a medium degree of constitutional asymmetry (thus are “more in than out” the set, but still considered as members of the outcome).

##### 4.1.1 Analysis of necessity

The first step of the Standard Analysis is the analysis of necessity. As explained in chapter three, a condition is necessary for the outcome if whenever the outcome is present, the condition is present as well. In other words, the presence of the outcome implies the presence of the condition as well.

When exploring which are the necessary conditions to produce a high degree of constitutional asymmetry, we find that there are no single conditions indispensable for the outcome, but we do find four possible SUIN conditions, namely those conditions that on their own are not indispensable for the outcome, but are a necessary part of necessity claims:

- DISTRIBUTION + RECOGNITION (i.e., a limited distribution of differentiated autonomy or a constitutional recognition of constitutional asymmetry is necessary to display a high degree of constitutional asymmetry).
- DISTRIBUTION + HOMOGENEITY (i.e., a limited distribution of differentiated autonomy or the prevalence of ethnically homogeneous subnational entities is necessary to display a high degree of constitutional asymmetry).
- DISTRIBUTION + ~SUBNATIONAL (i.e., a limited distribution of differentiated autonomy or the absence of subnational actors in the constituent process is necessary to display a high degree of constitutional asymmetry).
- RECOGNITION + ~SUBNATIONAL (i.e., a constitutional recognition of constitutional asymmetries or the absence of subnational actors in the constituent process is necessary to display a high degree of constitutional asymmetry).

To visualize these four combinations, it is useful to make reference to the following XY plots, with the combination of conditions on the x-axis and the outcome on the y-axis.

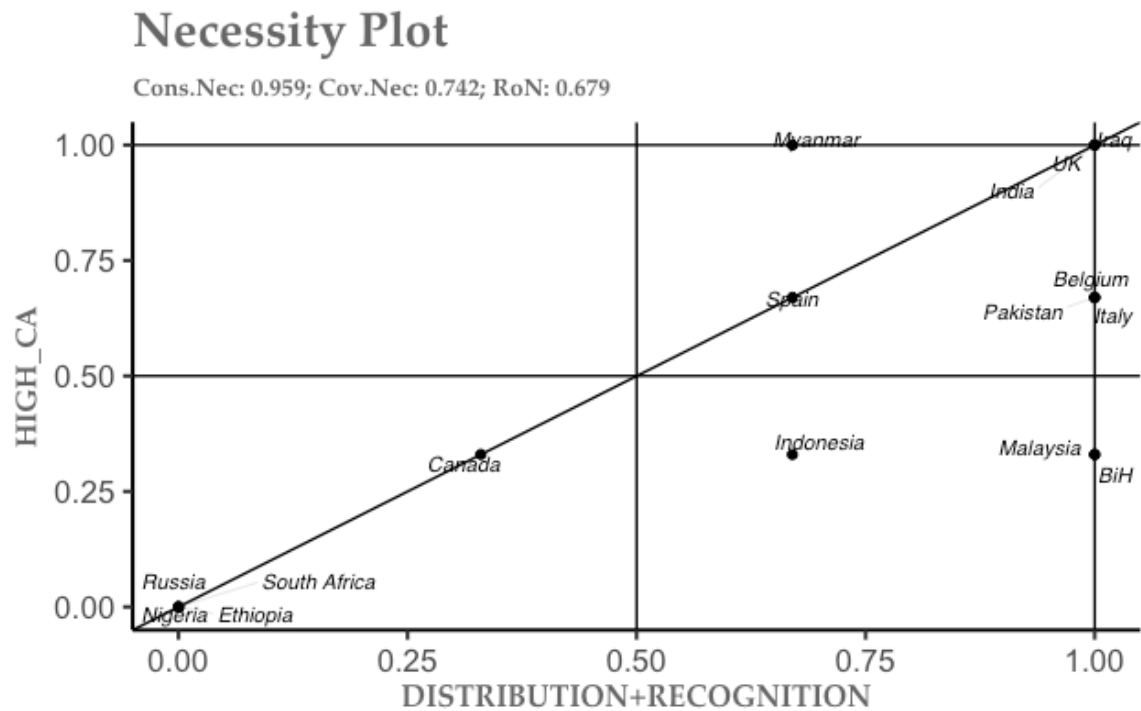


Figure 4: Necessity plot for DISTRIBUTION+RECOGNITION

This first XY plot (Figure 4) displays the first combination of necessary conditions to produce the outcome (i.e., limited distribution or constitutional recognition). From the plot we can see that all cases (but one) are on or below the diagonal, meaning that they are cases where the necessity claim holds true.<sup>519</sup> It is especially true for those cases in the triangle in the upper-right quadrant, namely Spain, India, Iraq, UK, Italy, Pakistan, Belgium, that in QCA theory are called “typical cases”.<sup>520</sup> The only partially problematic case is Myanmar, displayed above the diagonal in the upper-right quadrant. In QCA theory, the cases displayed in that portion of the upper-right quadrant are called “deviant cases in degree”. This means that Myanmar deviates from the necessity claim but not in a highly problematic way, since it is both part of the set in the condition and the outcome, therefore it merely constitutes a “variation on the theme”. Conversely, we can also notice that there are no highly problematic cases contradicting the necessity claim, since no case is present in the upper-left quadrant of the plot, where cases would be “deviant cases in kind”. This would have required further engagement with any such cases to understand why they contradict the necessity claim.

<sup>519</sup> Oana, Schneider, and Thomann, *Qualitative Comparative Analysis Using R*, 68.

<sup>520</sup> Ibidem



In conclusion, we can observe that this first combination, i.e., a limited distribution of differentiated autonomy or a constitutional recognition of constitutional asymmetry, is in line with the theoretical expectations anticipated in the second chapter.

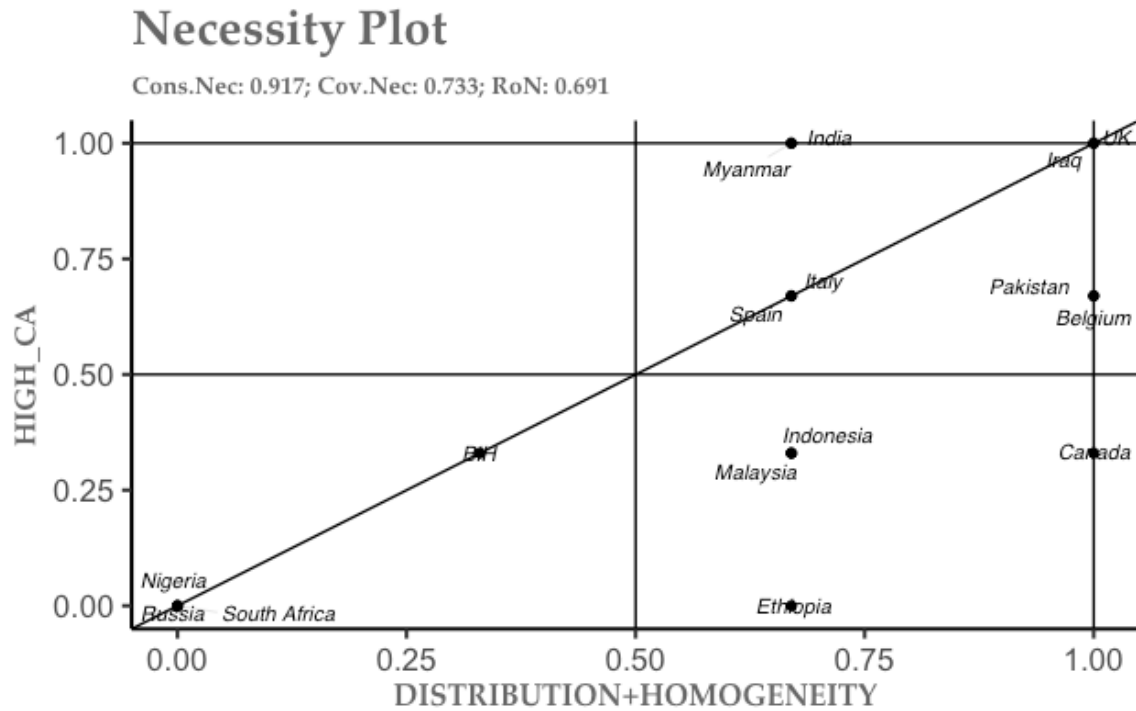


Figure 5: Necessity plot for DISTRIBUTION+HOMOGENEITY

Moving to the second combination, i.e., a limited distribution of differentiated autonomy or the prevalence of ethnically homogeneous subnational entities, we can also notice from the XY plot (Figure 5) that there are no deviant cases in kind (i.e., upper-right quadrant) contradicting the necessary claim. That said, we have another deviant case in degree (i.e., upper-left quadrant above the diagonal) aside from Myanmar, namely India, that in the previous necessity claim was a typical case. This second necessity claim is in line with the theoretical expectation emerged from the second chapter on constitutional asymmetries.

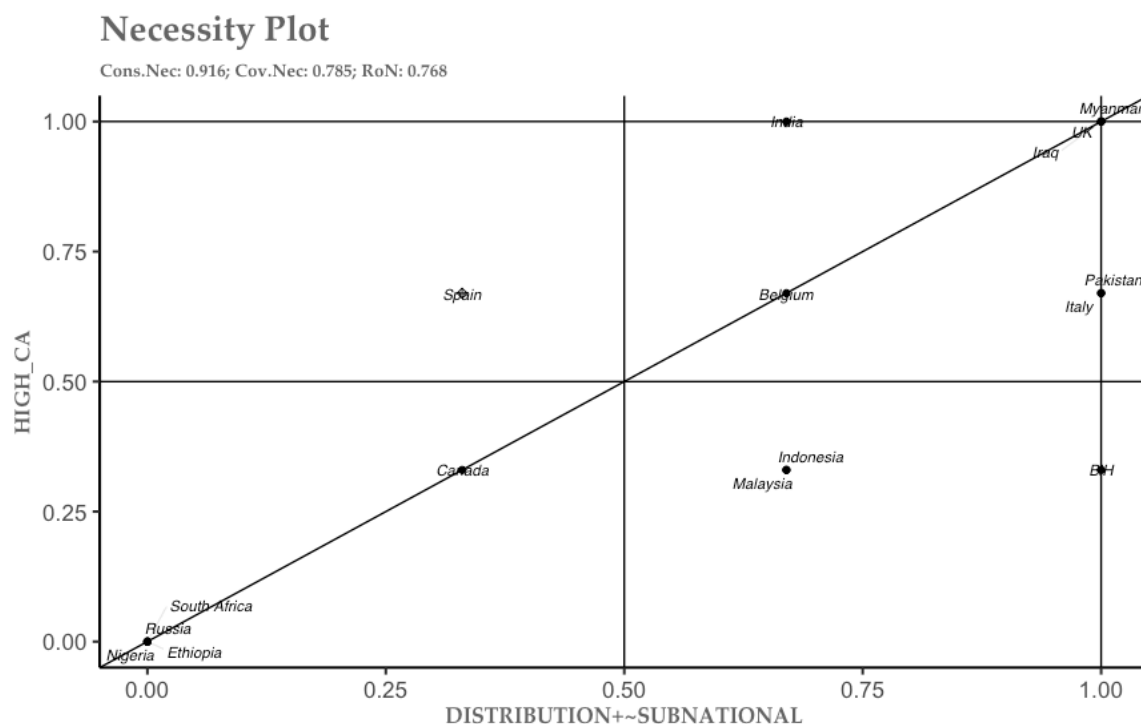


Figure 6: Necessity plot for DISTRIBUTION+~SUBNATIONAL

Then, the third necessity claim emerging from the analysis of necessity states that limited distribution of differentiated autonomy or the absence of subnational actors in the constituent process is necessary to display a high degree of constitutional asymmetry. This statement appears to contradict the theoretical expectations according to which the involvement of subnational actors would have enhanced the degree of constitutional asymmetries. Looking at the XY plot (Figure 6), we may notice not only that India is again a deviant case in degree as in the previous necessity claim, but also that there is a so-called “deviant case in kind” in the upper-left quadrant, namely Spain, contradicting the necessity claim. Indeed, in Spain the Autonomous Communities broadly enjoy the same level of autonomy, and asymmetries are present only in some dimensions (i.e., fiscal arrangements) in an otherwise symmetrical settlement. Also, in Spain subnational actors were involved in the constitution-making process, especially the nationalities that were the first to establish their own Autonomous Community, namely the Basque Country and Catalonia. These two elements create a contradiction, since Spain is not a member of the condition set on the x-axis (since it is before the 0.50 threshold) but it is a member of the outcome set on the y-axis (since it is above the 0.50 threshold).

In QCA theory, the presence of a deviant case in kind represents an alarm bell since it may falsify the necessity claim and needs a closer look to assess whether it is just an anomaly due to its peculiarities or an indication that the necessity claim does not hold true. However, this contradiction may be due to the peculiar constitutional and historical factors that led to the

introduction of constitutional asymmetries in Spain in the 1978 constitution, which led to strong potential for constitutional asymmetries but to a weak actualization of this. Indeed, constitutional asymmetries are not pervasive in all dimensions (i.e., status, powers, and fiscal arrangements) despite the strong *de facto* asymmetries present within the system.

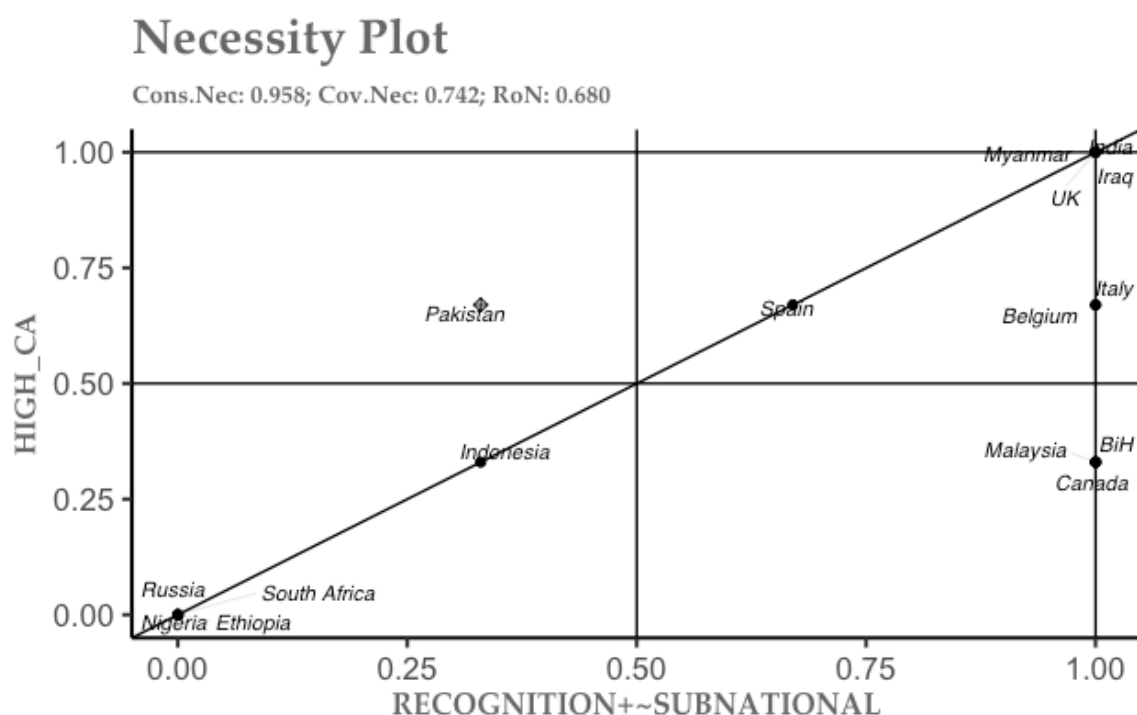


Figure 7: Necessity plot for RECOGNITION+~SUBNATIONAL

Finally, the last necessity claim emerging from the QCA states that constitutional recognition of constitutional asymmetries or the absence (indicated by the “~”) of subnational actors in the constituent process are necessary to produce a high degree of constitutional asymmetry. As for the previous necessity claim, the absence of subnational actors goes against the original theoretical expectations on their role in enhancing asymmetries. Looking at the XY plot (Figure 7), we do not find deviant cases in degree as the previous two graphs, but there is a deviant case in kind, namely Pakistan. Indeed, in Pakistan the constitutional asymmetries involving Gilgit-Baltistan are not constitutionally entrenched but were introduced by the Gilgit-Baltistan Empowerment and Self-Governance Order in 2009, and subnational actors (i.e., the ethnic groups) were involved in the constituent process. This means that Pakistan is not a member of the condition set (as displayed by the fact that it is below the 0.5 threshold on the x-axis). However, Pakistan is a member of the outcome, since it presents a medium degree of constitutional asymmetry (and thus is “more in than out” the set), contradicting this necessity statement. However, this may be an anomaly due

to the peculiar historical and political factors which determined the introduction of constitutional asymmetries in Pakistan, as will be further explained in chapter five.

In general, the two conditions that appear to play a more determining role are DISTRIBUTION and RECOGNITION, since they appear combined together in the first necessity statement or as a necessary part of the other two claims. As previously mentioned, the theoretical expectations of this research were that the presence of a limited distribution of differentiated autonomy and of a constitutional recognition of asymmetries would have led to a higher degree of asymmetry within the system, and thus these appear to be confirmed by the analysis of necessity.

#### 4.1.2 Analysis of sufficiency

Once necessity has been assessed, the Standard Analysis proceeds to analyze sufficiency. If necessity means that the presence of the outcome implies the presence of the condition, sufficiency is the other side of the coin: the presence of the condition implies the presence of the outcome. To identify the conditions (or their combinations) that are sufficient to produce the outcome, it is first necessary to build a truth table that will be later processed to find the solution formulas, explored in detail in the next paragraph.

As previously explained at the beginning of this chapter (see paragraph 3.2.1), the truth table rows are all the logically possible combinations between the conditions. Given that our model has five conditions, the truth table will have  $2^5 = 32$  rows. Based on the empirical information used to build the dataset, each row in the truth table is considered to be either sufficient or not for the outcome, or it can be considered a logical reminder. If the row is considered sufficient, the output value will be 1, if not sufficient 0, if logical reminder the output value will be “?”.<sup>521</sup>

To construct the truth table, the `truthTable()` function in the R package QCA was used, and the resulting truth table is provided in Table 11.<sup>522</sup> As we can observe, we find seven rows that are combinations of conditions sufficient for the outcome ( $OUT = 1$ ) and five rows of combinations that are not sufficient for the outcome ( $OUT = 0$ ). The remaining rows are combinations considered logical reminders (marked by the “?” in the table) and will be included in the analysis of the intermediate solution formulas during logical minimization. Before proceeding with logical minimization, we can further observe that there is one row (specifically

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<sup>521</sup> For more details on how the truth table is constructed, see Oana, Schneider and Thomann, *Qualitative Comparative Analysis Using R*, 102-109.

<sup>522</sup> See the R script on Harvard Dataverse for the complete code. Given the limited number of case studies employed in the research, the lowest number of cases in a row before it is classified as a logical reminder was 1 ( $n.cut = 1$ ).

row 18) in the truth table where the PRI value is 0.5. PRI is a parameter of fit in QCA to assess the quality of set relations in the analysis of sufficiency, to avoid the phenomenon of “simultaneous subset relations”, namely a non-sensical situation in which a combination of conditions is sufficient to produce both the outcome and its negation. Simultaneous subset relations occur when the PRI value is close to 0.5, and thus in the truth table row 18 is not considered as a combination of conditions sufficient to produce the outcome. From the truth table, we can observe that the combination of conditions expressed by row 18 involved two specific cases, Pakistan and Indonesia. As will become clear over the following pages, this means that these two cases are not explained by the current model of conditions, and therefore require a closer look. The last chapter will offer some proposals on the reasons why these two cases are not explained by the current model.

Table 11: Truth table for the outcome HIGH\_CA

|    | DISTRIBUTION | RECOGNITION | HOMOGENEITY | INTERNATIONAL | SUBNATIONAL | OUT | n | incl  | PRI   | cases                       |
|----|--------------|-------------|-------------|---------------|-------------|-----|---|-------|-------|-----------------------------|
| 14 | 0            | 1           | 1           | 0             | 1           | 1   | 1 | 1     | 1     | Spain                       |
| 17 | 1            | 0           | 0           | 0             | 0           | 1   | 1 | 1     | 1     | Myanmar                     |
| 21 | 1            | 0           | 1           | 0             | 0           | 1   | 1 | 1     | 1     | UK                          |
| 26 | 1            | 1           | 0           | 0             | 1           | 1   | 1 | 1     | 1     | India                       |
| 29 | 1            | 1           | 1           | 0             | 0           | 1   | 1 | 1     | 1     | Italy                       |
| 30 | 1            | 1           | 1           | 0             | 1           | 1   | 1 | 1     | 1     | Belgium                     |
| 32 | 1            | 1           | 1           | 1             | 1           | 1   | 1 | 1     | 1     | Iraq                        |
| 18 | 1            | 0           | 0           | 0             | 1           | 0   | 2 | 0.830 | 0.500 | Indonesia,Pakistan          |
| 6  | 0            | 0           | 1           | 0             | 1           | 0   | 2 | 0.495 | 0     | Canada,Ethiopia             |
| 11 | 0            | 1           | 0           | 1             | 0           | 0   | 1 | 0.493 | 0     | BiH                         |
| 28 | 1            | 1           | 0           | 1             | 1           | 0   | 1 | 0.493 | 0     | Malaysia                    |
| 2  | 0            | 0           | 0           | 0             | 1           | 0   | 3 | 0.229 | 0     | Nigeria,Russia,South Africa |
| 1  | 0            | 0           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 3  | 0            | 0           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 4  | 0            | 0           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 5  | 0            | 0           | 1           | 0             | 0           | ?   | 0 |       |       |                             |
| 7  | 0            | 0           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 8  | 0            | 0           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 9  | 0            | 1           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 10 | 0            | 1           | 0           | 0             | 1           | ?   | 0 |       |       |                             |
| 12 | 0            | 1           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 13 | 0            | 1           | 1           | 0             | 0           | ?   | 0 |       |       |                             |
| 15 | 0            | 1           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 16 | 0            | 1           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 19 | 1            | 0           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 20 | 1            | 0           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 22 | 1            | 0           | 1           | 0             | 1           | ?   | 0 |       |       |                             |
| 23 | 1            | 0           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 24 | 1            | 0           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 25 | 1            | 1           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 27 | 1            | 1           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 31 | 1            | 1           | 1           | 1             | 0           | ?   | 0 |       |       |                             |

#### 4.1.3 The solution formulas

From the truth table, the Standard Analysis derives three different solutions, differing in the extent to which they include logical reminders, and thus in their degree of complexity. This section will explore them separately.<sup>523</sup>

##### Conservative solution

The conservative solution does not include any reminder row (i.e., those truth table rows where OUT = ?) in the logical minimization and provides a detailed and complex solution. In this case, initially the solution's output produced a situation of so-called "model ambiguity", meaning that there is more than one solution formula to summarize the information in the truth table and the researcher has to choose between them. To address model ambiguity, the Standard Analysis protocol makes reference to the so-called "prime implicants (PI) chart", used to eliminate redundancies. In order not to over-complicate the explanation, it is sufficient to say that it was possible to identify a redundancy and model ambiguity was resolved.<sup>524</sup> The solution is now only one and composed of five terms.

Broadly speaking, the existence of five different solution terms perfectly reflects the concept of causal complexity typical of Qualitative Comparative Analysis. Specifically, such conservative solutions suggest that we are in presence not only of conjunctural causation (i.e., each term is a sequence of conditions that must occur together to produce the outcome, indicated by the \* ("AND") in Boolean algebra) but also of equifinality (i.e., each term contributes to the explanation of the outcome, indicated by the + ("OR") in Boolean algebra).

The resulting Boolean formula is the following:

$$\begin{aligned} & \text{DISTRIBUTION*~RECOGNITION*~INTERNATIONAL*~SUBNATIONAL} + \\ & \text{DISTRIBUTION* RECOGNITION* HOMOGENEITY* ~INTERNATIONAL} + \\ & \text{DISTRIBUTION* RECOGNITION* HOMOGENEITY* SUBNATIONAL} + \\ & \text{DISTRIBUTION* RECOGNITION* ~INTERNATIONAL* SUBNATIONAL} + \\ & \text{RECOGNITION* HOMOGENEITY* ~INTERNATIONAL* SUBNATIONAL} \\ & \rightarrow \text{HIGH\_CA} \end{aligned}$$

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<sup>523</sup> See Appendix 5 for the solution formulas and relative parameters of fit.

<sup>524</sup> The original conservative solution was composed of two solutions (M1, M2):

M1: DISTRIBUTION\*~RECOGNITION\*~INTERNATIONAL\*~SUBNATIONAL +  
DISTRIBUTION\*RECOGNITION\*HOMOGENEITY\*SUBNATIONAL +  
DISTRIBUTION\*RECOGNITION\*~INTERNATIONAL\*SUBNATIONAL +  
RECOGNITION\*HOMOGENEITY\*~INTERNATIONAL\*SUBNATIONAL +  
(DISTRIBUTION\*RECOGNITION\*HOMOGENEITY\*~INTERNATIONAL) -> HIGH\_CA  
M2: DISTRIBUTION\*~RECOGNITION\*~INTERNATIONAL\*~SUBNATIONAL +  
DISTRIBUTION\*RECOGNITION\*HOMOGENEITY\*SUBNATIONAL +  
DISTRIBUTION\*RECOGNITION\*~INTERNATIONAL\*SUBNATIONAL +  
RECOGNITION\*HOMOGENEITY\*~INTERNATIONAL\*SUBNATIONAL +  
(DISTRIBUTION\*HOMOGENEITY\*~INTERNATIONAL\*~SUBNATIONAL) -> HIGH\_CA

Thanks to the analysis of the PI chart on R, it was possible to eliminate the redundant term: DISTRIBUTION\*HOMOGENEITY\*~INTERNATIONAL\*~SUBNATIONAL.

|               |               |                 |                |  | cases          |
|---------------|---------------|-----------------|----------------|--|----------------|
| DISTRIBUTION* | ~RECOGNITION* | ~INTERNATIONAL* | ~SUBNATIONAL   |  | Myanmar; UK    |
| DISTRIBUTION* | RECOGNITION*  | HOMOGENEITY*    | ~INTERNATIONAL |  | Italy; Belgium |
| DISTRIBUTION* | RECOGNITION*  | HOMOGENEITY*    | SUBNATIONAL    |  | Belgium; Iraq  |
| DISTRIBUTION* | RECOGNITION*  | ~INTERNATIONAL* | SUBNATIONAL    |  | India; Belgium |
| RECOGNITION*  | HOMOGENEITY*  | ~INTERNATIONAL* | SUBNATIONAL    |  | Spain; Belgium |

Figure 8: Conservative solution terms and relative cases – outcome HIGH\_CA

To translate this complex solution into words, it is helpful to look at each solution term separately. Starting from the first term, this means that the limited distribution of differentiated autonomy, the absence of a constitutional recognition of constitutional asymmetries, and the absence of international and subnational actors, are all factors that when taken together explain a high degree of constitutional asymmetry, as is the case for Myanmar and the UK. Looking at the details of these two cases, in Myanmar, differentiated autonomy is expressed in terms of significantly less autonomy, and involves only the Self-Administered Areas and Self-Administered Zones, while the other subnational entities (states and regions) share equal powers. Asymmetry is not explicitly recognized by the constitution but is derived from bilateral agreements (especially ceasefire agreements). Concerning the actors involved, there were no international actors involved in the constituent process, and subnational actors were not directly involved since it was a process of controlled deliberation from the military. Looking at the UK, the only subnational entity that has not (yet) enjoyed devolution of powers is England, under the direct rule of the central parliament, thus marking a definite difference between England and the other devolved nations. Where devolution is indeed in place, it was introduced through ordinary legislation, with the 1998 devolution acts and followings. In the United Kingdom as well (but for very different reasons than Myanmar), no international or subnational actors were formally involved in the constituent process, given the centrality and supremacy of the Westminster Parliament. It is further interesting to notice that both Myanmar and the UK share a high degree of constitutional asymmetry (and thus are both “fully in” the outcome set), even though the value of the UK is higher than the one of Myanmar.

Moving to the second solution term, this indicates that a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetries, ethnically homogeneous subnational entities, and the absence of international actors, are all factors that, combined, explain a medium degree of constitutional asymmetry, as demonstrated by Italy and Belgium. As regards Italy, art. 116 of the Constitution provides for differentiated autonomy limited to the five special regions, who are granted more autonomy than the ordinary regions, and



subnational entities which are mainly homogeneous, aside from the subalpine special regions (Aosta Valley, Trentino/South Tyrol, Friuli Venezia Giulia), home of the linguistic minorities. Also in Italy, the constituent process was conducted at the national level by the constituent assembly, without the involvement of international actors. Concerning Belgium, the distribution of differentiated autonomy is rather complex, with the establishment of three Communities and three Regions, each having their own degree of differentiation. Broadly speaking, we could argue that the Flemish and French Communities enjoy differentiated autonomy since art. 137 of the Constitution entitles them to “exercise the competences, respectively, of the Flemish Region and of the Walloon Region”.<sup>525</sup> By contrast, the subnational entities are homogeneous, aside from the bilingual Brussels-Region. As in Italy, international actors were not involved in the constituent process.

The third solution term suggests that a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, the presence of ethnically homogeneous subnational entities, and the presence of subnational actors are conditions that taken together explain a medium and high degree of constitutional asymmetry. This is the case of Belgium (i.e., medium degree) and Iraq (i.e., high degree). Belgium having already been discussed, the only element to add concerns the role played by subnational entities in the constituent making process, essential in upholding their autonomy claims. Concerning Iraq, the constitution grants differentiated autonomy to regions, with the Kurdistan Region currently being the only established region, subnational entities are generally homogeneous, and (some) subnational actors, namely the Iraqi Kurds, were involved in the constituent process. It should be further noted that Iraq is the case study that displays the highest degree of constitutional asymmetry, to be further discussed in the next chapter.

Furthermore, the fourth term indicates that a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, the absence of international actors, and the presence of subnational actors, are factors that combined explain a medium and high degree of constitutional asymmetry. This combination describes the case of Belgium (i.e., medium degree) and India (i.e., high degree). Focusing on India, differentiated autonomy is limited to some north-eastern states and some union territories (e.g., Delhi), and these asymmetries are expressly provided for in the constitution (more specifically art. 370-371, Schedule 5 and 6, art. 239AA). Regarding the constituent process, if international actors were not involved in the process

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<sup>525</sup> Art. 137 – Belgian Constitution: “With a view to the application of Article 39, the Parliaments of the Flemish and French Communities, as well as their respective Governments, may exercise the competences, respectively, of the Flemish Region and of the Walloon Region, under the conditions and according to the terms set by the law. This law must be adopted by a majority as described in Article 4, last paragraph.”

(if we exclude the previous British colonial rule and the 1947 Indian Independence Act), subnational actors were involved, upholding and negotiating their autonomy with the central level in the drafting phase.

Finally, another explanation for the medium degree of constitutional asymmetry is a constitutional recognition of constitutional asymmetry, ethnically homogeneous subnational entities, the absence of international actors, and the presence of subnational actors, as is the case in Belgium and Spain. In Spain, the constitution contains a provision to establish differentiated autonomy among autonomous communities (Chapter III, art. 143 and 144), subnational entities are mainly homogeneous, aside from few that are heterogeneous (e.g., Valencia and Aragon), and international actors were not involved in the constituent process, but subnational actors were and played an important role in guaranteeing that their autonomy claims were recognized.

In conclusion, all these are alternatives that are sufficient to explain the outcome. It is also interesting to note that Belgium can be explained by four out of five solution terms. This is precisely the meaning of the principle of equifinality, namely the presence of more than one explanation for the same outcome.

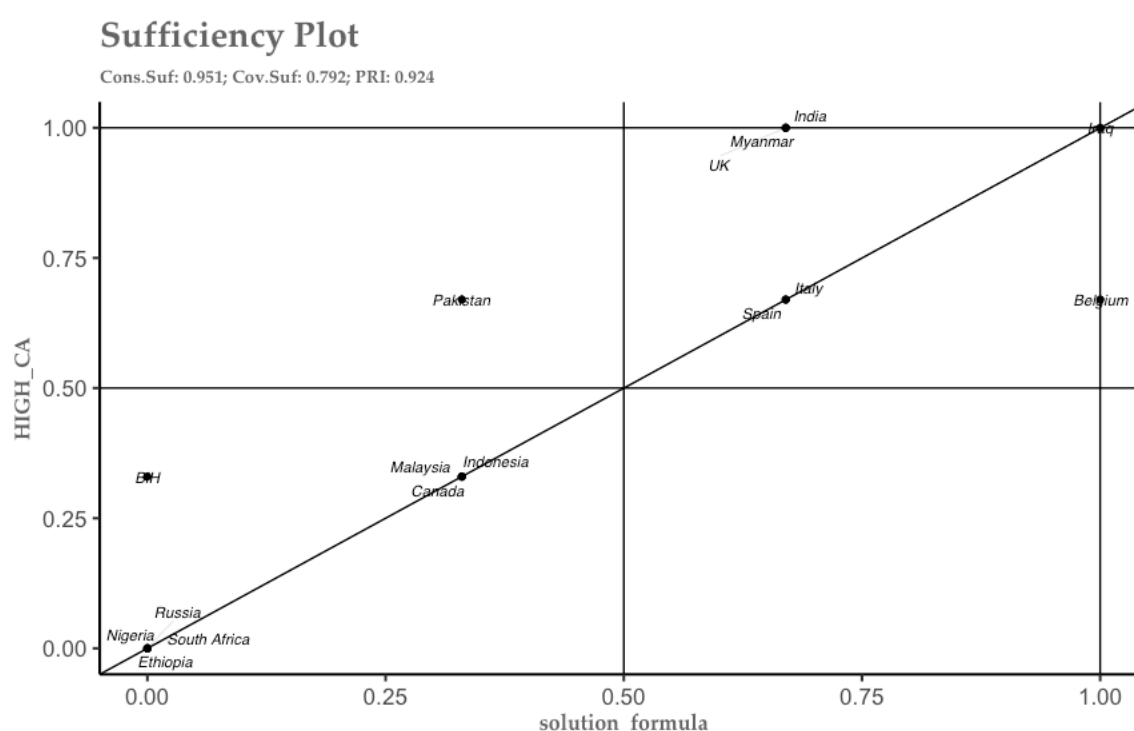


Figure 9: XY plot for the conservative solution formula – outcome HIGH\_CA

It is also possible to visualize the solution formula in a XY plot (Figure 9), where we find that only Pakistan is left unexplained by the conservative solution, being a so-called “deviant case

in coverage”<sup>526</sup> (i.e., in the upper-left quadrant) and thus contradicting the sufficiency statement. As was the case previously with necessity, this might derive from other extra-legal factors and thus not diminish substantially the solution formula for sufficiency. This is also supported by the fact that, if we look at the parameters of fit for the solution formula,<sup>527</sup> we can observe that the values are rather high, thus indicating that the formula is able to explain the outcome.

Also, we can notice that Myanmar, the UK, India, Spain, Italy, and Iraq are typical cases (i.e., upper-right quadrant above the diagonal) for this sufficiency claim, while Belgium is a deviant case in degree.

Having completed the review of the conservative solution, it is clear that this solution is extremely complex and detailed. However, it can be simplified through further steps of logical minimization, leading to the following most parsimonious solution.

### Most parsimonious solution

The most parsimonious solution includes all those reminder rows that contribute to obtaining the simplest solution.<sup>528</sup> As with the conservative solution, in the most parsimonious solutions we also experience model ambiguity, as four equivalent solutions are generated.<sup>529</sup>

Making reference to the prime implicants (PI) chart, we can drop the redundant terms and generate a single most parsimonious solution composed of three terms:

|                                                        |                              |
|--------------------------------------------------------|------------------------------|
| DISTRIBUTION*HOMOGENEITY + DISTRIBUTION*~SUBNATIONAL + |                              |
| RECOGNITION*~INTERNATIONAL                             |                              |
| → HIGH_CA                                              |                              |
| =====                                                  |                              |
| cases                                                  |                              |
| -----                                                  |                              |
| DISTRIBUTION* HOMOGENEITY                              | UK; Italy; Belgium; Iraq     |
| DISTRIBUTION* ~SUBNATIONAL                             | Myanmar; UK; Italy           |
| RECOGNITION* ~INTERNATIONAL                            | Spain; India; Italy; Belgium |
| -----                                                  |                              |

Figure 10: Most parsimonious solution terms and relative cases – outcome HIGH\_CA

<sup>526</sup> Oana, Schneider, and Thomann, *Qualitative Comparative Analysis Using R*, 99.

<sup>527</sup> See parameters of fit for the conservative solution in Appendix 5.

<sup>528</sup> To arrive to this conclusion, the software has included 10 “simplifying assumptions”, meaning those truth table rows (i.e., combinations of conditions) that were assumed to be sufficient for the outcome.

<sup>529</sup> The four solutions are:

M1: RECOGNITION\*~INTERNATIONAL + (DISTRIBUTION\*HOMOGENEITY + DISTRIBUTION\*~SUBNATIONAL) → HIGH\_CA  
M2: RECOGNITION\*~INTERNATIONAL + (DISTRIBUTION\*HOMOGENEITY + ~INTERNATIONAL\*~SUBNATIONAL) → HIGH\_CA  
M3: RECOGNITION\*~INTERNATIONAL + (DISTRIBUTION\*~SUBNATIONAL + RECOGNITION\*HOMOGENEITY) → HIGH\_CA  
M4: RECOGNITION\*~INTERNATIONAL + (RECOGNITION\*HOMOGENEITY + ~INTERNATIONAL\*~SUBNATIONAL) → HIGH\_CA

In other words, these three solution terms mean that a limited distribution of differentiated autonomy and ethnically homogeneous subnational entities (first solution term) is a combination of conditions that is sufficient to produce the outcome, as in the case of the UK, Italy, Belgium and Iraq. Another sufficient combination is a limited distribution of differentiated autonomy and the absence of subnational actors (second solution term), as in the case of Myanmar, UK, and Italy, and the same is true of a constitutional recognition of constitutional asymmetries and the absence of international actors (third solution term), as in Spain, India, Italy, and Belgium. Once again regarding the principle of equifinality, it is interesting to observe that the medium degree of constitutional asymmetry in Italy is explained by all three solution terms, while in Belgium and the UK by two out of three solution terms.

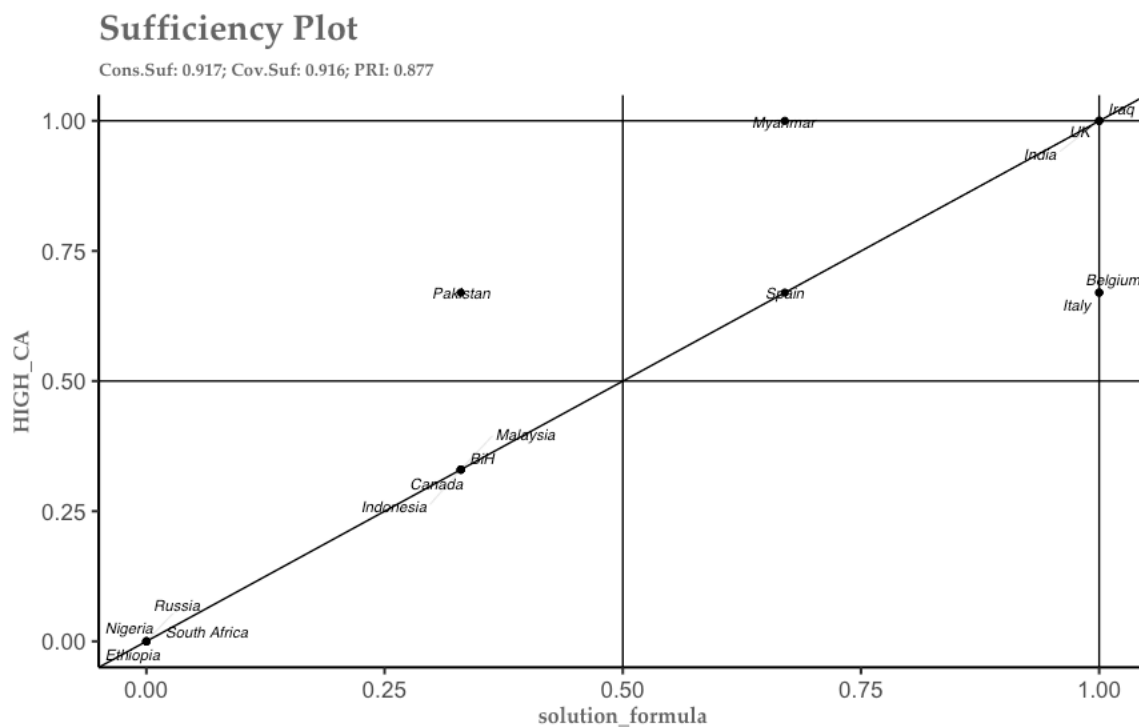


Figure 11: XY plot for the most parsimonious solution formula – outcome HIGH\_CA

Looking at the XY plot (Figure 11) for the solution formula, we can observe that the typical cases are Spain, India, the UK, Iraq, and Myanmar, while Belgium and Italy are deviant cases in degree. Once again Pakistan is the only deviant case in coverage, left unexplained by the solution formula.

### Intermediate solution

Finally, the intermediate solution includes all those reminder rows that were included in the most parsimonious solution, as long as they are in line with the so-called “directional expectations” (i.e., the theory-based expectations) on single conditions. For the purpose of this research, two directional expectations were tested to produce the intermediate solution.

In the first expectation, we hypothesize that international and subnational actors are not present in the constituent process, while there is a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, and ethnically homogeneous subnational entities. Using these expectations, the intermediate solution is the following:

$$\begin{aligned}
 & \text{DISTRIBUTION*RECOGNITION*HOMOGENEITY} + \\
 & \text{DISTRIBUTION* RECOGNITION* ~INTERNATIONAL} + \\
 & \text{DISTRIBUTION* ~INTERNATIONAL* ~SUBNATIONAL} + \\
 & \text{RECOGNITION* HOMOGENEITY* ~INTERNATIONAL} \\
 & \rightarrow \text{HIGH\_CA}
 \end{aligned}$$

Directional expectations (1, 1, 1, 0, 0)

|                                            | cases                 |
|--------------------------------------------|-----------------------|
| DISTRIBUTION* RECOGNITION* HOMOGENEITY     | Italy; Belgium; Iraq  |
| DISTRIBUTION* RECOGNITION* ~INTERNATIONAL  | India; Italy; Belgium |
| DISTRIBUTION* ~INTERNATIONAL* ~SUBNATIONAL | Myanmar; UK; Italy    |
| RECOGNITION* HOMOGENEITY* ~INTERNATIONAL   | Spain; Italy; Belgium |

Figure 12: Intermediate solution terms and relative cases for first directional expectations – outcome HIGH\_CA

As we can observe, this first intermediate solution is slightly less complex than the conservative solution, but more detailed than the most parsimonious solution. In other words, these solution terms mean that a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, and ethnically homogeneous subnational entities, are a combination of conditions that are sufficient to produce a medium and high degree of constitutional asymmetry, as in the case of Italy, Belgium, and Iraq. Similarly, a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, and the absence of international actors are sufficient to produce a medium or high degree of constitutional asymmetry, as in India, Italy, and Belgium. Also, a limited distribution of differentiated autonomy, and the absence of international and subnational actors is a sufficient combination of conditions to explain a high or medium degree of constitutional asymmetry. This is the case in Myanmar, the UK, and Italy. Finally, another combination of conditions that is sufficient to produce a medium

degree of constitutional asymmetry is a constitutional recognition of constitutional asymmetry, ethnically homogeneous subnational entities, and the absence of international actors, as visible in Belgium, Spain and Italy. It is interesting to observe that Italy is explained by all four intermediate solution terms, while Belgium only by three out of four solution terms, reinforcing the idea of equifinality in complex causation.

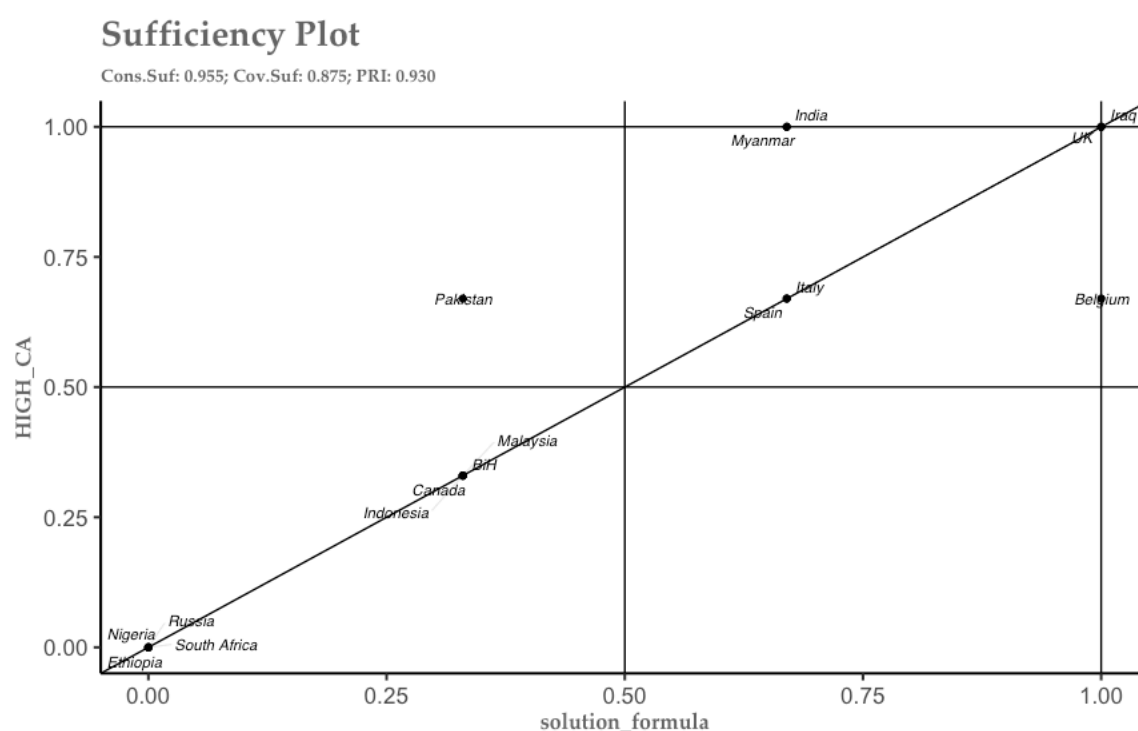


Figure 13: XY plot for intermediate solution formula, directional expectation (1, 1, 1, 0, 0) – outcome HIGH\_CA

From the XY plot for this first intermediate solution (Figure 13), we notice again that Pakistan is left unexplained by the solution formula, as was the case with the other necessity and sufficiency claims. Conversely, we notice that Myanmar, India, Spain, Italy, Iraq, and the UK are typical cases of this solution formula, while Belgium is a deviant case in degree.

The second intermediate solution provides the directional expectations, according to which there are a limited distribution of differentiated autonomy and a constitutional recognition of constitutional asymmetries, while the other three conditions (ethnically homogeneous subnational entities, international and subnational actors) are absent. This produced an intermediate solution slightly simpler than the previous one:

$$\begin{aligned} &\text{RECOGNITION}^* \sim \text{INTERNATIONAL} + \text{DISTRIBUTION}^* \text{RECOGNITION}^* \text{HOMOGENEITY} + \\ &\quad \text{DISTRIBUTION}^* \sim \text{INTERNATIONAL}^* \sim \text{SUBNATIONAL} \\ &\rightarrow \text{HIGH\_CA} \end{aligned}$$

Directional expectations (1, 1, 0, 0, 0)

|               |                              | cases                        |
|---------------|------------------------------|------------------------------|
| RECOGNITION*  | ~INTERNATIONAL               | Spain; India; Italy; Belgium |
| DISTRIBUTION* | RECOGNITION* HOMOGENEITY     | Italy; Belgium; Iraq         |
| DISTRIBUTION* | ~INTERNATIONAL* ~SUBNATIONAL | Myanmar; UK; Italy           |

Figure 14: Intermediate solution terms and relative cases for second directional expectations – outcome HIGH\_CA

This time we have three combinations of conditions, instead of four, that are sufficient to produce the outcome. The first combination provides that a constitutional recognition of constitutional asymmetries and the absence of international actors is sufficient to produce the outcome, as is the case in Spain, India, Italy, and Belgium. Then, the second and the third combinations are the same as the first and third combinations of the previous intermediate solution, namely a limited distribution of differentiated autonomy, a constitutional recognition of constitutional asymmetry, ethnically homogeneous subnational entities (Italy, Belgium, Iraq), a limited distribution of differentiated autonomy, and the absence of international and subnational actors (Myanmar, UK, Italy).

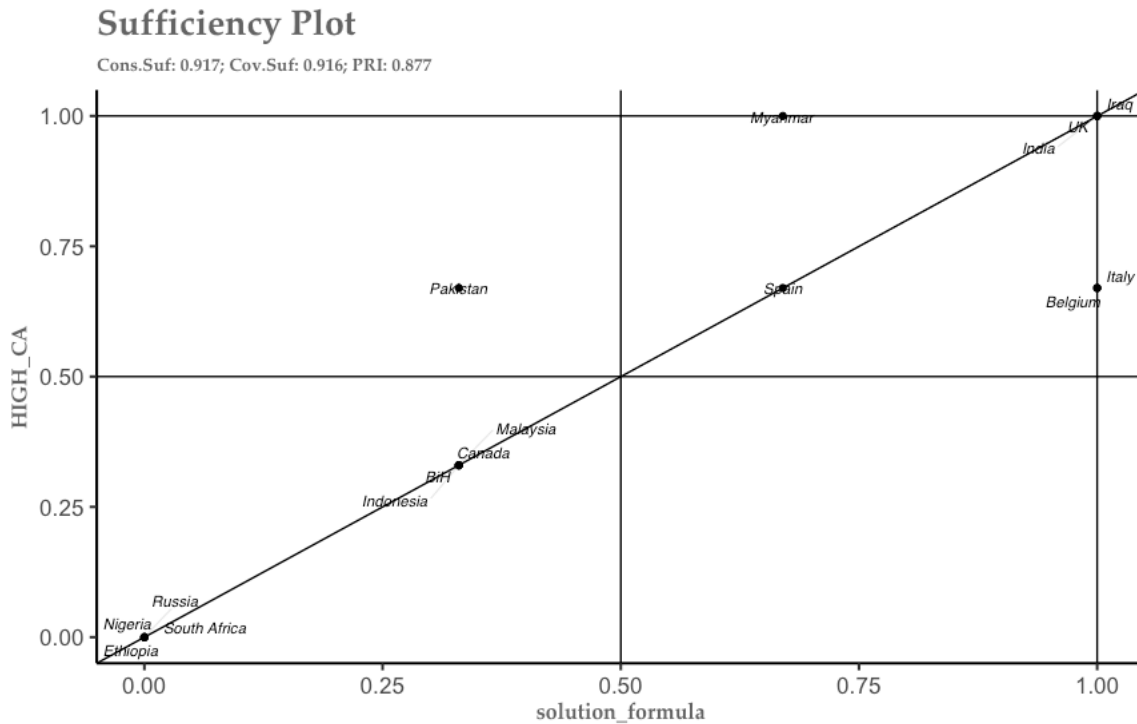


Figure 15: XY plot for intermediate solution formula, directional expectation (1, 1, 0, 0, 0) – outcome HIGH\_CA

From the XY plot for this second intermediate solution (Figure 15), we notice once again that Pakistan is not explained by this solution formula, as was also the case with the other necessity

and sufficiency claims. Conversely, we notice that Myanmar, India, Spain, Iraq, and the UK are typical cases of this solution formula, while Italy and Belgium are deviant cases in degree.



## *4.2 Standard Analysis for the absence of the outcome*

As previously anticipated, this paragraph analyzes the absence of the outcome ( $\sim$ HIGH\_CA), and thus those cases that display a low degree of constitutional asymmetry or are constitutionally symmetrical. The case studies that display the absence of the outcome are eight: Canada, Indonesia, Bosnia and Herzegovina and Malaysia, which have a low degree of constitutional asymmetry (thus are “more out than in” the outcome set HIGH\_CA, but still considered as members of the outcome), while Ethiopia, Nigeria, South Africa, and Russia display perfect constitutional symmetry (thus are “fully out” the set).

### 4.2.1 Analysis of necessity

Starting from the analysis of necessity, we find that there are no single necessary conditions to produce the outcome. Conversely, there are five SUIN conditions:

- $\sim$ DISTRIBUTION+ $\sim$ RECOGNITION (i.e., the absence of a limited distribution of differentiated autonomy, or the absence of a constitutional recognition of constitutional asymmetries is necessary to display constitutional symmetry or a low degree of constitutional asymmetry).
- $\sim$ DISTRIBUTION+ $\sim$ HOMOGENEITY (i.e., the absence of a limited distribution of differentiated autonomy, or the absence of ethnically homogeneous subnational entities is necessary to display constitutional symmetry or a low degree of constitutional asymmetry).
- $\sim$ DISTRIBUTION+INTERNATIONAL (i.e., the absence of a limited distribution of differentiated autonomy, or the presence of international actors is necessary to display constitutional symmetry or a low degree of constitutional asymmetry).
- $\sim$ RECOGNITION+ $\sim$ HOMOGENEITY (i.e., the absence of a constitutional recognition of constitutional asymmetries, or the absence of ethnically homogeneous subnational entities is necessary to display constitutional symmetry or a low degree of constitutional asymmetry).
- $\sim$ RECOGNITION+INTERNATIONAL (i.e., the absence of a constitutional recognition of constitutional asymmetries, or the presence of international actors is necessary to display constitutional symmetry or a low degree of constitutional asymmetry).

To better explain these five necessity claims, it is helpful to refer to the XY plots for necessity, with the combination of conditions on the x-axis and the outcome on the y-axis.

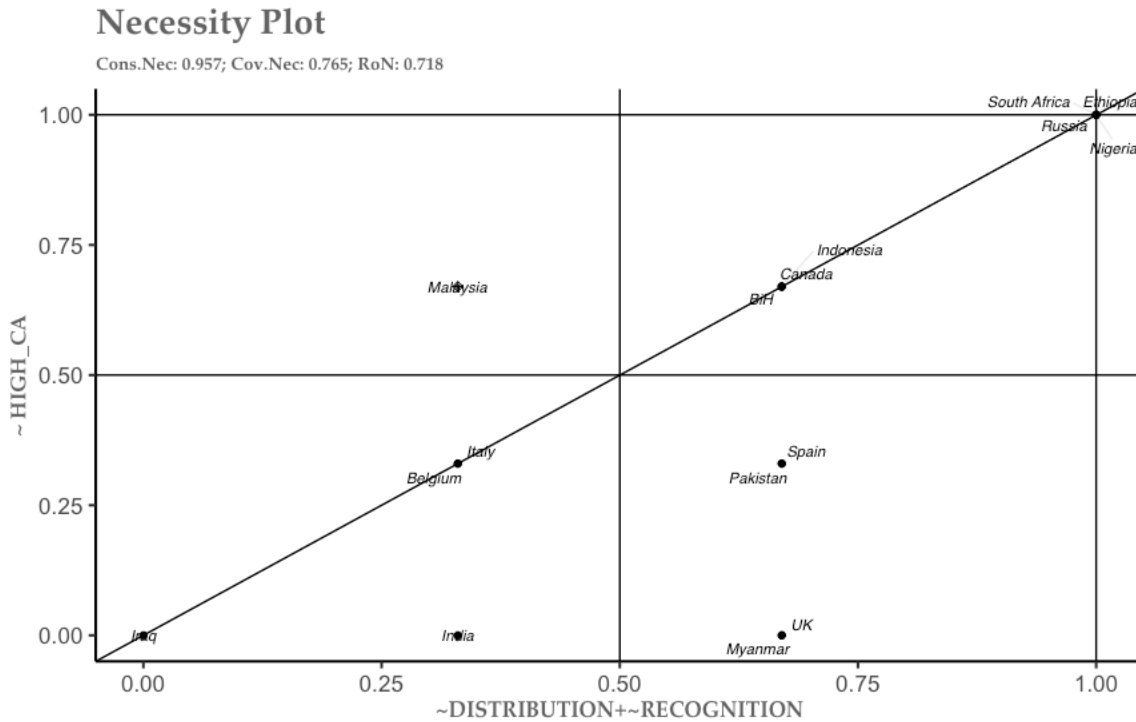


Figure 16: XY necessity plot for ~DISTRIBUTION+~RECOGNITION

The first necessity claim states that the absence of a limited distribution of differentiated autonomy, or the absence of a constitutional recognition of constitutional asymmetries, is necessary to display constitutional symmetry or a low degree of constitutional asymmetry. From the XY plot (Figure 16) we can observe that (almost) all the cases displaying a low degree of asymmetry (Canada, Indonesia and Bosnia-Herzegovina) and those which display constitutional symmetry (South Africa, Ethiopia, Russia, and Nigeria), are typical cases since they placed on the diagonal in the upper-right quadrant. The only case that deviates from the claim is Malaysia. Being in the upper-left quadrant it is to be considered a deviant case in kind, since it is a member of the outcome (i.e., above the 0.50 threshold value on the y-axis), but is not a member of the combination of conditions (i.e., below the 0.50 threshold value on the x-axis). Taking a closer look, in Malaysia differentiated autonomy is only granted to Sabah and Sarawak, and as these asymmetries are entrenched in the constitution at art. 161E, Malaysia cannot be member of the necessity claim set. However, the constitutional system displays a low degree of constitutional asymmetry, and therefore is a member of the outcome set. This contradiction could derive from the fact that despite the strong potential for asymmetry, the central government still has the upper hand in countering such potential. Therefore, the degree of asymmetry remains low.

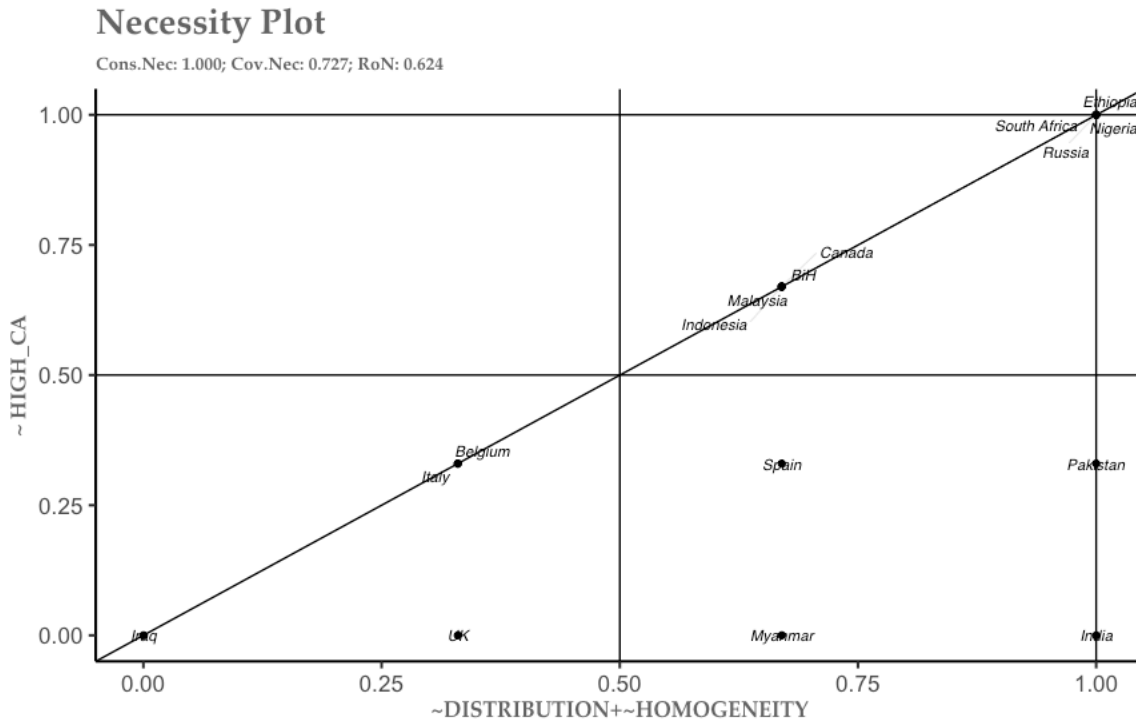


Figure 17: : XY necessity plot for ~DISTRIBUTION+~HOMOGENEITY

The second statement on necessity holds that the absence of a limited distribution of differentiated autonomy, or the absence of ethnically homogeneous subnational entities, is necessary to display constitutional symmetry or a low degree of constitutional asymmetry. The XY plot for this necessity claim (Figure 17) shows that all the cases displaying constitutional symmetry and low constitutional asymmetry are placed on the diagonal in the upper-right quadrant, and thus are all typical cases for this necessity claim. We can also notice that there are no deviant cases in degree or in kind for this claim.

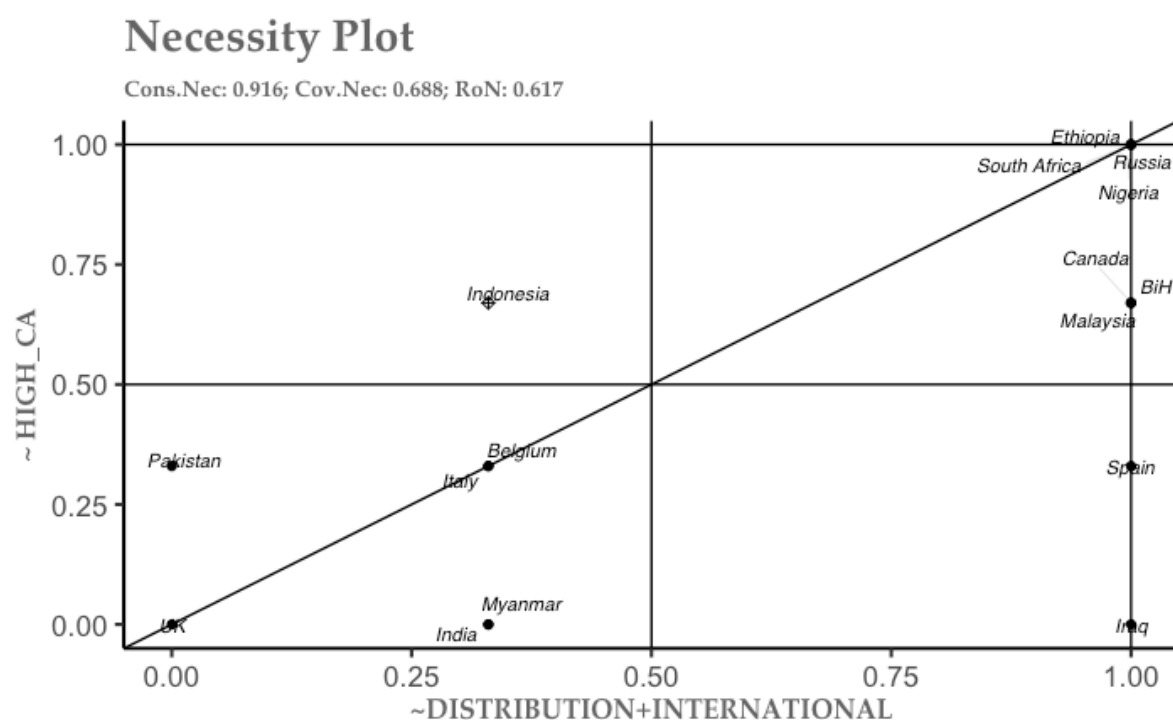


Figure 18: XY necessity plot for ~DISTRIBUTION+INTERNATIONAL

The third necessity claim states that the absence of a limited distribution of constitutional asymmetries or the involvement of international actors in the constituent process is necessary to display a low degree of constitutional asymmetry or constitutional symmetry. From the XY plot (Figure 18) we can see that the typical cases are Ethiopia, South Africa, Russia, Nigeria, Malaysia, Canada, and Bosnia-Herzegovina. In this plot, Indonesia is in the upper-left quadrant and must be considered a deviant case in kind, since it is member of the outcome (i.e., above the 0.50 threshold value on the y-axis), but is not member of the combination of conditions (i.e., below the 0.50 threshold value in the x-axis). As mentioned in previous paragraph, the presence of a deviant case in kind contradicts the necessity claim and needs a closer look to assess whether it is an anomaly due to its peculiarities or an indication that this necessity claim does not hold true. Indeed, in Indonesia special autonomy is granted to five special subnational entities (Aceh, Papua, West Papua, Jakarta, and Yogyakarta), and therefore it is limited, and international actors were not involved in the constituent process. However, also looking back at Figure 2 in paragraph 3.3, Indonesia displays an extremely low degree of constitutional asymmetry. This could be explained by the fact that in Indonesia there is still a strong central oversight over subnational laws, therefore any law that is deemed contradictory to central legislation can be overruled to maintain overall symmetry within the system. The main source of asymmetry granted to Aceh, the special region that was chosen in the analysis of subnational autonomy, is provided by the 2006 Special

Autonomy Law, authorizing Aceh to implement Islamic law at the subnational level, explicitly mentioning criminal law. In Indonesia the promise of a differentiated treatment for Papua and Aceh was an incentive to keep them in the system and appease separatist movements, even though in reality asymmetry is limited by the central government. Along with the other deviant cases in kind, the Indonesian case will be further analyzed in chapter five.

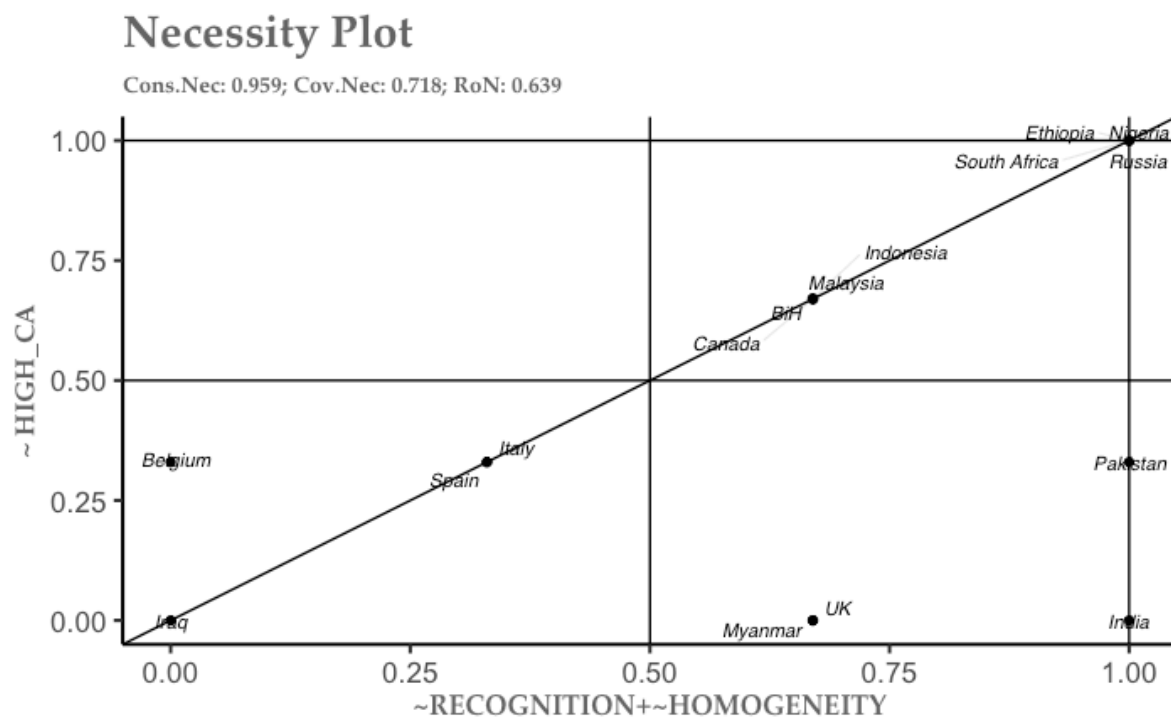


Figure 19: XY necessity plot for ~RECOGNITION+~HOMOGENEITY

Then, the fourth necessity claim holds that the absence of constitutional recognition of constitutional asymmetry or the absence of ethnically homogeneous subnational entities is necessary to display constitutional symmetry or a low degree of constitutional asymmetry. In this plot (Figure 19), we find that the typical cases are Indonesia, Malaysia, BiH, Canada, South Africa, Russia, Nigeria, Ethiopia, and they all are on the diagonal. They are grouped especially around two points, one corresponding to low constitutional asymmetry (Indonesia, Malaysia, Bosnia-Herzegovina, Canada) and one to constitutional symmetry (Ethiopia, Nigeria, Russia, South Africa). In this plot there is no deviant case in kind, potentially contradicting the necessity claim.

This necessity claim aligns particularly strongly with the theoretical expectations, since it was expected that the introduction of constitutional asymmetry through ordinary legislation, as well as the prevalence of heterogeneous subnational entities, would lead to low constitutional asymmetry or even constitutional symmetry.

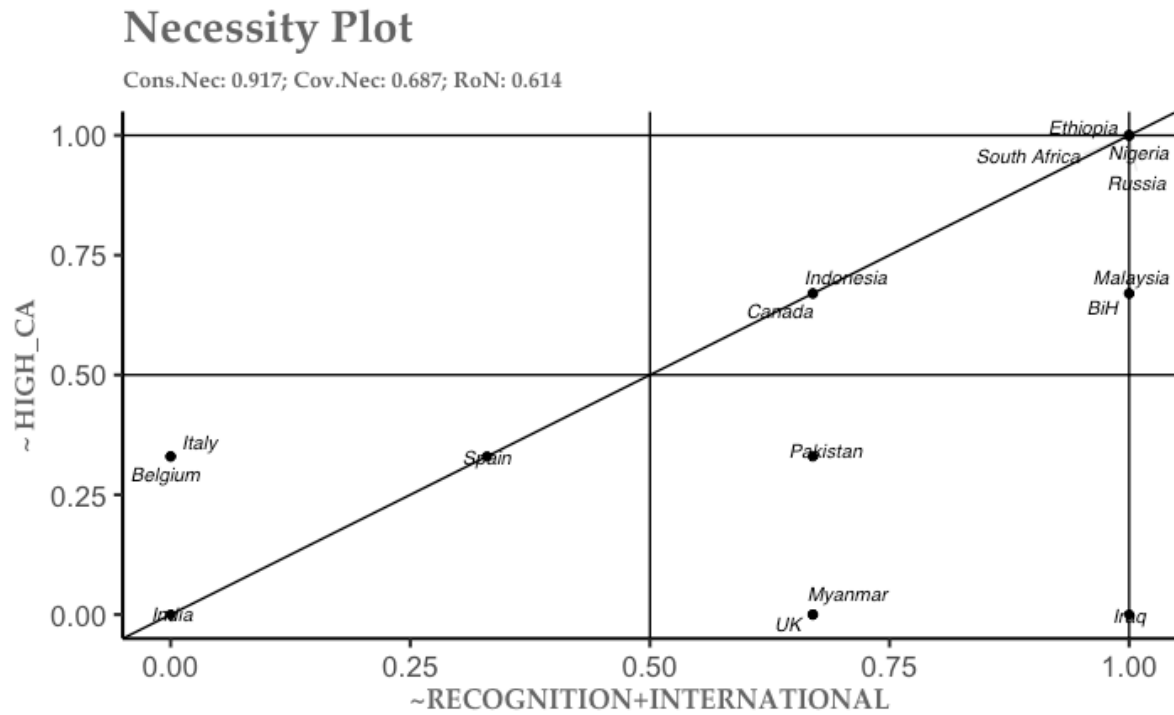


Figure 20: XY necessity plot for ~RECOGNITION+INTERNATIONAL

Finally, the last necessity claim holds that the absence of constitutional recognition of constitutional asymmetries or the presence of international actors is necessary to display low constitutional asymmetry or constitutional symmetry. In this plot (Figure 20), we find that all eight case members of the outcome ~HIGH\_CA are typical cases of this necessity claim, namely Canada, Indonesia, BiH, Malaysia, South Africa, Nigeria, Ethiopia, and Russia. Moreover, there is no deviant case in kind potentially contradicting the necessity claim. From the same reasons expressed for the other necessity claims, this necessity statement is in line with the theoretical expectations.

In general, as with the analysis of necessity for the presence of the outcome, the conditions that appear to play a more determining role in the absence of the outcome are ~DISTRIBUTION and ~RECOGNITION. Therefore, only after this separate analysis can we conclude that the absence of these two conditions can explain the absence of the outcome, as their presence explains the presence of the outcome, once again confirming the previous theoretical expectations.

#### 4.2.2 Analysis of sufficiency

As in the previous paragraph, the next step is the analysis of sufficiency and the production of a truth table, again with 32 rows. Table 12 shows that there are four rows with OUT and PRI equal

1, indicating perfect subset relations. As for the previous truth table, Indonesia and Pakistan with PRI values quite near 0.5 and low consistency scores are therefore not deemed sufficient for the outcome even though they have a low degree of constitutional asymmetry. This means that these cases are left unexplained and require further engagement.

Table 12: Truth table for the outcome  $\sim$ HIGH\_CA

|    | DISTRIBUTION | RECOGNITION | HOMOGENEITY | INTERNATIONAL | SUBNATIONAL | OUT | n | incl  | PRI   | cases                       |
|----|--------------|-------------|-------------|---------------|-------------|-----|---|-------|-------|-----------------------------|
| 2  | 0            | 0           | 0           | 0             | 1           | 1   | 3 | 1     | 1     | Nigeria,Russia,South Africa |
| 6  | 0            | 0           | 1           | 0             | 1           | 1   | 2 | 1     | 1     | Canada,Ethiopia             |
| 11 | 0            | 1           | 0           | 1             | 0           | 1   | 1 | 1     | 1     | BiH                         |
| 28 | 1            | 1           | 0           | 1             | 1           | 1   | 1 | 1     | 1     | Malaysia                    |
| 18 | 1            | 0           | 0           | 0             | 1           | 0   | 2 | 0.830 | 0.500 | Indonesia,Pakistan          |
| 14 | 0            | 1           | 1           | 0             | 1           | 0   | 1 | 0.795 | 0     | Spain                       |
| 30 | 1            | 1           | 1           | 0             | 1           | 0   | 1 | 0.795 | 0     | Belgium                     |
| 26 | 1            | 1           | 0           | 0             | 1           | 0   | 1 | 0.663 | 0     | India                       |
| 29 | 1            | 1           | 1           | 0             | 0           | 0   | 1 | 0.248 | 0     | Italy                       |
| 32 | 1            | 1           | 1           | 1             | 1           | 0   | 1 | 0.248 | 0     | Iraq                        |
| 17 | 1            | 0           | 0           | 0             | 0           | 0   | 1 | 0     | 0     | Myanmar                     |
| 21 | 1            | 0           | 1           | 0             | 0           | 0   | 1 | 0     | 0     | UK                          |
| 1  | 0            | 0           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 3  | 0            | 0           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 4  | 0            | 0           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 5  | 0            | 0           | 1           | 0             | 0           | ?   | 0 |       |       |                             |
| 7  | 0            | 0           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 8  | 0            | 0           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 9  | 0            | 1           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 10 | 0            | 1           | 0           | 0             | 1           | ?   | 0 |       |       |                             |
| 12 | 0            | 1           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 13 | 0            | 1           | 1           | 0             | 0           | ?   | 0 |       |       |                             |
| 15 | 0            | 1           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 16 | 0            | 1           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 19 | 1            | 0           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 20 | 1            | 0           | 0           | 1             | 1           | ?   | 0 |       |       |                             |
| 22 | 1            | 0           | 1           | 0             | 1           | ?   | 0 |       |       |                             |
| 23 | 1            | 0           | 1           | 1             | 0           | ?   | 0 |       |       |                             |
| 24 | 1            | 0           | 1           | 1             | 1           | ?   | 0 |       |       |                             |
| 25 | 1            | 1           | 0           | 0             | 0           | ?   | 0 |       |       |                             |
| 27 | 1            | 1           | 0           | 1             | 0           | ?   | 0 |       |       |                             |
| 31 | 1            | 1           | 1           | 1             | 0           | ?   | 0 |       |       |                             |



#### 4.2.3 The solution formulas

As for the presence of the outcome in the previous paragraph, this section will explore the different solution formulas separately.<sup>530</sup>

##### Conservative solution

The conservative solution provides the most detailed solution of all the combined conditions that are sufficient to explain the outcome  $\sim\text{HIGH\_CA}$ . The solution formula is composed of three solution terms, and in Boolean algebra is the following:

$$\begin{aligned} & \sim\text{DISTRIBUTION} * \sim\text{RECOGNITION} * \sim\text{INTERNATIONAL} * \text{SUBNATIONAL} + \\ & \sim\text{DISTRIBUTION} * \text{RECOGNITION} * \sim\text{HOMOGENEITY} * \text{INTERNATIONAL} * \sim\text{SUBNATIONAL} + \\ & \text{DISTRIBUTION} * \text{RECOGNITION} * \sim\text{HOMOGENEITY} * \text{INTERNATIONAL} * \text{SUBNATIONAL} \\ & \rightarrow \sim\text{HIGH\_CA} \end{aligned}$$

| ===== cases =====                                                                                                       |                                                 |
|-------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|
| $\sim\text{DISTRIBUTION} * \sim\text{RECOGNITION} * \sim\text{INTERNATIONAL} * \text{SUBNATIONAL}$                      | Nigeria, Russia, South Africa; Canada, Ethiopia |
| $\sim\text{DISTRIBUTION} * \text{RECOGNITION} * \sim\text{HOMOGENEITY} * \text{INTERNATIONAL} * \sim\text{SUBNATIONAL}$ | BiH                                             |
| $\text{DISTRIBUTION} * \text{RECOGNITION} * \sim\text{HOMOGENEITY} * \text{INTERNATIONAL} * \text{SUBNATIONAL}$         | Malaysia                                        |
| -----                                                                                                                   |                                                 |

Figure 15: Conservative solution terms and relative cases – outcome  $\sim\text{HIGH\_CA}$

Translating the solution into words, it means that the absence of a limited distribution of differentiated autonomy, the absence of a constitutional recognition of constitutional asymmetries, the absence of international actors and the presence of subnational actors are all factors that taken together explain the absence of a high degree of constitutional asymmetry, i.e., low constitutional asymmetry or constitutional symmetry. This first term explains Canada, a case of (extremely) low constitutional asymmetry, and the cases of constitutional symmetry (Nigeria, Russia, South Africa, and Ethiopia), where all subnational entities enjoy the same autonomy, constitutional asymmetries are not entrenched in the legal framework, international actors were not involved in the constituent process, and where subnational actors played a determining role in the constituent process upholding their autonomy claims.

According to the second term, the absence of a limited distribution of differentiated autonomy, the constitutional recognition of constitutional asymmetries, the absence of ethnically homogeneous subnational entities, the presence of international actors and the absence of

<sup>530</sup> See Appendix 5 for the solution formulas and relative parameters of fit.

subnational actors are all factors that taken together explain low constitutional asymmetry. This is specifically the case in Bosnia-Herzegovina, where all subnational entities roughly enjoy the same autonomy, the (limited) constitutional asymmetries are entrenched in the constitution, the subnational entities are prevalently heterogeneous (aside from Republika Srpska), and international actors were strongly involved in the constituent process, at the expense of subnational actors. One of the crucial points of the conflict resolution process was to ensure as much balance as possible, introducing a complex constitutional architecture based on the principle of parity among ethnocultural groups, and this reasonably justifies a low degree of constitutional asymmetry, visible mainly in the status of the Brčko District.

Finally, the third terms provides that a limited distribution of differentiated autonomy, the constitutional recognition of constitutional asymmetries, the absence of ethnically homogeneous subnational entities, and the presence of international as well as subnational actors are all factors that taken together explain low constitutional asymmetry, and this is specifically the case in Malaysia. As previously mentioned, in Malaysia special autonomy is granted only to few subnational entities as provided by the constitution (i.e., art. 161 recognizes the special status of Sabah and Sarawak), subnational entities are mainly heterogeneous, and international as well as subnational actors were involved in the federating process, specifically with the presence of the United Kingdom (as previous colonial power) and of the leaders of Sabah and Sarawak.

In conclusion, these three terms are sufficient to explain the presence of constitutional symmetry or of low constitutional asymmetry.

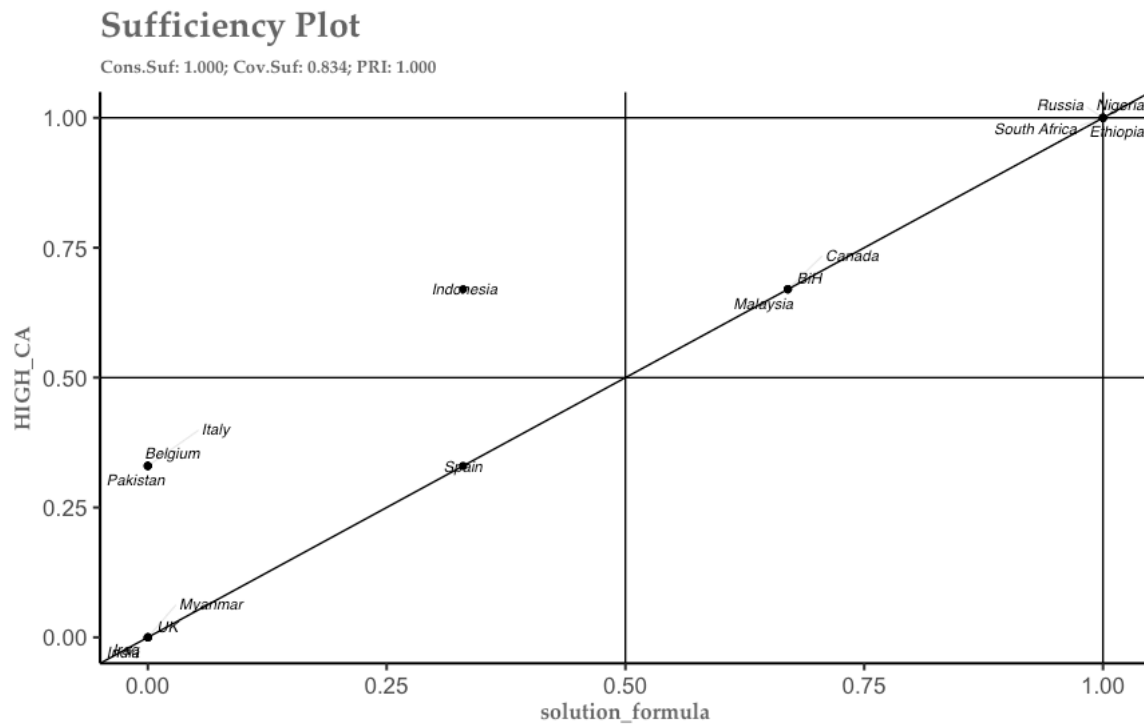


Figure 21: XY plot for the conservative solution – outcome  $\sim$  HIGH\_CA

If we visualize the solution formula through a XY plot (Figure 21) it is possible to observe that the typical cases are all on the diagonal and they are Bosnia-Herzegovina, Malaysia, Canada, South Africa, Nigeria, Russia, Ethiopia. Also, if it is true that there are no deviant cases in kind, we find that Indonesia, as anticipated by the truth table, is not explained by the formula and is a deviant case in coverage, contradicting the sufficiency claim. Indonesia will be further analyzed in the next chapter, but it is reasonable to expect that this case of low constitutional asymmetry should be treated as symmetrical, since its score is extremely low (0.3 for Indonesia), and its asymmetry derives from peculiar and contingent conditions, explained mainly by extra-legal rather than legal factors.

### Most parsimonious solution

Regarding the absence of the outcome, the most parsimonious solution displays no model ambiguity. As for the presence of the outcome, this is composed of two solution terms:

```

~DISTRIBUTION*~RECOGNITION + ~HOMOGENEITY*INTERNATIONAL → ~HIGH_CA
=====
cases
-----
~ DISTRIBUTION* ~ RECOGNITION Nigeria,Russia, South Africa; Canada,Ethiopia
~ HOMOGENEITY* INTERNATIONAL   BiH; Malaysia
-----

```

Figure 22: Most parsimonious solution terms and relative cases – outcome  $\sim$  HIGH\_CA

Translating the Boolean formula into words, the first term holds the absence of a limited distribution of differentiated autonomy and the absence of constitutional recognition of constitutional asymmetries is a sufficient combination of conditions to explain constitutional symmetry, as in Nigeria, Russia, South Africa, Ethiopia and Canada. The second term claims that the absence of ethnically homogeneous subnational entities and the presence of international actors are two combined conditions that are sufficient to explain a low degree of constitutional asymmetry, as in the case of Bosnia-Herzegovina and Malaysia previously addressed.

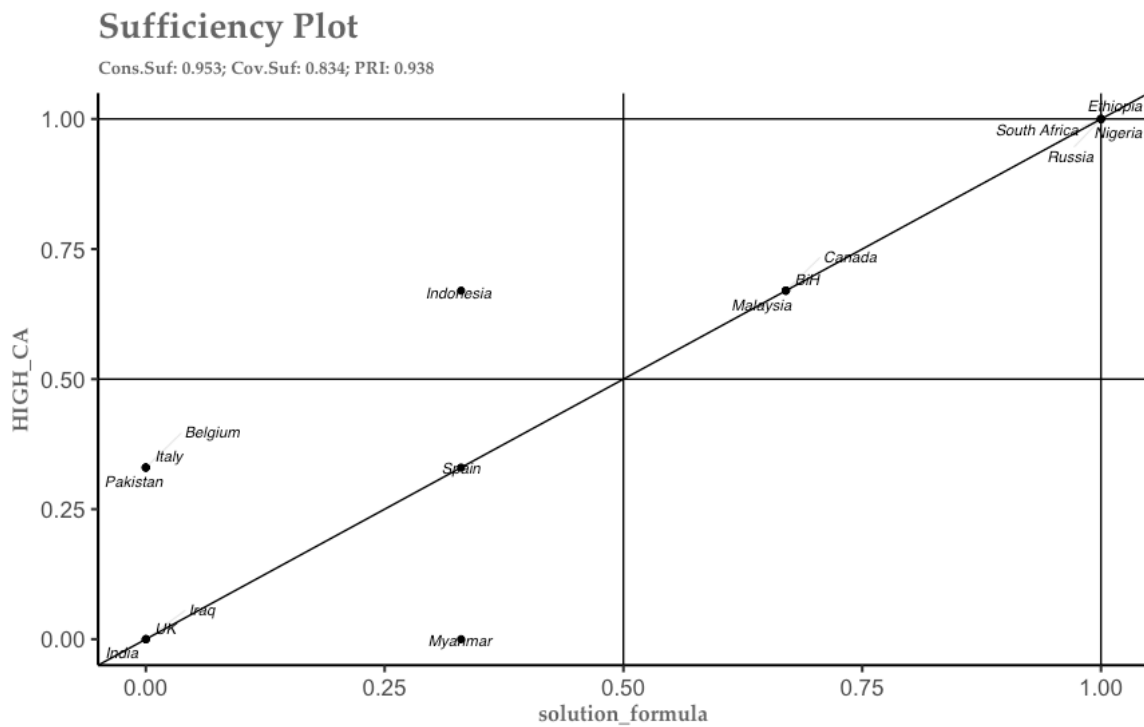


Figure 23: XY plot for the most parsimonious solution – outcome ~HIGH\_CA

Looking at the XY plot (Figure 23) we can observe that it is identical to that of the conservative solution, with all the typical cases on the diagonal (Bosnia-Herzegovina, Malaysia, South Africa, Nigeria, Russia, Ethiopia), no deviant cases in kind, and only one deviant case in coverage (Indonesia) that is not explained by the solution formula.

### Intermediate solution

Finally, for the intermediate solutions for the absence of the outcome, two directional expectations were tested.

As for the presence of the outcome, the first directional expectation wanted to explore a situation where international and subnational actors are not present in the constituent process. The resulting formula is the following:

$$\begin{aligned}
& \sim \text{DISTRIBUTION} * \sim \text{RECOGNITION} * \sim \text{INTERNATIONAL} + \\
& \text{DISTRIBUTION} * \text{RECOGNITION} * \sim \text{HOMOGENEITY} * \text{INTERNATIONAL} + \\
& \text{RECOGNITION} * \sim \text{HOMOGENEITY} * \text{INTERNATIONAL} * \sim \text{SUBNATIONAL} \\
& \rightarrow \sim \text{HIGH\_CA}
\end{aligned}$$

Directional expectations (1, 1, 1, 0, 0)

| cases                                                    |                                                 |
|----------------------------------------------------------|-------------------------------------------------|
| ~ DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL           | Nigeria, Russia, South Africa; Canada, Ethiopia |
| DISTRIBUTION* RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL  | Malaysia                                        |
| RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL* ~ SUBNATIONAL | BiH                                             |

Figure 24: Intermediate solution terms and relative cases for the first directional expectations – outcome  $\sim \text{HIGH\_CA}$

As we can observe, this formula is composed of three terms and strongly resembles the conservative solution, only slightly simplified.

The differences with the conservative solutions are that in the first term of the intermediate solution the conjunct on the presence of subnational actors is dropped, while the others remain the same (i.e., the absence of a limited distribution of differentiated autonomy, the absence of constitutional recognition of constitutional asymmetries, the absence of international actors).

In the second term explaining Malaysia the presence of subnational actors is also dropped, while all the other conditions remain the same (i.e., a limited distribution of differentiated autonomy, the constitutional recognition of constitutional asymmetries, the absence of ethnically homogeneous subnational entities, the presence of international actors in the constituent process).

Concerning the last term explaining low constitutional asymmetry in Bosnia-Herzegovina, the only difference with the conservative solution is that absence of a limited distribution of differentiated autonomy is dropped, while all the other conditions remain (i.e., the constitutional recognition of constitutional asymmetries, the absence of ethnically homogeneous subnational entities, the presence of international actors and the absence of subnational actors in the constituent process).

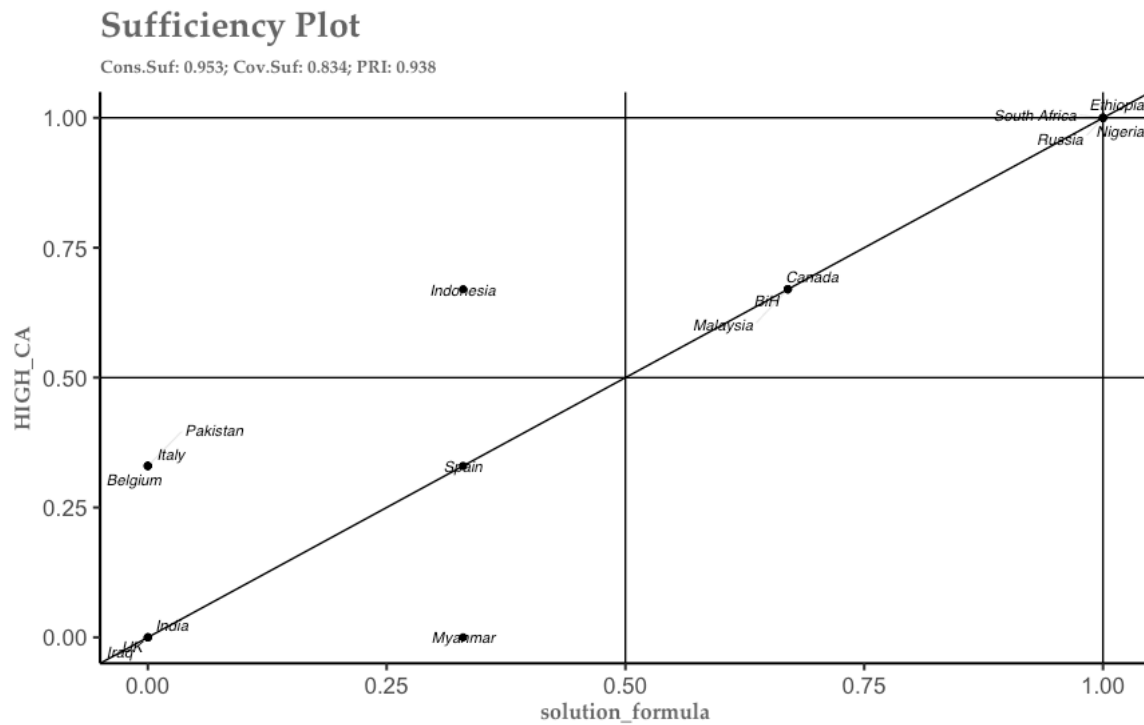


Figure 25: XY plot for intermediate solution formula, directional expectation (1, 1, 1, 0, 0) – outcome ~HIGH\_CA

Once again, the XY plot (Figure 25) is identical to the previous ones, indicating that Indonesia is not explained by this solution, and there are no deviant cases in kind.

The second directional expectation sought to test the absence of all four conditions, and the resulting intermediate solution is the following:

$$\begin{aligned}
 &\sim \text{HOMOGENEITY} * \text{INTERNATIONAL} + \\
 &\sim \text{DISTRIBUTION} * \sim \text{RECOGNITION} * \sim \text{INTERNATIONAL} \\
 &\rightarrow \sim \text{HIGH\_CA}
 \end{aligned}$$

Directional expectations (0, 0, 0, 0, 0)

|                                                |                                                 |
|------------------------------------------------|-------------------------------------------------|
| =====                                          |                                                 |
| cases                                          |                                                 |
| -----                                          |                                                 |
| ~ HOMOGENEITY* INTERNATIONAL                   | BiH; Malaysia                                   |
| ~ DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL | Nigeria, Russia, South Africa; Canada, Ethiopia |
| -----                                          |                                                 |

Figure 26: Intermediate solution terms and relative cases for the second directional expectations – outcome ~HIGH\_CA

As happened before, this time the second intermediate solution is rather similar to the most parsimonious solution, only slightly more detailed. Indeed, the first term is identical to the second term of the most parsimonious solution explaining low constitutional asymmetry. As regards

constitutional symmetry, the solution term results are more complex than the second term of the most parsimonious solution in that the absence of international actors is added, while all the other conditions remain the same (i.e., the absence of a limited distribution of differentiated autonomy and the absence of constitutional recognition of constitutional asymmetries).

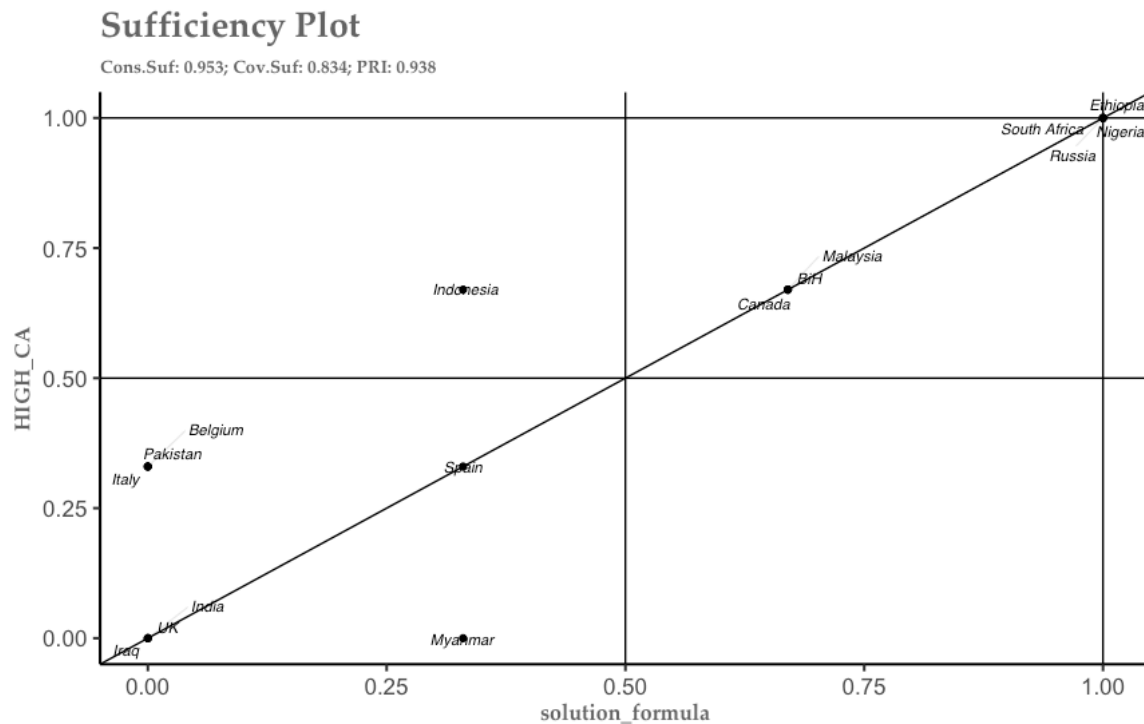


Figure 27: XY plot for intermediate solution formula, directional expectation  $(0, 0, 0, 0, 0) - outcome \sim HIGH\_CA$

Once again, in this case the XY plot (Figure 27) is the identical to the previous ones, with no deviant cases in kind and Indonesia as deviant case in coverage, not explained by this solution. In the next chapter, this case will be further explored to understand the possible explanations for such deviation.

### *4.3 Concluding remarks*

This chapter addressed what has been previously defined as the “analytic moment” of the Qualitative Comparative Analysis,<sup>531</sup> namely the elaboration of the datamatrix resulting from the calibration process, outlining the analysis of necessity and sufficiency. These results have been discussed in detail in the previous two paragraphs, making reference to the different solution formulas encompassing the combination of conditions that are sufficient to produce the outcome. However, since the research is positioned in the domain of comparative constitutional design for divided societies, we can frame the results of the QCA in simpler terms, laying down which legal factors are more likely to lead to a high, medium, or low asymmetry, or conversely to constitutional symmetry, when designing a multi-tiered system in a divided society.

From the perspective of constitutional designers, we can expect that the features most likely to lead to a high degree of constitutional symmetry are a differentiated autonomy limited to only few parts of the territory, a legal recognition of asymmetries through bilateral agreements or ordinary legislation, and the involvement of national actors in the constituent process, without any international or subnational actor formally present. Overall, the two main factors that appear to be conducive to a high degree of constitutional asymmetry are the limited distribution of differentiated autonomy and a constituent process only led by national actors (i.e., an internal constitution-making process).

Moreover, the QCA showed that many other combinations of legal factors are likely to produce both a medium and high degree of constitutional asymmetry, outlining a rather nuanced picture. Generally speaking, if constitutional designers limit the distribution of differentiated autonomy only to few subnational entities, entrenching these asymmetries in the constitution, and involving the subnational entities in the constituent process, this is most likely to produce a medium-high degree of constitutional asymmetry. Moreover, a homogeneous design of subnational entities is another factor that, combined with the previous elements, reinforces the medium and high degree of constitutional asymmetry.

Conversely, constitutional designers must consider that a heterogeneous design of constitutional entities is a crucial factor in producing a low degree of constitutional asymmetry, along with a limited distribution of differentiated autonomy which is constitutionally recognized. Another crucial element leading to this outcome seems to be the direct involvement of international actors in the constituent process, perhaps influenced by the integrationist approach to constitutional design in divided societies discussed in the first chapter.

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<sup>531</sup> See chapter 3.2.1.



Not surprisingly, if constitutional designers provide the same level of autonomy for all the subnational entities and there is no legal recognition of asymmetries, the resulting multi-tiered system is most likely to display constitutional symmetry. Another element that appears to be conducive to constitutional symmetry is the involvement of subnational actors in the constitution-making process.

In conclusion, the results of the Qualitative Comparative Analysis discussed in this chapter perfectly reflect the notion of complex causality and the overall complexity of constitutional asymmetries. Indeed, the previous paragraphs showed that there are many explanations for the different degrees of constitutional asymmetry (i.e., equifinality), and these are the result of a combination of legal factors (i.e., conjunctural causation), rather than a single legal factor or a single explanation. Further research could shed more light on other legal factors that may play a role in the degree of constitutional asymmetry in divided multi-tiered systems, in order to refine the current results.

## CHAPTER FIVE

### A MATTER OF DEGREES

This concluding chapter aims to draw a comparative overview of the case studies analyzed in the thesis. They will be grouped according to their degree of constitutional asymmetry, in order to address each degree in a separate paragraph. Accordingly, paragraph 5.1 will deal with the constitutional systems displaying a high degree of constitutional asymmetry; paragraph 5.2 those with a medium degree of constitutional asymmetry; paragraph 5.3 those with a low degree of constitutional asymmetry; and, finally, paragraph 5.4 those countries displaying constitutional symmetry.

Each paragraph will first comment on the autonomy scores for each constitutional system and the resulting asymmetry. The focal point of interest is to understand what the degree of subnational autonomy is in countries displaying a determined degree of constitutional asymmetry, and whether asymmetry is pervasive in all dimensions of autonomy (i.e., status, powers, fiscal arrangements) or conversely only concentrated in one or few dimensions, but not all. Subnational autonomy will be first reviewed in detail at the subnational entity level and then on average at the country level.

Then, each paragraph will comment on the implementation of the solution formulas identified in the QCA and explained in the previous chapter, trying to assess whether constitutional asymmetries “in the books” actually reflect the asymmetries “in action”. Indeed, the thesis focuses on asymmetries as entrenched in the constitutional and legal framework, but this does not necessarily mean that they are translated into (or reflect) reality.

Before delving into the chapter, it should be briefly remembered that to measure constitutional asymmetry in each constitutional system, first the subnational autonomy scores were measured for two selected subnational entities, according to a “most different” selection criteria, and then these scores were subtracted to derive the constitutional asymmetry scores. Subnational autonomy and thus constitutional asymmetry were conceptualized along three dimensions: status, powers, and fiscal arrangements.<sup>532</sup>

It should also be recalled that the intervals for each degree of subnational autonomy are: 0 – 0.33 (low degree), 0.34 – 0.66 (medium degree), 0.67 – 1 (high degree).

Conversely, for constitutional asymmetry the intervals to define the degrees are: 0 (symmetry), 0.01 – 0.14 (low degree), 0.15 – 0.23 (medium degree), 0.24 – 1 (high degree).

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<sup>532</sup> See chapters 2 and 3 for more details on the measure of subnational autonomy and constitutional asymmetry.

The following table, already shown in chapter three, displays the scores for constitutional asymmetry for the 16 case studies,<sup>533</sup> with the color-indication of each degree of asymmetry.

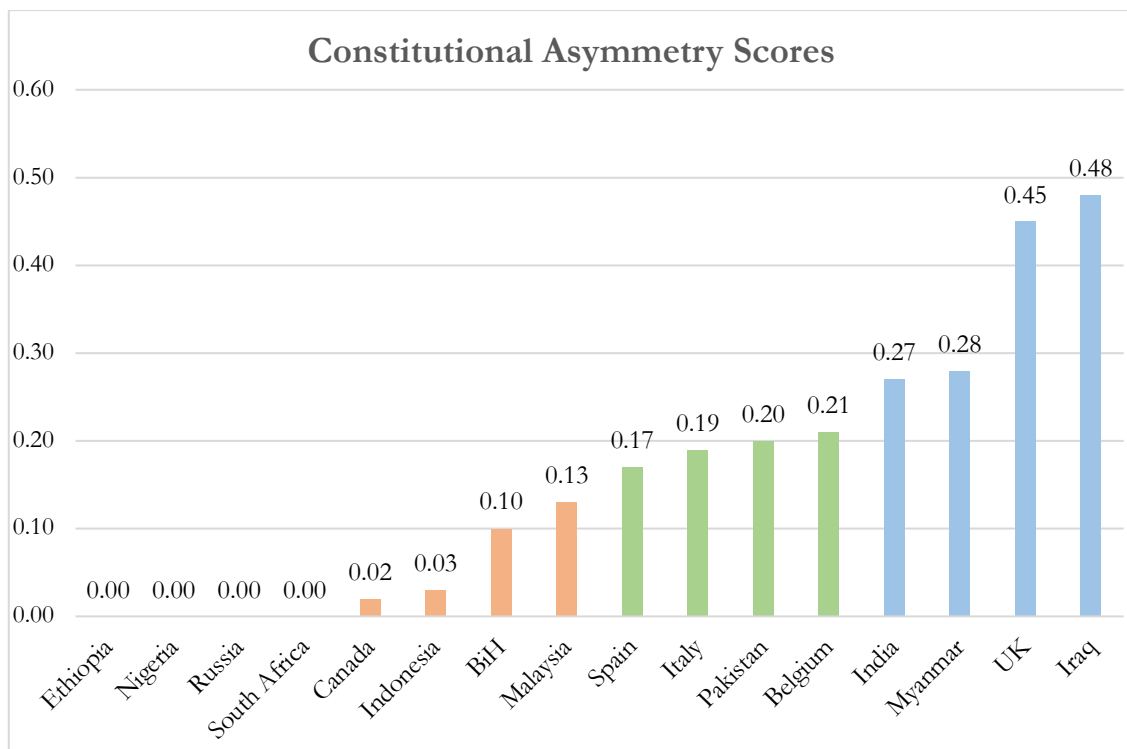


Figure 28: Constitutional asymmetry scores for the 16 case studies

<sup>533</sup> See the model for the autonomy sheet in Appendix 2 and the autonomy sheets for each country in Appendix 3 for more details on the assignment of the subnational autonomy scores.

## *5.1 High constitutional asymmetry*

### 5.1.1 Autonomy and asymmetry

The four cases displaying a high degree of constitutional asymmetry, i.e., India, Myanmar, the United Kingdom, and Iraq, all reflect a similar trend in terms of subnational autonomy. Indeed, in these cases the high degree of asymmetry derives from a rather significant differential in terms of subnational autonomy between the two analyzed subnational entities. In all four cases, one subnational entity enjoys a medium degree of autonomy, while the other has an extremely low degree of autonomy.

The following subparagraphs look more closely at each case and their respective dimension of subnational autonomy (i.e., status, powers, fiscal arrangements), as well as at the resulting degree of asymmetry.

#### India

Before commenting on India's autonomy and asymmetry scores, it should first be clarified that the analysis of subnational autonomy, which took place in 2022, had to take into account the Jammu and Kashmir Reorganization Act enacted by the Indian Parliament in August 2019, which re-designed the status and powers of the Jammu and Kashmir union territory, dramatically reducing the autonomy it was originally granted by Art. 370 of the Indian Constitution. The legislative provision has been challenged and has been pending in the Supreme Court for over two years. Therefore, since this study is a picture of the current constitutional framework, Jammu and Kashmir was not chosen as a subnational entity to analyze, since the peculiarities in terms of differentiated autonomy were scrapped by the 2019 legislation.

Having clarified the choice over the Jammu and Kashmir subnational entity, it should be added that the two subnational entities selected for the analysis were a state, Nagaland, which enjoys some degree of differentiated autonomy (ex. Art. 371A of the Indian Constitution), and Chandigarh, a union territory enjoying (as is largely also true of the other Indian union territories) only limited autonomy.

From the analysis of subnational autonomy in India it emerges that, overall, the state of Nagaland enjoys a medium degree of subnational autonomy, resulting from a medium degree of autonomy in powers, while autonomy is low in the other two dimensions of status and fiscal arrangements. The union territory of Chandigarh, on the other hand, overall enjoys a low degree of subnational autonomy, lightly traceable only in the status and the powers dimensions of autonomy, while it has no fiscal autonomy, since this domain is under the direct control of the central government. If we observe the average scores of subnational autonomy, bearing in mind

the picture at the country-level, it is possible to notice that subnational autonomy scores are low, for each dimension and overall.

| INDIA                  |                         |                           |                        |                          |
|------------------------|-------------------------|---------------------------|------------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Nagaland | Autonomy value Chandigarh | Average autonomy score | Constitutional asymmetry |
| Status                 | 0.26                    | 0.09                      | 0.18                   | <b>0.17</b>              |
| Powers                 | 0.52                    | 0.14                      | 0.33                   | <b>0.38</b>              |
| Fiscal arrangements    | 0.25                    | 0.00                      | 0.13                   | <b>0.25</b>              |
| Overall score          | <b>0.34</b>             | <b>0.08</b>               | <b>0.21</b>            | <b>0.27</b>              |
| Overall degree         | <b>Medium</b>           | <b>Low</b>                | <b>Low</b>             | <b>High</b>              |

Table 13: Subnational autonomy and constitutional asymmetry scores for India

However, in terms of constitutional asymmetry overall, this translates to a high degree of asymmetry, as the differential between the medium autonomy enjoyed by Nagaland and the low autonomy enjoyed by Chandigarh is significant. This is traceable in all dimensions of constitutional asymmetry, with the highest score in the powers dimension. Specifically, the degree of constitutional asymmetry is medium in status, whereas it is high in powers and fiscal arrangements.

Indeed, in the status dimension, the main sources of asymmetry are the legislative and executive level at the subnational entity-level, and the organization of courts. If Nagaland (as other Indian states) has a directly elected assembly, which as a rule makes decisions without central oversight but only with potential oversight *ex post*, union territories as Chandigarh do not have a law-making assembly. Similarly, while Nagaland has a directly elected executive which makes decisions without central oversight but only with potential oversight *ex post*, Chandigarh does not have an executive of its own, as it is governed by the central level. In terms of organization of courts, in the Indian states, courts are organized at the central level according to an integrated system, whereas in union territories courts are organized at the central level. In terms of powers, Indian states have substantial exclusive powers over many domains, whereas Chandigarh generally only has administrative powers or implementation powers, as is mainly administered from the central level. Finally, subnational autonomy in fiscal arrangements is rather limited in both subnational entities, but if in Nagaland at least some form of autonomy is provided by the power to set the base and/or rate of minor taxes and to introduce subnational taxes, in Chandigarh such minor degree of autonomy is not provided.

As we can observe, despite constitutional asymmetries being present in all three dimensions, with the highest score in powers, the widest differences are actually in the status dimension, where

asymmetry concerns the executive, legislative, and judicial level, leaving Chandigarh as a subnational entity enjoying only a “minimal” degree of autonomy.

### Myanmar

Concerning Myanmar, the selection of the two subnational entities for the measurement of subnational autonomy and constitutional asymmetry involved the Shan state, the largest and richest state in Myanmar, and the Wa Self-Administered Division (SAD), namely the largest SAD in the system. It should be clarified that despite being geographically within the Shan state, the Wa Self-Administered Division is not subject to the jurisdiction of the Shan state, and therefore should be considered a subnational entity of its own. The Constitution of Myanmar establishes the tiers of both regions and states, but since these are completely symmetrical, it was of no interest for this study to compare a state and a region, whereas the Self-Administered Division and Self-Administered Zones are an additional tier of government and represent clusters of nationalities.

From the perspective of subnational autonomy, the case of Myanmar is rather similar to India. On the one hand, subnational autonomy, overall, is medium in the Shan state. Its highest score is for the fiscal arrangements dimension of autonomy, with a score of 0.63 (quite close to the threshold for high degree of autonomy fixed at 0.67). In the other two dimensions of autonomy, i.e., status and powers, the scores are significantly lower and indicate a low degree of autonomy. On the other hand, subnational autonomy is rather low in the Wa Self-Administered Division, with the score for the dimension of powers slightly higher than the one for status, and with no fiscal autonomy, similar to the Indian case of the Chandigarh union territory. Looking at the country-level, i.e., the average autonomy score, the degree of autonomy is low in each dimension of subnational autonomy as well as overall.

| MYANMAR                |                           |                       |                  |                          |
|------------------------|---------------------------|-----------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Shan state | Autonomy value Wa SAD | Average autonomy | Constitutional asymmetry |
| Status                 | 0.22                      | 0.09                  | 0.16             | <b>0.13</b>              |
| Powers                 | 0.25                      | 0.17                  | 0.21             | <b>0.08</b>              |
| Fiscal arrangements    | 0.63                      | 0.00                  | 0.32             | <b>0.63</b>              |
| Overall scores         | <b>0.37</b>               | <b>0.09</b>           | <b>0.23</b>      | <b>0.28</b>              |
| Overall degree         | <b>Medium</b>             | <b>Low</b>            | <b>Low</b>       | <b>High</b>              |

*Table 14: Subnational autonomy and constitutional asymmetry scores for Myanmar*

As for India, but also in the case of Myanmar, the fact that one of the two subnational entities has a significantly lower degree of subnational autonomy than the other is translated in

terms of constitutional asymmetry. Specifically, it is possible to observe that constitutional asymmetry is low in the dimension of status and powers, but high in the dimension of fiscal arrangements, resulting in a high degree of constitutional asymmetry overall.

Specifically, in the status dimension, constitutional asymmetry concerns the legislative and judicial levels. Indeed, in the legislative domain, the electorate of the Shan state is represented in the central law-making bodies and can initiate laws. It also has its own assembly directly elected, whereas the electorate of the Wa Self-Administered Division is not directly represented in the central law-making bodies and Wa has an indirectly elected assembly. Regarding the organization of courts, Shan state has its own courts system, even though the supreme court is organized at the central level, whereas Wa does not have a court system of its own. Then, in the powers dimension, constitutional asymmetries arise in the scope of powers and in the allocation techniques, since the Shan state enjoys substantial powers in matters concerning economic policies, political control and organization, and territorial management, whereas Wa enjoys powers only in the latter two domains. Moreover, in terms of allocation techniques, the Shan state has mostly concurrent powers with priority given to central rule in case of dispute, whereas Wa has mostly administrative or implementation powers. Finally, the dimension where constitutional asymmetry is most evident is the one on fiscal arrangements. Indeed, the Shan state has the power to set the base and/or rate of property tax, without upper or lower limitations set by the central authority, and the levying of specific taxes is reserved to the Shan state, whereas Wa does not have powers to collect taxes.

### *The United Kingdom*

The case of the United Kingdom has been rather peculiar because of the unique position of England in the British constitutional system, and some considerations were taken into account in order to measure subnational autonomy. Currently, England has no distinct parliament and government, and the relative powers and competences are exercised by the UK Parliament and government. For the purposes of this study, the decision was taken to equate England with a subnational entity with sub-tiers of local government, but with no direct legislative powers, only administrative or implementation powers. Therefore, the UK parliament and government was not considered and analyzed as the English parliament and government, since to do so would have been conceptually incoherent, with the further risk that it would assimilate England with the rest of the UK, disregarding the other devolved nations. Parliamentary discussions of further devolution to England are currently ongoing, but as the Select Committee on the Constitution stated in its 10<sup>th</sup> Report of Session, “there are no obvious governance changes to provide England with a distinctive voice that command political and public support. Establishing an English

parliament would crystallize England’s relative strength – in population and economic terms – vis-à-vis the existing devolved legislatures. This would destabilize the Union.”<sup>534</sup>

Keeping these considerations in mind, apart from England, the other subnational entity analyzed to assess subnational autonomy and constitutional asymmetry was Northern Ireland, given its peculiar status within the constitutional system and the post-conflict arrangements introduced by the Belfast/Good Friday Agreement in 1998.

Looking at the subnational autonomy scores, the difference, at least at the formal level, between Northern Ireland and England is striking. Indeed, Northern Ireland displays a medium degree of subnational autonomy in both the status and powers dimensions, as well as overall, with only the fiscal arrangement dimensions being low. Conversely, England has an extremely low degree of subnational autonomy, because as anticipated it has only limited autonomy in terms of status and powers. Looking at the country-level, the average scores for subnational autonomy indicate a generally low degree of autonomy, with the only exception being the dimensions of powers which displays a medium degree of subnational autonomy.

| UNITED KINGDOM         |                                 |                        |                  |                          |
|------------------------|---------------------------------|------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Northern Ireland | Autonomy value England | Average autonomy | Constitutional asymmetry |
| Status                 | 0.55                            | 0.04                   | 0.30             | <b>0.51</b>              |
| Powers                 | 0.63                            | 0.04                   | 0.34             | <b>0.59</b>              |
| Fiscal arrangements    | 0.25                            | 0                      | 0.13             | <b>0.25</b>              |
| Overall scores         | <b>0.48</b>                     | <b>0.03</b>            | <b>0.26</b>      | <b>0.45</b>              |
| Overall degree         | <b>Medium</b>                   | <b>Low</b>             | <b>Low</b>       | <b>High</b>              |

*Table 15: Subnational autonomy and constitutional asymmetry scores for the United Kingdom*

As one might expect, the resulting constitutional asymmetry is rather significant, with asymmetry being high in all dimensions as well as overall. This is not surprising given the very limited autonomy that England is currently enjoying at a formal level. Indeed, the only domains in the status dimension where Northern Ireland and England are broadly symmetrical concern the legislative level, since at the central level, both entities are represented in the British parliament through their electorates, even though the central government has to consult the NI Assembly in matters of its competence, something that is not reserved to England (as it has no legislative assembly of its own). Moreover, neither subnational entities are directly involved in the

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<sup>534</sup> Select Committee on the Constitution, “Respect and Co-operation: Building a Stronger Union for the 21st century”, 10th Report of Session 2021-22 (20 January 2022) - HL Paper 142, chapter 7, para. 230.



appointment of the central-level executive. In terms of all other categories of analysis on status, the asymmetries between the two entities are extremely evident and pervasive. Indeed, Northern Ireland was recognized as an autonomous part of the UK constitutional system by the Northern Ireland Act 1998, with the Belfast/Good Friday Agreement providing that Northern Ireland can decide on its constitutional status through a popular referendum, thus leaving some space to leave the union and move towards the reunification of the Irish island. Moreover, the Northern Irish Assembly adopted a series of legislation on constitutional issues, concerning fundamental rights, political organization, and identity issues, that can be regarded as a subnational constitutional text. Also, as regards procedure, this constitutional legislation was adopted without interference from the central level. Moreover, Northern Ireland has its own directly elected assembly and an indirectly elected executive, which make laws and decisions without prior central oversight. Finally, in terms of the organization of courts, Northern Ireland has its own court system, even though the UK Supreme Court is organized at the central level, and by custom and practice is represented in the UKSC with one judge. Conversely, in England, subnational autonomy is limited to the representation of the English electorate in the Westminster parliament, leaving space for English voters and representatives to make their voices heard.

In terms of asymmetries in powers, once again the two subnational entities are rather different and the only category of analysis where they are similar is the appointment of the UKSC judges, as both subnational entities are involved in their appointments through regional judicial commissions, i.e., Judicial Appointments Commission for England and Wales, and the Judicial Appointments Commission in Northern Ireland. However, as mentioned, by custom and practice, in cases that affect Northern Ireland, the court gives its decisions in a chamber with a judge that is, in terms of geography or identity markers, representative of Northern Ireland.

Finally, the dimension of fiscal arrangements is the one where asymmetries are less evident, as neither England nor Northern Ireland have autonomous taxing powers, but the latter can introduce new taxes as well as tax reliefs.

Once again, it should be noted that the choice of England as one of the two subnational entities to analyze in order to grasp constitutional asymmetries significantly impacts on the resulting degree of asymmetry. If Northern Ireland were to be compared to Scotland or Wales, the degree of constitutional asymmetry would be substantially lower, as the devolution process in the UK has tended to follow a re-symmetrization trend in recent decades. However, England is the largest subnational entity in terms of size and population, and the area from which the majority of MPs in the central parliament are elected, yet despite all this still has no devolved government or

legislature of its own, making laws and taking decisions at the entity level. This contradiction was the leading reason why it was deemed interesting to include England in the analysis.

### Iraq

Moving to the last case displaying a high degree of constitutional asymmetry, a similar reasoning as for the UK underpinned the decision to include Iraq. The Iraqi constitution currently recognizes only the Kurdistan Region as federal region, while the other tiers of system, i.e., the governorates, enjoy only limited subnational autonomy and of a mostly administrative nature. Although the Constitution provides for the establishment of other federal regions,<sup>535</sup> Kurdistan still remains the only established region. This is also due to the fact that, since the enactment of the 2005 Constitution, the governorates that intended to organize as regions failed in their attempts.<sup>536</sup>

Therefore, in Iraq we can observe a specular image of the UK. Whereas England is the only subnational entity enjoying significantly less or even no autonomy compared to the others, in Iraq it is the opposite, with the Kurdistan Region being the only subnational entity enjoying significantly more autonomy than the others. The result in terms of subnational autonomy and constitutional asymmetry is rather similar. Indeed, the Kurdistan Region displays a high degree of subnational autonomy across all dimensions of this as well as overall. Conversely, the governorates enjoy a low degree of autonomy in status and powers, while they have no fiscal autonomy, given that the fiscal dimension of governorates is under the direct control of the central government. At the country-level, Iraq is different from the three previous countries, because it displays on average a medium degree of subnational autonomy in the status and powers dimension, with only the fiscal arrangements dimensions being slightly under the 0.33 threshold for medium autonomy, having a score of 0.32. Overall, the average autonomy score indicates that Iraq enjoys a medium degree of autonomy.

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<sup>535</sup> The Iraqi Constitution at art. 117 provides that “This Constitution shall affirm new regions established in accordance with its provisions.”, whereas at art. 119 it provides that “One or more governorates shall have the right to organize into a region based on a request to be voted on in a referendum submitted in one of the following two methods: First. A request by one-third of the council members of each governorate intending to form a region. Second. A request by one-tenth of the voters in each of the governorates intending to form a region.”. However, the legal procedures to establish a new region are provided by the Law of the Executive Procedures regarding the Formations of Regions, Law No. 13 of 2008 (also known as “Law on Federalism”).

<sup>536</sup> It should be further noticed that governorates failed to establish new regions either because their requests were withdrawn at a later stage, or because these were denied despite the fact that the rules provided by the constitution and the Law on Federalism were followed. This especially affected the Sunni-majority governorates, which saw their constitutional right to hold a referendum to organize into a region denied by the central government (see Eva Maria Belser, “A Failure of State Transformation Rather than a Failure of Federalism? The Case of Iraq,” *Ethnopolitics* 19, no. 4 (2020): 390).

| IRAQ                   |                                 |                            |                  |                          |
|------------------------|---------------------------------|----------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Kurdistan Region | Autonomy value Governorate | Average autonomy | Constitutional asymmetry |
| Status                 | 0.65                            | 0.21                       | 0.43             | <b>0.44</b>              |
| Powers                 | 0.58                            | 0.21                       | 0.40             | <b>0.37</b>              |
| Fiscal arrangements    | 0.63                            | 0                          | 0.32             | <b>0.63</b>              |
| Overall scores         | <b>0.62</b>                     | <b>0.14</b>                | <b>0.38</b>      | <b>0.48</b>              |
| Overall degree         | <b>Medium</b>                   | <b>Low</b>                 | <b>Medium</b>    | <b>High</b>              |

Table 16: Subnational autonomy and constitutional asymmetry scores for Iraq

As expected, the resulting overall degree of constitutional asymmetry is high, with an even higher overall score (0.48) than the United Kingdom (0.45). As in the UK, in Iraq constitutional asymmetry is high across all dimensions, but especially in the fiscal arrangements dimension, whereas in the UK the highest asymmetry score was in the powers dimension.

Indeed, in Iraq, in the status dimension, the most significant asymmetries emerge in the category of analysis concerning subnational constitutional autonomy and the organization of courts. In the former, the constitution provides that each region, and thus the Kurdistan region, can adopt its own constitution defining the structure of powers and its authorities, adopting such constitution without central interference. In this regard, it should be noted that despite being drafted, the Kurdistan constitution was never formally adopted,<sup>537</sup> leaving this space for autonomy only “on the books”. Moreover, concerning the organization of courts, the Kurdistan region has its own court system, and is represented in the transitional Federal Supreme Court (according to art. 92.2 of the Iraqi constitution). In both categories, governorates have no subnational autonomy. Concerning the other categories, i.e., self-definition, legislative and executive level, the differences are less evident, with both tiers enjoying roughly the same degree of autonomy, with governorates and the Kurdistan region having their own directly elected subnational assemblies and their own executive, but with a differentiated position for the Kurdistan region which has to be consulted by the federal government in matters affecting its interests or competences.

In terms of power, as for Myanmar, constitutional asymmetries emerge in the scope of powers and the allocation techniques, as the Kurdistan region has substantial powers in domains such as economic policies,<sup>538</sup> political control and organization,<sup>539</sup> multinational conflict

<sup>537</sup> See Michael J. Kelly, “The Kurdish Regional Constitution within the Framework of the Iraqi Federal Constitution: A Struggle for Sovereignty, Oil, Ethnic Identity, and the Prospects for a Reverse Supremacy Clause,” *Penn State Law Review* 114, no. 3 (2010): 707-808.

<sup>538</sup> As defined in the autonomy sheet (Appendix 2), core competences in this category are economic expansion, import and export policy, regional aspects of credit policy, natural resources, commerce, tourism, transport, and energy.

<sup>539</sup> This category includes urban and spatial planning, traffic regulations, local police and public order, public services, establishment conditions, waste management, sports, and recreation.

management,<sup>540</sup> and territorial management,<sup>541</sup> whereas governorates have very limited and non-substantial powers. Then, in terms of allocation techniques, the Kurdistan Region has mostly concurrent powers with priority given to subnational rule in case of conflict with federal legislation and with no political central oversight, whereas governorates have mostly administrative or implementation powers.

Finally, as for Myanmar, constitutional asymmetries in the fiscal arrangement dimension are at the extreme, as the Kurdistan Region has the power to set the base/rate of at least one major tax without upper or lower limitations by the central authority, and has the power to introduce new taxes, whereas governorates do not have taxing powers.

As for the United Kingdom, a high degree of constitutional asymmetry emerges because two very different types of subnational entities were included in the analysis. If other regions were to be established in the future, they would enjoy the same degree of autonomy as the Kurdistan region, leaving space for complete symmetry among regions. From a political perspective, this would mean reducing the differentiated position (and thus power) that the Kurdistan region is currently enjoying within the system, reigniting potential conflict.

### *Comparative overview*

Looking comparatively at the results of subnational autonomy and constitutional asymmetry, we can observe a general trend and two distinct directions.

First, these four cases of high constitutional asymmetry derive from the difference between a medium and an extremely low degree of subnational autonomy displayed in the two subnational entities analyzed for each country. Indeed, the low degrees of subnational autonomy are comprised of 0.03 (i.e., England in the United Kingdom) and 0.14 (i.e., governorates in Iraq), thus are both rather close to 0, the lower extreme of the interval for low degree of autonomy. As one might expect, this generates a rather high differential in terms of subnational autonomy and thus of constitutional asymmetry. Moreover, as shown in Figure 29, we can observe that on average subnational autonomy tends to be low (i.e., below the 0.33 threshold) in all dimensions and overall (the green line). Iraq and to some extent the UK behave slightly differently, each having one dimension (respectively status and powers) going beyond the 0.33 threshold for medium subnational autonomy. Moreover, as mentioned, Iraq also has an overall average score of

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<sup>540</sup> Core competences in this category are linked to the protection of regional identity, such as culture, religion, education, and language.

<sup>541</sup> This category can contain very diverse competences that may overlap with previous categories (such as spatial planning, transport, natural resources). The core territory-related competences not already included in the others would concern environment protection, land policy, agriculture and fisheries, local administration.

autonomy that is slightly over the 0.33 threshold, thus a medium degree of subnational autonomy at the country-level that is not as low as the other countries.

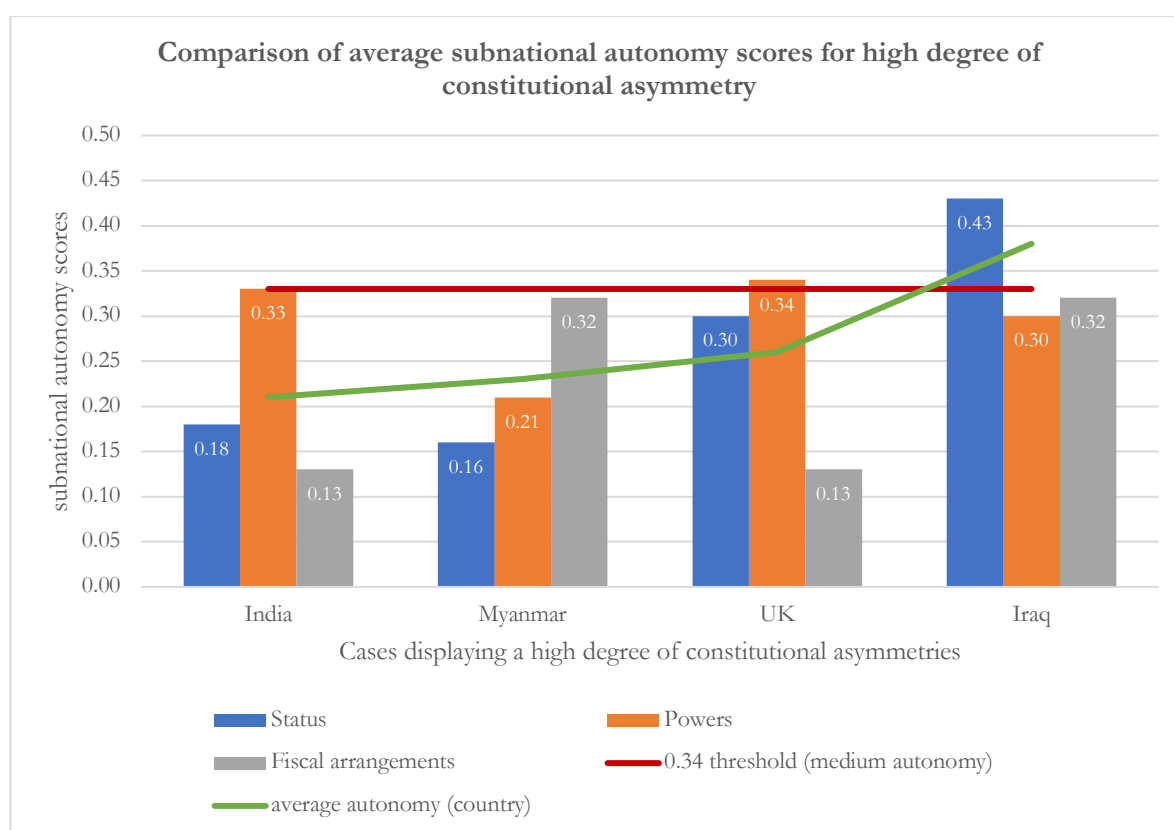


Figure 29: Comparison of average subnational autonomy scores - high constitutional asymmetry

This last observation on Iraq and the UK is linked to two distinct directions retraceable among the four cases. Indeed, the situation of India and Myanmar can be assimilated, as well as the one of the UK and Iraq. On the one hand, the constitutional systems of India and Myanmar provide for a typology of subnational entity that enjoys distinctively less autonomy than the others, i.e., the union territories in India<sup>542</sup> and the Self-Administered Division and Self-Administered Zones in Myanmar. These were created to accommodate specific needs deriving from specific territorial locations or ethnonational identity; in the case of Myanmar this often happened after the conclusion of ceasefire (and thus bilateral) agreements. On the other hand, in the UK and Iraq, the two constitutional systems grant a differentiated level of subnational autonomy to only one specific part of the territory, respectively England and the Kurdistan Region. As already observed,

<sup>542</sup> It should be noted that in India not all union territories are equal, as for example Delhi and Puducherry are given special democratic institutions, while the other union territories are governed by representatives of the central government. In order to grasp the widest divide in terms of subnational autonomy and thus asymmetry, these two territories were not selected in the analysis. It remains generally true that union territories do not enjoy the same autonomy of Indian states, but the nuances among territories should not be forgotten.

these are two mirror experiences, since the former enjoys significantly less autonomy, while the latter significantly more than the other subnational entities.

Therefore, we can tentatively conclude that high constitutional asymmetry is displayed in constitutional systems that overall enjoy a relatively low degree of subnational autonomy, with limited parts of the territory enjoying significantly less autonomy than the others. Indeed, high constitutional asymmetry does not appear to derive from a differential between high subnational autonomy and medium or low subnational autonomy, but from a differential between medium subnational and low subnational autonomy, on the lower extreme of the interval.

### 5.1.2 High constitutional asymmetry “in action”

A more complex picture of these four high asymmetry cases emerges from a nuanced look at the interaction between constitutional and political asymmetries within these systems.

As already mentioned, the Indian constitutional system presented much stronger constitutional asymmetries in the (recent) past, with the distinct status of Jammu and Kashmir constitutionally entrenched in art. 370 of the Indian constitution up until the 2019 Jammu and Kashmir Reorganization Act. Despite this dramatic reduction of subnational autonomy, the degree of asymmetry emerging in the current analysis is still significant and derives from the analytical choices that were made, namely to include two rather different types of subnational entities without ignoring the existence of union territories. Some scholars observe that India is a case of strong political asymmetry rather than constitutional asymmetries, since the overwhelming majority of Indian states, despite their extensive internal ethnocultural, demographic and socio-economic diversity, all stand on an equal footing.<sup>543</sup> However, this consideration also derives from the analytical choice to focus only on states, that do indeed roughly enjoy the same degree of subnational autonomy, without taking into account the reality of union territories, that despite being considerably smaller are constitutionally recognized as an autonomous part of the territory. An additional reason for the definition of India as a weak form of constitutional asymmetry stands in the political history of the country. Indeed, as Pandey observes, “it is a running theme of the Indian constitution that political asymmetries need not to get reflected in the form of constitutional asymmetry to the maximum extent possible”.<sup>544</sup> This is also translated in the fact that the asymmetrical elements of the Indian constitution were designed to be temporary and transitional, to hold the system together during the formation of the Union before ultimately transforming

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<sup>543</sup> Rajendra Kumar Pandey, “Accommodating Diversity, Consolidating Nationhood. A Country Study of Constitutional Asymmetry in India,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 222.

<sup>544</sup> Pandey, “Accommodating Diversity”, 223.

India into a symmetrical federation.<sup>545</sup> In conclusion, the Indian case is a first good example of how asymmetries can be strongly associated with inequality (or even perpetuation of previous inequalities), and of the ideal of symmetry as a way to fully ensure equality among subnational entities, despite the different existing conditions and consequently different needs.

Myanmar is another case where constitutional asymmetries were significantly stronger in the past. Indeed, the constitutional framework introduced by the 1947 constitution was strongly asymmetrical, recognizing some ethnic nationalities and not others, with different levels of representation, as well as different sets of rights and powers. This asymmetry between the Bamar majority and the non-Bamar ethnic nationalities created increasing tensions, culminating in a military coup in 1962 and in the suspension of the 1947 constitution and of the federal structure of the state. The following constitutions in 1974 and then 2008 contain some federal elements, but asymmetries were reduced as much as possible to avoid to entrenching asymmetries in the constitutional framework. Indeed, states and regions are completely symmetrical, in order to formally ensure equality among ethnic communities. However, as for India, Myanmar still emerges as a case of high constitutional asymmetry given the presence of the Self-Administered Areas (Zones and Division), recognized by the constitution as an autonomous part of the territory. Despite their considerably smaller size, these were introduced for smaller but clustered ethnic nationalities, and therefore are relevant in terms of autonomous units. Moreover, as Breen notes, “a largely symmetrical constitution does not mean ethnic neutrality”,<sup>546</sup> as the Bamar population is still in a privileged position, with art. 3 of the constitution recognizing the special position of Buddhism, i.e., the majority and Bamar religion, leading to the adoption of discriminatory legislation against non-Bamar religions, such as Islam. Therefore, the apparent symmetry does not necessarily translate into full equality among ethnic nationalities and disregards the existing formal asymmetry between states/regions and self-administered areas.

Finally, for what concerns the asymmetries “in action” in the United Kingdom and Iraq, much has already been said in the previous section. If Iraq is unequivocally a case of high constitutional asymmetry, as designed by the 2005 constitution, it is still interesting to notice how the United Kingdom can easily be considered a case of low constitutional asymmetry when excluding England as a unit of analysis. As mentioned, if England is not counted as a subnational entity, the other three subnational entities have become pretty much symmetrical over time, despite the asymmetrical development of the devolution system in the UK.

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<sup>545</sup> Pandey, “Accommodating Diversity”, 223.

<sup>546</sup> Michael G. Breen, “Asymmetry or Equality? Ethnic Nationalities in a Bamar-Dominated State. A Country Study of Constitutional Asymmetry in Myanmar,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 363.

Indeed, due to different analytical and methodological choices, the current research offers another perspective on asymmetries to previous works on constitutional asymmetries, where these were considered moderate in the case of the case of India and Myanmar,<sup>547</sup> or minimal in the case of the UK.<sup>548</sup>

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<sup>547</sup> Sahadžić, *Asymmetries*, 83; Pandey, “Accommodating Diversity,” 223; Breen, “Asymmetry or Equality,” 363.

<sup>548</sup> See for example Sahadžić, *Asymmetries*, 83; Brice Dickson, “Work in Progress. A Country Study of Constitutional Asymmetry in the United Kingdom,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 481.



## *5.2 Medium constitutional asymmetry*

### 5.2.1 Autonomy and asymmetry

The four cases displaying a medium degree of constitutional asymmetry, i.e., Spain, Italy, Pakistan, and Belgium, do not share a regular path in terms of subnational autonomy as the previous cases for high constitutional asymmetry do. However, they do share an overall medium degree of autonomy at the country-level. The following subparagraphs briefly review the variations among cases.

#### *Spain*

For the Spanish case, the two selected subnational entities were the Basque Country and Andalusia, as the goal was to analyze two autonomous communities (ACs) that could reflect the widest divide in terms of internal diversity. Indeed, the Basque Country is one of the smallest AC (and one of the highest GPD per capita in the country), having a distinctive identity and enjoying special arrangements in one of the dimensions of autonomy (i.e., the fiscal arrangements). Conversely, Andalusia is one of the largest subnational entities in Spain, in terms of population and territorial size, with one of the lowest GPD per capita.

The two selected subnational entities appear to be rather asymmetrical in reality, but when it comes to their degree of subnational autonomy, and thus to the degree of constitutional asymmetry, the picture is rather different. As Table 17 shows, the status and powers dimensions of subnational autonomy is the same for the Basque Country and for Andalusia, both enjoying a low degree of autonomy in status, but a medium degree of autonomy in powers. The only dimension of subnational autonomy where there is a significant divide is the one on fiscal arrangements, with the Basque Country enjoying a high degree of autonomy and Andalusia a low degree of autonomy. Looking at the overall scores, both subnational entities enjoy a medium degree of subnational autonomy. At the country-level, the average autonomy scores confirm that autonomy in status is low, while in powers and in fiscal arrangement it is medium, leading to an overall medium degree of subnational autonomy in the country.

| SPAIN                  |                               |                          |                  |                          |
|------------------------|-------------------------------|--------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Basque Country | Autonomy value Andalusia | Average autonomy | Constitutional asymmetry |
| Status                 | 0.26                          | 0.26                     | 0.26             | 0.00                     |
| Powers                 | 0.43                          | 0.43                     | 0.43             | 0.00                     |
| Fiscal arrangements    | 0.75                          | 0.25                     | 0.50             | 0.50                     |
| Overall scores         | 0.48                          | 0.31                     | 0.40             | 0.17                     |
| Overall degree         | Medium                        | Medium                   | Medium           | Medium                   |

Table 17: Subnational autonomy and constitutional asymmetry scores for Spain

In terms of constitutional asymmetry, this is only traceable in the fiscal arrangements, where the score is rather high (0.50). Indeed, the Basque Country enjoys significant fiscal autonomy through a special regime that is only shared by the autonomous community of Navarre. The Basque statute of autonomy provides that the autonomous community has the power to set the base and/or rate of at least one major tax (personal and corporate income), without upper or lower limitations or other constraints set by the central authority. Specifically, the special regime of the Basque Country and Navarre is constitutionally entrenched in Additional Provision 1 of the Spanish constitution, according to which “the Constitution protects and respects the historic rights of the territories with traditional charts (*fueros*).”<sup>549</sup> The traditional roots of this privilege can be found in the so-called *concierto* in the Basque Country, and *convenio* in Navarre, granting the two ACs the power to collect taxes and bilaterally agree with the central state the amount (the so-called *cupo*) to be paid for the central state expenses. For the Basque Country in particular, the legal basis for its fiscal autonomy is provided by Title 3 of its Statute of Autonomy and the fiscal pact currently in force under the Spanish Statute 12/2002. Conversely, Andalusia falls within the ordinary regime of fiscal autonomy as provided by art. 156 and 157 of the Spanish constitution and has no power to substantially set the base and/or rate of taxes, but only to slightly change it.

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<sup>549</sup> Spanish constitution, Additional Provision 1. Concerning Additional Provision 1, some authors have observed that it provides an interesting case of “asymmetrical interpretation of history as a legitimate source of rights” (Bossacoma and Sanjaume, “Asymmetry as a Device for Equal Recognition,” 454). Historically speaking, also other territories such as Catalonia had their own laws and jurisdictions (*fueros*), including their own fiscal system. However, the constitutional interpretation of that provision excluded those territories where the *fueros* were not maintained over time, without any discontinuity. Looking at the political and constitutional history of Spain, it can also be noticed that Navarre and the Basque Country maintained such historic privilege thanks to their support for the conservative reign of King Charles in the XIX century, when the *concierto* and *convenio* began. Some critics also suggest that such continuity was a reward for the non-opposition to the 1936 *coup* which brought Franco to power (see Bossacoma and Sanjaume, “Asymmetry as a Device for Equal Recognition,” 454).

However, since the other two dimensions are symmetrical, the overall score for constitutional asymmetry is not considerable (0.17), thus it can be considered a medium degree of asymmetry.

### Italy

For Italy, the choice of the two subnational entities had to take into account that the Italian constitution provided for two types of regions, i.e., special and ordinary, the former enjoying differentiated autonomy. Therefore, the selection involved a special region, i.e., Aosta Valley, that is also the smallest in terms of size and population, and an ordinary region, i.e., Lombardy, which is also one of the biggest in terms of size and population. An additional reason to choose Lombardy is that it is among the ordinary regions that expressed their intention to negotiate for more autonomy as allowed by art. 116.3 of the Italian constitution.

As can be observed from Table 18, the two subnational entities enjoy different degrees of subnational autonomy across the dimensions. Indeed, Aosta Valley enjoys a medium degree of autonomy in status, but a high degree in powers and fiscal arrangements, producing an overall high degree of subnational autonomy. Conversely, Lombardy enjoys a medium degree in all three dimensions, as well as overall. At the country-level, the average autonomy scores indicate that autonomy is medium in status and powers, while high in fiscal arrangements. Overall, the average degree of subnational autonomy is medium.

| ITALY                  |                                |                            |                     |                             |
|------------------------|--------------------------------|----------------------------|---------------------|-----------------------------|
| Dimensions of autonomy | Autonomy value<br>Aosta Valley | Autonomy value<br>Lombardy | Average<br>autonomy | Constitutional<br>asymmetry |
| Status                 | 0.46                           | 0.35                       | 0.41                | 0.11                        |
| Powers                 | 0.79                           | 0.43                       | 0.61                | 0.36                        |
| Fiscal<br>arrangements | 0.75                           | 0.63                       | 0.69                | 0.12                        |
| Overall scores         | 0.67                           | 0.47                       | 0.57                | 0.20                        |
| Overall degree         | High                           | Medium                     | Medium              | Medium                      |

*Table 18: Subnational autonomy and constitutional asymmetry scores for Italy*

Constitutional asymmetry is present in all three dimensions, but to different degrees. Indeed, asymmetry is low in status and fiscal arrangements, given that the relative autonomy scores of the two subnational entities are rather close, whereas asymmetry is high in powers, deriving from a significant differential in terms of subnational autonomy between the two entities.

Looking more closely at how constitutionally asymmetry is translated, the asymmetries in status concern almost all the categories of analysis, even though the differences are not striking. First, asymmetries emerge from the specific recognition of Aosta Valley as a special region (art. 116.1 of the Italian constitution) enjoying differentiated autonomy, whereas Lombardy is generally recognized as an autonomous part of the system (art. 131 of the Italian constitution). Then, in terms of subnational constitutional autonomy, in its special statute, Aosta Valley can make substantial arrangements in domains such as fundamental rights, identity clauses, representative structures and organization of public authority, whereas ordinary regions can make substantial arrangements only in regards to the latter. Moreover, the differentiated position of Aosta Valley as a special region, and thus the resulting asymmetry, emerges at the legislative level, as it has to be consulted in matters affecting its interest or competences, and especially at the executive level, as it not only has to be consulted in matters affecting its interest or competences but also, due to the principle of specialty and of bilateral cooperation, it could be argued that as a special region it co-decides matters that affect its interests or competences. These provisions are limited to special regions, and thus Lombardy as an ordinary region does not enjoy the same level of autonomy.

However, the dimension of autonomy where asymmetry is widest is as regards powers. Indeed, in terms of scope of powers, the statute of Aosta Valley provides substantial powers in domains such as economic policies, political control, territorial management, and multinational conflict management, whereas ordinary regions have substantial powers only in the domains of economic policies and political control. In terms of the techniques of allocation of competences, Aosta Valley has mostly concurrent powers with priority given to central rule, but central interference is conditional on detailed subsidiarity or necessity conditions, as also stated by the constitutional court case-law,<sup>550</sup> whereas Lombardy has mostly concurrent powers with priority given to central rule. Then, when looking at the system of intergovernmental relations (IGR) for political conflict resolution, the principle of specialty provides for an equal and balanced relationship between the special region and the central authority, with an equal number of representatives on both sides in bilateral negotiations. However, in respect of the other regions, it could also be argued that the special regions have a dominant position in the political dispute resolution mechanism, since such an equal relationship is not granted to ordinary regions, where the dominant position is the one of the central authorities. Moreover, Aosta Valley can initiate the dispute resolution mechanism if the central authorities have harmed its interests or exceeded its competences.

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<sup>550</sup> It should be noted that Aosta Valley is granted more exclusive powers than ordinary regions, so in some matters it could be said that priority is given to subnational rule.

Finally, in the fiscal domain, the differences between special and ordinary regions were reduced over time, and the only asymmetry is the mechanisms in place in Aosta Valley to protect its subnational capacity to raise taxes. Otherwise, both special and ordinary regions appear to have rather symmetrical powers.

Overall, the low asymmetry in status and fiscal arrangements, but high asymmetry in powers, creates a score for constitutional asymmetry of 0.20, which can be considered a medium degree of asymmetry.

### Pakistan

As apparent from chapter four, Pakistan is not explained by the QCA solutions and thus is considered a “deviant case”. By looking at the analysis of subnational autonomy, it is also possible to observe some deviations from the other three constitutional systems sharing a medium degree of constitutional asymmetry.

Starting from the choice of the two subnational entities, subnational autonomy was measured for the province of Punjab and Gilgit-Baltistan. In Pakistan, provinces all enjoy the same level of autonomy. The only part of the Pakistani territory that enjoys a different degree of autonomy is Gilgit-Baltistan, which the law defined as an “autonomous region” in the Gilgit-Baltistan Empowerment and Self-Governance Order in 2009. The territory of Gilgit-Baltistan historically enjoyed a semi-autonomous status since its accession to Pakistan in 1947, but its differentiated constitutional status created political tensions and repeated requests to change its status to ensure equality with the rest of the system. After 2009, Gilgit-Baltistan gained *de facto* a province-like status, albeit without a corresponding constitutional recognition and with reasonably strong central oversight remaining.

Looking at the scores of subnational autonomy, we can observe from Table 19 that Punjab enjoys a medium degree of autonomy in all dimensions (with the highest score in powers), as well as overall. Conversely, in Gilgit-Baltistan subnational autonomy is medium only in powers (with a lower score than Punjab), whereas autonomy is low in both status and fiscal arrangements. Therefore, in Gilgit-Baltistan the overall degree of autonomy is low, albeit quite close to the 0.34 threshold of medium autonomy. At the country level, the lower scores of subnational autonomy in Gilgit-Baltistan generate average autonomy scores that are low in status and fiscal arrangements, while medium in powers. Overall, in the systems the average degree of autonomy is medium.

| PAKISTAN               |                       |                                 |                  |                          |
|------------------------|-----------------------|---------------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Punjab | Autonomy value Gilgit-Baltistan | Average autonomy | Constitutional asymmetry |
| Status                 | 0.39                  | 0.12                            | 0.26             | <b>0.27</b>              |
| Powers                 | 0.61                  | 0.40                            | 0.51             | <b>0.21</b>              |
| Fiscal arrangements    | 0.38                  | 0.25                            | 0.32             | <b>0.13</b>              |
| Overall scores         | <b>0.46</b>           | <b>0.26</b>                     | <b>0.36</b>      | <b>0.20</b>              |
| Overall degree         | <b>Medium</b>         | <b>Low</b>                      | <b>Medium</b>    | <b>Medium</b>            |

*Table 19: Subnational autonomy and constitutional asymmetry scores for Pakistan*

In terms of constitutional asymmetry, Pakistan is slightly different from the two previous cases, given that in Spain and Italy the overall degree of subnational autonomy is either medium in both subnational entities, or high and medium. Conversely, in Pakistan the overall degree of subnational autonomy is medium in Punjab and low in Gilgit-Baltistan. Formally, it appears to reflect a similar situation as the systems with a high degree of constitutional asymmetry, since in those cases the subnational entities respectively enjoyed a medium and a low degree of subnational autonomy. However, in those systems the subnational entities with a low degree of autonomy were placed at the lower end of the interval (as their scores were rather close to 0), whereas Gilgit-Baltistan, despite enjoying a low degree of autonomy (0.26), is placed closer to the higher end of the low degree interval (the 0.34 threshold of medium autonomy). Similarly, the overall autonomy score for Punjab, despite indicating a medium degree of autonomy (0.46), is rather close to the lower end of the medium degree interval (0.34 threshold). Therefore, the resulting constitutional asymmetry score (0.20) is not as high as the cases addressed in the previous paragraph, and thus it can be considered as showing a medium degree of constitutional asymmetry.

Looking more in detail at the dimensions of asymmetry, it is present in all three dimensions although in different degrees, as is high in status, medium in powers, and low in fiscal arrangements. The status dimension is the one with the widest asymmetries, with Gilgit-Baltistan being recognized as an autonomous part of the system not by the constitution (as the provinces), but by ordinary legislation, and without being represented in the central level institutions, despite having a directly elected assembly. In terms of the organization of courts, provinces such as Punjab have their own court system and they are represented in the Supreme Court (which is organized at the central level), whereas in Gilgit-Baltistan courts are organized at the central level. In terms of powers, asymmetries are also considerable. Indeed, provinces have powers in matters concerning economic purposes, political control, multinational conflict management, and territorial management, whereas Gilgit-Baltistan does not have powers over multinational conflict

management (but does over the other three categories). In terms of allocation techniques, if provinces have mostly exclusive powers, Gilgit-Baltistan has concurrent powers with priority given to central rule. Another aspect in which asymmetry is present concerns the role of subnational entities in the appointment of supreme court judges, as provinces are consulted on this, whereas Gilgit-Baltistan has no say over appointments. Finally, asymmetries in the fiscal arrangements dimension are minimal, as provinces have the power to set the base and/or rate of minor taxes, whereas Gilgit-Baltistan does not. However, all subnational entities in Pakistan can introduce new taxes and levies.

### Belgium

As regards Belgium, the analysis of subnational autonomy directly recalls that already conducted by Popelier in *Dynamic Federalism*.<sup>551</sup> The two selected subnational entities are the Flemish Community (FC) and the German Speaking Community (GSC), as they are rather different not only in terms of size and population, but also because the FC took the opportunity granted by art. 137 of the Belgian Constitution and merged the institutions of the Flemish community and the Flanders region into one single Flemish parliament and executive, exercising both sets of powers.

The subnational autonomy scores for the FC indicate a medium degree of autonomy in status, and a rather high degree in powers and fiscal arrangements, with the highest score in powers (0.96). Conversely, the GSC enjoys a medium degree of autonomy in status and fiscal arrangements, but a high degree of autonomy in powers. Overall, subnational autonomy is high in the FC and medium in the GSC, in a similar situation as in Italy. At the country-level, the average scores for autonomy indicate a medium degree of autonomy in status and fiscal arrangements, and a high degree of autonomy in powers. Overall, the degree of autonomy at the country-level is medium, but, as Table 20 shows, the score is at the highest end of the medium interval (0.66).

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<sup>551</sup> For the Belgian case, no separate autonomy sheet was filled out, as the analysis has already been done. For the details on the assigned scores, see Popelier, *Dynamic Federalism*, 258-268.

| <b>BELGIUM</b>                |                                  |                                          |                  |                                 |
|-------------------------------|----------------------------------|------------------------------------------|------------------|---------------------------------|
| <b>Dimensions of autonomy</b> | Autonomy value Flemish Community | Autonomy value German Speaking Community | Average autonomy | <b>Constitutional asymmetry</b> |
| <b>Status</b>                 | 0.58                             | 0.47                                     | 0.53             | <b>0.11</b>                     |
| <b>Powers</b>                 | 0.96                             | 0.70                                     | 0.83             | <b>0.26</b>                     |
| <b>Fiscal arrangements</b>    | 0.75                             | 0.50                                     | 0.63             | <b>0.25</b>                     |
| <b>Overall scores</b>         | <b>0.76</b>                      | <b>0.56</b>                              | <b>0.66</b>      | <b>0.21</b>                     |
| <b>Overall degree</b>         | <b>High</b>                      | <b>Medium</b>                            | <b>Medium</b>    | <b>Medium</b>                   |

*Table 20: Subnational autonomy and constitutional asymmetry scores for Belgium*

In terms of constitutional asymmetry, as with Italy and Pakistan, asymmetry is present in all dimensions, specifically it is low in status while high in powers and fiscal arrangements. Looking closely at how asymmetries are translated, in status, the main differences emerge from the legislative level, as the Dutch groups in the central parliament can veto a law, whereas the representatives from the German-Speaking Community cannot, and the executive level, as the Flemish Community is indirectly represented in the central executive through geographical or identitarian criteria, whereas the German-Speaking Community is not. This asymmetry linked to identity markers is also present in the organization of courts, since, despite being organized at the central level, in the Flemish Community courts are embedded within the subnational legal space and the FC is indirectly represented in apex courts, whereas in the GSC this provision is not in place. Concerning the powers dimension, it is possible to observe the widest asymmetry between the two subnational entities, and the extremely high score of subnational autonomy enjoyed by the Flemish Community. Indeed, in terms of scope of powers, the FC has substantial powers in economic policies, political control, territorial management, and multinational conflict management, whereas the German-Speaking Community only holds these in the latter two domains. Moreover, in terms of political conflict dispute resolution, the FC has a dominant position in the dispute resolution mechanisms, and, like Aosta Valley, can initiate the mechanisms if its interests and competences have been harmed by the central authorities. Conversely, the German-Speaking Community does not have a dominant position in dispute resolution mechanisms, even though in an unbalanced dialogue there is still prominent representation of the GSC. Furthermore, the Flemish Community has an individual veto right in the appointment of (some) judges of the Constitutional Court, whereas the German-Speaking Community is involved through collective vote. Finally, in terms of fiscal arrangements, asymmetries emerge between the two subnational entities since the Flemish Community has the power to set the base and/or rate of at least one major tax (with constraints set by the central authority), whereas the German-



Speaking Community has the power to set the base and/or rate only of minor taxes (without limitations set by the central authority).

Overall, the low asymmetry in status and the high asymmetry in powers and fiscal arrangements create a score for constitutional asymmetry of 0.21, which can be considered a medium degree of asymmetry.

### Comparative overview

The comparative overview of the four cases sharing a medium degree of constitutional asymmetry, also supported by Figure 30, shows that these cases share on average an overall medium degree of subnational autonomy (the green line in Figure 30), with some variations. Indeed, all countries display a medium degree of subnational autonomy in at least two dimensions, with the exception of Pakistan where only regarding the dimension of powers is the degree of autonomy medium, whereas in the other two dimensions it is low (albeit close to the threshold). In Belgium and Italy, in two dimensions autonomy is medium, while in the third dimension it is high: in Belgium in the dimension of powers, in Italy in the fiscal arrangements. Conversely, in Spain autonomy is medium in two dimensions, whereas in the third dimension (status) autonomy it is low.

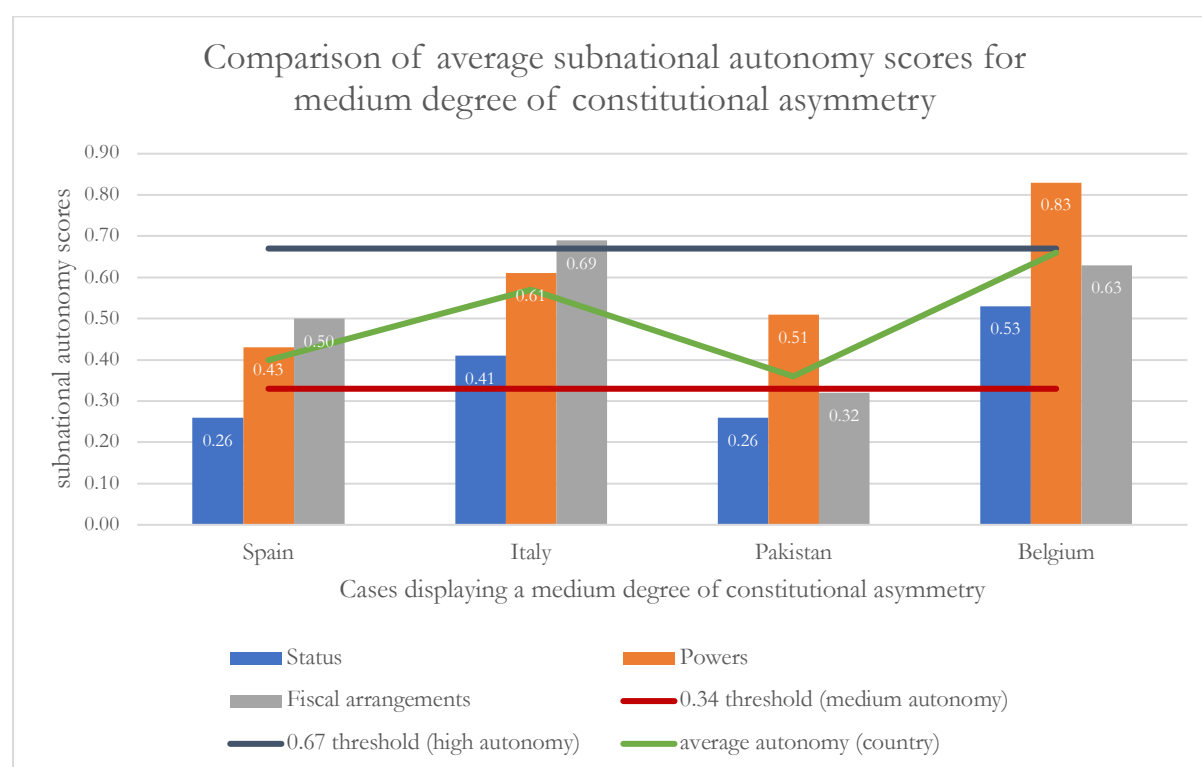


Figure 30: Comparison of average subnational autonomy scores - medium constitutional asymmetry

Therefore, it can be concluded that a medium degree of constitutional asymmetry is linked to an average medium degree of subnational autonomy, as differentials in terms of subnational

autonomy are not as marked as in the cases displaying a high degree of constitutional asymmetry. Further research would be required to explore whether in the past constitutional asymmetry was higher and later constitutional developments led to a decrease of the levels of asymmetry, aiming to reduce differentiated treatments within the systems.

### 5.2.2 Medium constitutional asymmetry “in action”

Within the group of cases sharing a medium degree of constitutional asymmetries, Spain and Italy offer some interesting insights not only on the evolution of asymmetries over time, but also on the difference between law on the books and law in action. Indeed, in both Italy and Spain, the constitutional asymmetries originally introduced by the newly adopted democratic constitutions were stronger than they are now. In the Spanish system, the initial asymmetry between the Basque Country and Catalonia on the one side (i.e., the “nationalities” as art. 2 of the constitution defines them), and the rest of the system on the other (i.e., the “regions”), has been reduced following a re-symmetrization trend, through the extension of powers to the rest of the autonomous communities, a standardization of central legislation, the centralization of practices, and a homogenization of the case law. To counter this trend, both Catalonia and the Basque Country made formal proposals to re-establish a more marked asymmetry, but both proposals to reform their autonomy statutes failed. In conclusion, Bossacoma and Sanjaume argue that “it was a transitory and potential asymmetry more than a permanent and actual asymmetry”,<sup>552</sup> and the strong potential for asymmetry allowed by the constitution did not actualize in its later implementation. The Italian case offers an even more nuanced picture on the implementation of asymmetries, as even the five special regions are rather different from one another, with Friuli-Venezia Giulia being established just a few years before the rest of ordinary regions and much later than the other special regions, and with the two islands of Sicily and Sardinia never having developed what Palermo and Valdesalici define as “autonomist consciousness”,<sup>553</sup> as they focused more on developing and strengthening ties with the central government than on taking advantage of their special autonomy. Thus, the only two special regions actually enjoying their asymmetric potential are the two small subalpine regions, namely Aosta Valley and Trentino-South Tyrol. Moreover, the constitutional developments of 1999 and 2001 significantly changed the panorama of Italian regionalism, reducing constitutional asymmetries between special and ordinary regions. Interestingly, Palermo and Valdesalici frame the discourse on constitutional asymmetries (and thus asymmetric federalism) in Italy as a pendulum that “oscillates wildly between (symmetric)

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<sup>552</sup> Bossacoma and Sanjaume, “Asymmetry as a Device for Equal Recognition,” 457.

<sup>553</sup> Palermo and Valdesalici, “Irreversibly Different,” 304.

centralization and (asymmetric) decentralization”.<sup>554</sup> They further observe that these oscillations have little to do with the constitutional framework but are rather tied to the political discourse and the case law of the Italian Constitutional Court. Indeed, proposed legislation to implement “differentiated autonomy” regularly emerges in the political discourse of some political parties, and as previously mentioned in chapter 2 the Italian Constitutional Court significantly changed its degree of support for decentralization and asymmetries before and after the 2001 constitutional reform. Finally, art. 116.3 of the constitution holds the potential to reignite the discussion on further differentiation within the Italian regional system, even though it did not find actual implementation.

Then, the Pakistani case is an interesting case of “temporary” constitutional asymmetry, as the only existing constitutional asymmetries derive from the differentiated position of Gilgit-Baltistan, that currently has “quasi-provincial” status and will eventually enjoy equal autonomy as provinces. The roots of the differentiated position of Gilgit-Baltistan are to be found in history, as traditionally the region had been ruled by tribes, kingdoms, and dynasties.<sup>555</sup> Following the accession to Pakistan in 1947, it enjoyed a semi-autonomous status, even though such differentiated treatment created tensions and repeated calls to ensure full parity and equality in status with other provinces. After being governed by the federal government of Pakistan for decades, in 1999 the Supreme Court of Pakistan ruled that the treatment of the region should have been comparable with other provinces, and even though the changes have been slow, the *de facto* recognition of Gilgit-Baltistan as a “quasi-province” arrived in 2009 with the issuing of the Gilgit-Baltistan Empowerment and Self-Governance Order. Although the temporary nature of asymmetries concerning Gilgit-Baltistan did not come by explicit design, the ultimate goal is expected to be constitutional symmetry, in a rather highly politically asymmetrical system.<sup>556</sup> Indeed, this is the reason why previous research framed Pakistan as a case of low constitutional asymmetry.<sup>557</sup> However, looking at the current constitutional framework, it is possible to notice that the asymmetries in status and powers are still significant.

Finally, it should be noted that the degree of constitutional asymmetry in Belgium largely depends on how the system is framed. If Belgium is framed as a dyadic federation revolving around the two major language groups, as it operates at the central level with the power-sharing system in place between the Dutch and French groups, constitutional asymmetries would be weaker and

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<sup>554</sup> Palermo and Valdesalici, “Irreversibly Different,” 308.

<sup>555</sup> Zubair Shahid and Melanie Gerster, “Subnational Empowerment for a Cohesive Federation. A Country Study of Constitutional Asymmetry in Pakistan,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 384.

<sup>556</sup> See Shahid and Gerster, “Subnational Empowerment,” 377-383.

<sup>557</sup> Sahadžić, *Asymmetries*, 83.

mainly concentrated in the fiscal domain, deriving from the merger of the community and regional institutions by the Flemish. However, such a dyadic nature is mitigated by the design of the federal structure, which also encompasses smaller entities such as the Brussels Region and the German-Speaking Community,<sup>558</sup> as well as the French Community Commission and the Joint Community Commission. This creates stronger and more pervasive asymmetries, as communities and regions hold different sets of powers, and the merger of the institutions in the Flemish Community has created a concentration of powers that in a single territorial entity.

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<sup>558</sup> It should be noted that despite being smaller entities, the Brussels Region and the German-Speaking Community are mentioned in the Belgian constitution in articles 2 and 3 on the same level as the other regions and communities, the asymmetry between these and the rest of the entities thus results from the merger of the institutions in the Flemish Community.

### 5.3 Low constitutional asymmetry

#### 5.3.1 Autonomy and asymmetry

The four cases displaying a low degree of constitutional asymmetry do not share a common approach to subnational autonomy, rather they seem to follow two separate trends. In Canada and Bosnia-Herzegovina, the overall degree of subnational autonomy is medium, whereas in Indonesia and Malaysia the overall degree of subnational autonomy is low. However, when looking at the resulting constitutional asymmetry, Canada and Indonesia appear to be similar to each other, while Bosnia and Malaysia share other similarities. Each case will be briefly reviewed separately in the following sections.

#### Canada

In Canada, the two subnational entities selected to analyze were Québec, the only province with an overwhelming majority of French-speaking population, as well as being one of the largest and richest provinces, and Nova Scotia, one of the smallest, less rich, and least populated provinces in Canada.

Looking at the subnational autonomy scores, we can observe that the two subnational entities enjoy a medium degree of autonomy in status and powers, and a high degree of autonomy in fiscal arrangements. Overall, the two subnational entities enjoy a medium degree of autonomy. At the country level, the average autonomy scores, as well as the overall score, reflect the picture at the subnational entity level: medium autonomy in status and powers, high autonomy in fiscal arrangements, and medium autonomy overall.

| CANADA                 |                       |                            |                  |                          |
|------------------------|-----------------------|----------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Québec | Autonomy value Nova Scotia | Average autonomy | Constitutional asymmetry |
| Status                 | 0.63                  | 0.57                       | 0.60             | 0.06                     |
| Powers                 | 0.42                  | 0.42                       | 0.42             | 0.00                     |
| Fiscal arrangements    | 0.75                  | 0.75                       | 0.75             | 0.00                     |
| Overall scores         | 0.60                  | 0.58                       | 0.59             | 0.02                     |
| Overall degree         | Medium                | Medium                     | Medium           | Low                      |

Table 21: Subnational autonomy and constitutional asymmetry scores for Canada

In terms of constitutional asymmetry, the only dimension in which Québec and Nova Scotia differ is in the status dimension, with Québec having a slightly higher autonomy score than Nova Scotia. This derives from the fact that Québec is the only province to which three seats in the

Supreme Court are reserved, given that it is the only province with a civil law legal system resting on the French codified tradition, and this would guarantee knowledge of Québec civil law in the Supreme Court.<sup>559</sup> The other provinces do not enjoy the same autonomy as these two domains, but aside from these minimal (yet politically significant) differences, all the Canadian provinces share the same level of autonomy in the remaining two dimensions of powers and fiscal arrangements. Therefore, the resulting overall score for constitutional asymmetry is extremely low (0.02), rather close to constitutional symmetry.

### Indonesia

For the Indonesian case, the two selected subnational entities were Aceh, one of the regions enjoying special autonomy which has a distinctive ethno-cultural identity, and East Kalimantan, an ordinary region which is also one of the richest in terms of resources and assets.

Looking at the subnational autonomy scores, we can notice that, in both entities, autonomy is low in status and fiscal arrangements, whereas it is medium in powers. Overall, in both entities, autonomy is low, even though it is close to the 0.34 threshold for medium autonomy. At the country-level, the average autonomy scores reflect the situation already depicted at the subnational level: low autonomy in status and fiscal arrangements, medium autonomy in powers, and low autonomy overall.

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<sup>559</sup> It is interesting to notice how the presence of civil law in Québec is *per se* a source of constitutional asymmetry compared to the rest of the system, based on common law. As with the Spanish case, with the recognition of historic rights and legal traditions through the adoption of Additional Provision 1 in the constitution, the 1985 Supreme Court Act introducing the appointment of three judges reserved to Québec entrenches such particular legal tradition in the legal framework. The selected indexes to measure subnational autonomy and asymmetry do not specifically analyze the presence of different legal traditions within the constitutional system but are still able to capture such a presence through its translation, e.g., the special fiscal regime in Spain, and the appointment of judges in the Supreme Court in Canada. It should be further added that this element would have also emerged in the United Kingdom, if Scotland had been selected as one of the two subnational entities to analyze. Indeed, Scotland has retained its traditional legal system based on a hybrid civil-common law system (*Lagh na h-Alba*) and thus criminal law cases should be decided by the High Court of Justiciary in Edinburgh as court of last instance and not by the UK Supreme Court. As will be further recalled, the presence of multiple legal systems within one constitutional system becomes extremely relevant in the case of Nigeria and Indonesia, where in some parts of the territory Islamic law (especially criminal law) is directly applied within some subnational entities (for more on this see also Mohammed H. A. Bolaji, “Shari’ah in Northern Nigeria in the Light of Asymmetrical Federalism,” *Publius: The Journal of Federalism* 40, no. 1 (2010): 114–35).

| INDONESIA              |                     |                                |                  |                          |
|------------------------|---------------------|--------------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Aceh | Autonomy value East Kalimantan | Average autonomy | Constitutional asymmetry |
| Status                 | 0.24                | 0.18                           | 0.21             | 0.06                     |
| Powers                 | 0.46                | 0.42                           | 0.44             | 0.04                     |
| Fiscal arrangements    | 0.25                | 0.25                           | 0.25             | 0                        |
| Overall scores         | 0.32                | 0.28                           | 0.30             | 0.03                     |
| Overall degree         | Low                 | Low                            | Low              | Low                      |

Table 22: Subnational autonomy and constitutional asymmetry scores for Indonesia

In terms of constitutional asymmetry, this is only slightly present in status and powers, whereas the fiscal arrangement dimension is fully symmetrical. The difference in status and powers mainly derives from the peculiar position of Aceh within the Indonesian constitutional system, as the constitution recognizes the existence of special provinces at art. 18B, and the 2014 Law on Regional Autonomy recognizes Aceh as a Special Province at art. 399 thus isolating it (along with the other special provinces)<sup>560</sup> from the rest of the provinces. Moreover, Aceh must be consulted when the central parliament or executive are drafting laws or enacting policies concerning the governance of Aceh, and this treatment is not reserved to the other ordinary provinces. In terms of powers, Aceh is a particular case of direct implementation of Islamic law within the region, especially of Islamic criminal law with Shari'a courts adjudicating Islamic law cases. Finally, Aceh is the only subnational entity in Indonesia which may form a regional party. All other parties must be nationalized.

Despite the significant impact of asymmetry, the overall constitutional asymmetry score is 0.06, and therefore extremely low. However, aside from the strictly formal point, Indonesia is practically symmetrical, and this could be a reason why the case is not explained by the solution formulas of the Qualitative Comparative Analysis.

### Bosnia and Herzegovina

In Bosnia-Herzegovina, the two selected subnational entities were the Federation of Bosnia-Herzegovina (FBiH), one of the two entities constituting the system, and the Brčko district, an autonomous district established in 1999 after an arbitration process. At the subnational level, Bosnia-Herzegovina is composed of two entities, i.e., FBiH and Republika Srpska, enjoying the

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<sup>560</sup> Aside from Aceh, the other special regions in Indonesia are the provinces of Papua and West Papua, whose special autonomy is entrenched in the 2001 Law on Special Autonomy for Papua Province, and the cities of Yogyakarta and Jakarta (the capital city), whose special autonomy rooted in historical reasons is respectively entrenched in the 2012 Law on The Special Region of Yogyakarta, and the 2007 Law on the Administration of the Special Region of Jakarta.

same level of autonomy. It therefore made little sense to select both of them to assess the presence of constitutional asymmetry, whereas the Brčko district is a distinct tier of government, having its own legislative, executive and judicial branches, though enjoying less autonomy than the entities.

Looking at the subnational autonomy scores, the Federation of Bosnia-Herzegovina enjoys a high degree of autonomy in status and fiscal arrangements and a medium degree in powers, producing an overall high degree of subnational autonomy. Conversely, in the Brčko district autonomy is medium in status and powers, and high in fiscal arrangements, leading to a medium overall degree of autonomy. At the country-level, the situation in terms of average autonomy is similar to the one emerging from Brčko, but with higher values (despite still being below the 0.67 threshold for high autonomy): medium autonomy in status and powers, high autonomy in fiscal arrangements, and an overall medium degree of autonomy.

| <b>BOSNIA AND HERZEGOVINA</b> |                        |                                  |                  |                                 |
|-------------------------------|------------------------|----------------------------------|------------------|---------------------------------|
| <b>Dimensions of autonomy</b> | Autonomy value<br>FbiH | Autonomy value<br>Brčko district | Average autonomy | <b>Constitutional asymmetry</b> |
| <b>Status</b>                 | 0.73                   | 0.55                             | 0.64             | <b>0.18</b>                     |
| <b>Powers</b>                 | 0.54                   | 0.42                             | 0.48             | <b>0.12</b>                     |
| <b>Fiscal arrangements</b>    | 0.75                   | 0.75                             | 0.75             | <b>0</b>                        |
| <b>Overall scores</b>         | <b>0.67</b>            | <b>0.57</b>                      | <b>0.62</b>      | <b>0.10</b>                     |
| <b>Overall degree</b>         | <b>High</b>            | <b>Medium</b>                    | <b>Medium</b>    | <b>Low</b>                      |

*Table 23: Subnational autonomy and constitutional asymmetry scores for Bosnia-Herzegovina*

Constitutional asymmetry is not present in all dimensions, but only to a medium degree in status and in low degree in powers, while it is absent in the fiscal arrangements. Indeed, the highest value in status (0.18) derives from the fact that the Brčko district is not directly represented in central institutions (legislative, executive, judiciary), despite having its own institutions at the subnational level. Indeed, the electorate of the Federation of Bosnia-Herzegovina is represented in the central parliament and in the central executive and can veto a law or a decision through “entity voting” or the vital interest veto procedure, whereas the electorate of the Brčko district is not equally entitled to do so. Regarding the power dimensions, art. XI.1 of the Bosnian constitution provides that “four [of the nine] members [of the constitutional court] shall be selected by the House of Representatives of the Federation”,<sup>561</sup> thus marking the representation of the entity in the Bosnian constitutional court, whereas the Brčko district is not represented.

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<sup>561</sup> Bosnian constitution, art. XX.1(a).



It should further be noticed that representation of the entities in the central level institutions as well as in the constitutional court is more closely linked to identity than territory, as the seats of the representatives in the central parliament and central executive, as well as the constitutional court judges appointed by the national parliaments of the two entities, are distributed according to the power-sharing principle of parity. In practice, this means that the four judges appointed by the House of Representative of the Federation are normally two Bosniaks and two Bosniac-Croats, guaranteeing parity between the two constituent peoples cohabiting in the entity. Conversely, the Brčko district does not follow ethnic logic and therefore its equal representation was not included in the power-sharing arrangements which make up the constitutional system.

Overall, the difference between the two subnational autonomy scores is 0.10, and therefore the degree of constitutional asymmetry can be assessed as rather low, albeit not as low as Canada and Indonesia.

### Malaysia

Finally, for the Malaysian case the two analyzed subnational entities are Sarawak, the largest entity in size and one of the two entities enjoying a differentiated degree of autonomy within the system (along with Sabah), and Pulau Pinang, the smallest ordinary state in Malaysia.

Looking at the subnational autonomy scores, Sarawak enjoys medium autonomy in status, while low autonomy in powers (despite being at the limit of the interval) and in fiscal arrangements. Overall, the degree of autonomy in Sarawak is medium. In Pulau Pinang, the situation is rather similar. Although the degrees of autonomy are the same across the three dimensions, the scores are considerably lower, especially in the fiscal arrangements dimension, where the score for Pulau Pinang is 0, indicating that it is normally a domain of the central level. This imbalance creates an overall low degree of subnational autonomy in Pulau Pinang. At the central level, the previous picture is confirmed: medium autonomy in status, low autonomy in powers and fiscal arrangements, and overall a low degree of subnational autonomy.

| MALAYSIA               |                        |                             |                  |                          |
|------------------------|------------------------|-----------------------------|------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Sarawak | Autonomy value Pulau Pinang | Average autonomy | Constitutional asymmetry |
| Status                 | 0.50                   | 0.40                        | 0.45             | <b>0.10</b>              |
| Powers                 | 0.33                   | 0.29                        | 0.31             | <b>0.04</b>              |
| Fiscal arrangements    | 0.25                   | 0                           | 0.13             | <b>0.25</b>              |
| Overall scores         | <b>0.36</b>            | <b>0.23</b>                 | <b>0.30</b>      | <b>0.13</b>              |
| Overall degree         | <b>Medium</b>          | <b>Low</b>                  | <b>Low</b>       | <b>Low</b>               |

Table 24: Subnational autonomy and constitutional asymmetry scores for Malaysia

Constitutional asymmetry is present in all dimensions but in different degrees. As one might expect from the previous assessment on subnational autonomy, asymmetry is low in status and powers, whereas it is high in fiscal arrangements. Indeed, in the status dimension the only differences concern the fact that the special position of Sarawak within the Malaysian Federation is locked by a *de facto* eternity clause in art. 161E of the Federal Constitution, a provision that does not concern any other state. Moreover, Sarawak enjoys wider subnational constitutional autonomy, as it is entitled to make substantial arrangements in constitutional matters such as fundamental rights, identity clauses, and representative structures, whereas ordinary states can only make arrangements regarding the latter. As with the other subnational entities previously analyzed, Sarawak is consulted in matters that affect its interests or competences and is represented in the Federal Court through the Chief Judge of the High Court of Sabah and Sarawak. In terms of powers, Sarawak enjoys wider powers than ordinary states, especially concerning economic policies, a domain over which ordinary states have no powers. Finally, in terms of fiscal arrangements, despite having no power to set the base and/or rate of taxes, Sarawak has a unique power to introduce new taxes and set tax reliefs, whereas in ordinary states fiscal autonomy is extremely limited and under the control of the central level.

Overall, the constitutional asymmetry score is 0.13, which mainly derives from the high score in the dimension on fiscal arrangements, but indicates a low degree of constitutional asymmetry.

#### Comparative overview

From Figure 31, it can be easily observed that the four countries displaying a low degree of constitutional asymmetry follow two different paths. Indeed, in Canada and Bosnia-Herzegovina, at the country-level the overall degree of subnational autonomy is medium in status and powers, and high in fiscal arrangements, leading to an average medium degree of subnational autonomy. Conversely, in Indonesia and Malaysia, at the country-level the overall degree of subnational

autonomy is medium to only one dimension (respectively powers and status), while in the remaining two dimensions autonomy is low, leading to an overall low degree of subnational autonomy.

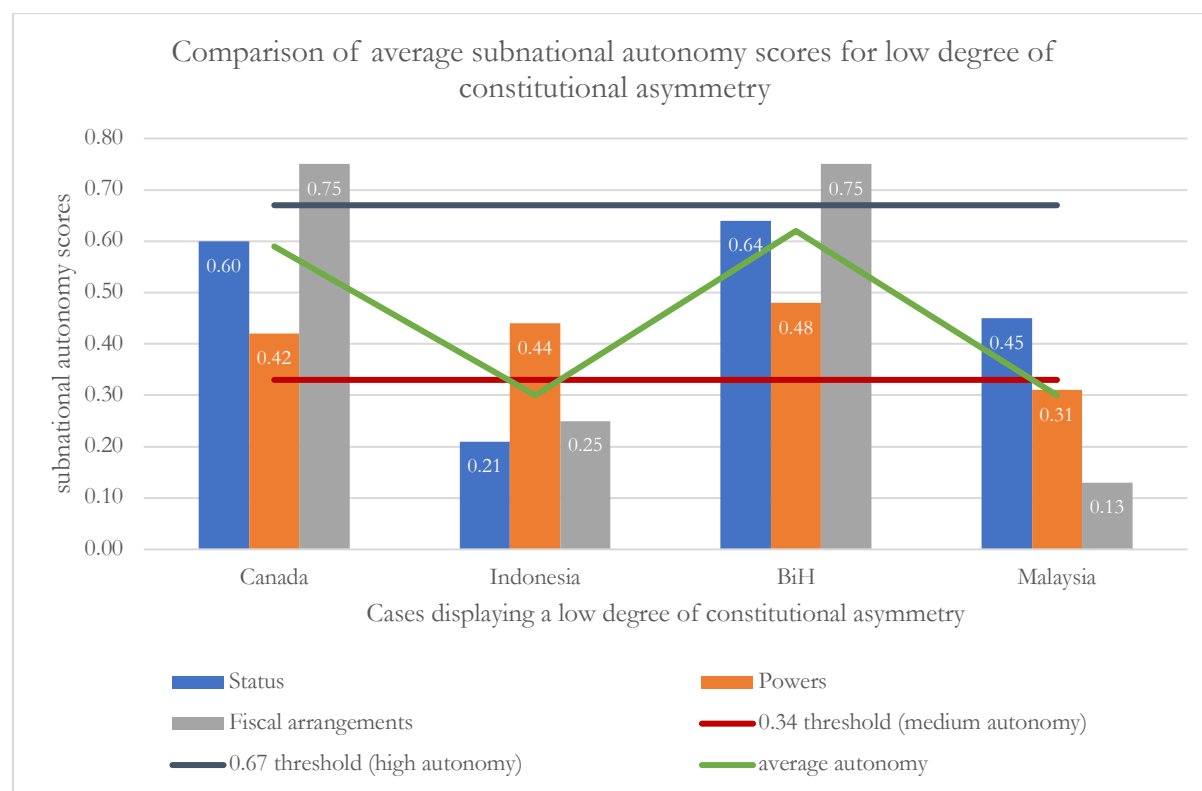


Figure 31: Comparison of average subnational autonomy scores - low constitutional asymmetry

However, as anticipated at the beginning of the paragraph, this parallel is not translated in terms of constitutional asymmetries. Indeed, Canada and Indonesia display extremely low scores of asymmetry in one or two dimensions: in Canada asymmetry is present only in the status dimension (0.04), whereas in Indonesia asymmetry is present in status (0.06) and in powers (0.04). Therefore, in Canada and Indonesia the asymmetry score is significantly lower and close to full symmetry. This could derive from the fact that in these two systems constitutional asymmetries were introduced to address the presence of the traditional civil law legal system in Québec and the specific and localized autonomy claims coming from Aceh in Indonesia. Conversely, in Bosnia-Herzegovina and in Malaysia, the scores of constitutional asymmetries are higher and are present in two or three dimensions. In Bosnia, constitutional asymmetry is medium in status and low in powers, while in Malaysia it is low in status and powers and high in fiscal arrangements. This could derive from the fact that in Bosnia and Malaysia asymmetries were introduced to preserve the integrity of the systems and avoid separatism, holding the system in balance.

### 5.3.2 Low constitutional asymmetry “in action”

Among the four analyzed cases, Indonesia is a rather effective example of the fact that even a formally low degree of asymmetry can have an enormous impact on the rights and freedoms of citizens, and therefore there should always be a closer look at the impact of asymmetries within the system. As already anticipated in the second chapter of this thesis, in Indonesia the 2006 Special Autonomy Law first authorized Aceh to implement Islamic law, expressly mentioning criminal law (*jinayat*) in art. 125.2, granting wide powers to the Aceh government on how to regulate the implementation of Islamic law, by issuing *Qanun*. Moreover, art. 126.1 provides that “Every adherent to Islam in Aceh must adhere to and observe Islamic law”, while art. 126.2 adds that “Every person living in or present in Aceh must respect the application of Islamic law”. Even though the same law at art. 127.2 specifies that the Aceh government is required to respect religious diversity, Islamic criminal law currently also applies to the non-Muslim in Aceh. Indeed, in 2014, the Aceh government issued the *Qanun Jinayat* (the Islamic Criminal Code), raising concerns over violations of human rights standards. Moreover, the enacting of the *Qanun Jinayat* was controversial because in art. 75 it asserts that its provisions and the imposed precepts prevail over national laws and even international human rights laws. This would of course be in violation of the Indonesian constitution, protecting human rights in chapter XA from art. 28 to 28(J).<sup>562</sup>

For its part, Malaysia is a case of “promised” asymmetries, that largely remained unfulfilled. Indeed, the 20-Point and 18-Point Memorandum, as well as the Malaysia Agreement in 1963 set out the potential for strong and intentional asymmetries to include Sabah and Sarawak in the Malaysian federation, against separatist threats. However, the federal government has progressively implemented symmetrization provisions, and retains the upper hand in the regulation of the extent of the differentiated autonomy to Sabah and Sarawak. As such, their legislative and financial autonomy is still subject to the oversight of the federal government, further reducing the space for asymmetry.<sup>563</sup> Therefore, despite their strong potential, constitutional asymmetries remain low in reality due to the strong oversight from the central level.

Then, concerning Bosnia-Herzegovina, it is interesting to notice how sometimes the system is depicted as strongly asymmetrical, even though constitutional asymmetries are rather limited.

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<sup>562</sup> Specifically, freedom of religion is recognized in art. 28E(1), “Every person shall be free to choose and to practice the religion of his/her choice [...]”, and art. 28E(2), “Every person shall have the right to the freedom to believe his/her faith (*kepercayaan*), and to express his/her views and thoughts, in accordance with his/her conscience”. Moreover, art. 28I(5) states that “For the purpose of upholding and protecting human rights in accordance with the principle of a democratic and law-based state, the implementation of human rights shall be guaranteed, regulated and set forth in laws and regulations.”

<sup>563</sup> Asri Salleh, Arnold Puyok, and Tony Paridi Bagang, “Constitutional Asymmetry in Malaysia: A Case study of Sabah and Sarawak. A Country Study of Constitutional Asymmetry in Malaysia,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 334-336.

Indeed, the two entities, i.e., the Federation of Bosnia-Herzegovina and the Republika Srpska, are extremely different in terms of institutional structures, with the former being a decentralized federation, and the latter a centralized and unitary republic. However, when looking at their status, powers, and fiscal arrangements, the two entities are completely symmetrical. Therefore, the “asymmetries” are a product of a radically different implementation of their autonomy at the institutional design level, rather than a different degree of autonomy. Moreover, the power-sharing principle of parity would make it rather difficult to accept asymmetries among constituent peoples, another reason why asymmetries are low in Bosnia-Herzegovina and are only traceable when looking at the differentiated position of the Brčko district within the system.

Finally, even though constitutional asymmetries are almost non-existent in Canada, which is often framed as a symmetrical system,<sup>564</sup> significant asymmetries emerge in two policy sectors (i.e., immigration and manpower training), where Québec sought to depart from other provinces when elaborating public policies, especially through bilateral agreements.<sup>565</sup> When assessing constitutional asymmetries in Canada, Gagnon and Garon conclude that the cohabitation of two political communities could make asymmetric federalism an important feature in the future developments of Canada as a multinational federation.<sup>566</sup>

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<sup>564</sup> Sahadžić, *Asymmetries*, 83.

<sup>565</sup> Alain-G. Gagnon and Jean-Denis Garon, “Constitutional and Non-constitutional Asymmetries in the Canada Federation: An Exploration into the Policy Fields of Immigration and Manpower Training. A Country Study on Constitutional Asymmetry in Canada,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 94-100.

<sup>566</sup> Gagnon and Garon, “Constitutional and Non-constitutional Asymmetries,” 101.

## 5.4 Constitutional symmetry

### 5.4.1 Autonomy and asymmetry

The four constitutional systems displaying full constitutional symmetry are Ethiopia, Nigeria, South Africa and Russia, and they all share a common trait, namely they all enjoy an overall medium degree of subnational autonomy. Each case will be briefly reviewed separately in the following sections.

#### Ethiopia

For the Ethiopian case,<sup>567</sup> the two selected subnational entities were SNNPR, one of the most populous states in Ethiopia and one of the few states not “ethnically owned” by one single ethnic group, and Harari, the smallest and least populated state, but which is an ethnic-owned state.

As evident from looking at the subnational autonomy scores, the two subnational entities enjoy the same medium degree of autonomy in all dimensions, with the highest value in status and powers (0.59 and 0.57) relative to a slightly slower score in fiscal arrangements (0.50). Overall, the degree of subnational autonomy at the country level is medium (0.55).

| ETHIOPIA               |                      |                       |                          |
|------------------------|----------------------|-----------------------|--------------------------|
| Dimensions of autonomy | Autonomy value SNNPR | Autonomy value Harari | Constitutional asymmetry |
| Status                 | 0.59                 | 0.59                  | 0.00                     |
| Powers                 | 0.57                 | 0.57                  | 0.00                     |
| Fiscal arrangements    | 0.50                 | 0.50                  | 0.00                     |
| Overall scores         | 0.55                 | 0.55                  | 0.00                     |
| Overall degree         | Medium               | Medium                | Symmetrical              |

Table 25: Subnational autonomy and constitutional asymmetry scores for Ethiopia

Constitutional asymmetry is therefore absent, even though *de facto* there is an asymmetry among the ethnic groups composing the state populations, and among the states that are ethnic-owned and those which are not. However, this asymmetry is not traceable from the constitution, which designed all subnational entities as perfectly symmetrical.

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<sup>567</sup> The present research did not take into account the conflict in Tigray, which was ongoing at the time of the analysis and only concluded in November 2022.

### Nigeria

In Nigeria, the two selected subnational entities were Lagos and Niger, which are rather different in terms of size, population density, GDP per capita and ethnic composition. On the one hand, Lagos is the smallest entity, but with the highest population density, highest level of GDP and populated mainly by one ethnic group (even though it is not completely homogeneous). On the other hand, Niger is the largest state in size, but has a low population density and GDP, as well as a multiethnic population.

The subnational autonomy scores indicate that autonomy is not enjoyed to the same degree in all dimensions, since it is low in status, medium in powers, and high in fiscal arrangements, leading to an overall medium degree of subnational autonomy.

| NIGERIA                |                         |                         |                             |
|------------------------|-------------------------|-------------------------|-----------------------------|
| Dimensions of autonomy | Autonomy value<br>Lagos | Autonomy value<br>Niger | Constitutional<br>asymmetry |
| Status                 | 0.33                    | 0.33                    | 0.00                        |
| Powers                 | 0.43                    | 0.43                    | 0.00                        |
| Fiscal arrangements    | 0.75                    | 0.75                    | 0.00                        |
| Overall scores         | 0.50                    | 0.50                    | 0.00                        |
| Overall degree         | Medium                  | Medium                  | Symmetrical                 |

Table 26: Subnational autonomy and constitutional asymmetry scores for Nigeria

Constitutional asymmetry is therefore absent among Nigerian states. However, research has found that in the past the situation was rather different, with higher asymmetries being a source of conflict among states.<sup>568</sup>

### South Africa

For South Africa, the two selected subnational entities were Gauteng, the smallest and least populated province, and Northern cape, the biggest and most populated province.

As in Ethiopia, subnational autonomy is medium across all three dimensions and tends to display closely related scores, with the highest in powers (0.56) and the lowest in the fiscal arrangements (0.38). Overall, the degree of subnational autonomy is medium.

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<sup>568</sup> See for example Rotimi Suberu, "Federalism in Africa: The Nigerian Experience in Comparative Perspective," *Ethnopolitics* 8, no. 1 (2009): 67-86.

| SOUTH AFRICA           |                        |                              |                          |
|------------------------|------------------------|------------------------------|--------------------------|
| Dimensions of autonomy | Autonomy value Gauteng | Autonomy value Northern Cape | Constitutional asymmetry |
| Status                 | 0.47                   | 0.47                         | 0.00                     |
| Powers                 | 0.56                   | 0.56                         | 0.00                     |
| Fiscal arrangements    | 0.38                   | 0.38                         | 0.00                     |
| Overall scores         | 0.47                   | 0.47                         | 0.00                     |
| Overall degree         | Medium                 | Medium                       | Symmetrical              |

Table 27: Subnational autonomy and constitutional asymmetry scores for South Africa

As evident, constitutional asymmetry is absent in South Africa and, as for Nigeria, the choice of symmetry is intimately linked to its past, built on inequality among ethno-cultural groups. Further research would be needed to explore the dynamics of asymmetry in South Africa and the choices in constitutional design that were made to address the challenges deriving from its political and ethno-cultural composition.

### Russia

Finally, Russia is a rather peculiar case, due to its considerable territorial size and variety in terms of ethno-cultural composition of the population. Since art. 5 of the Russian constitution recognizes 85 “subjects of the federation”, divided into republics, *oblasts*, *krais*, cities of federal importance, autonomous regions, and autonomous *oblasts*, the choice of two subnational entities to analyze subnational autonomy was not obvious. After some consideration, the Republic of Tatarstan, namely a republic traditionally having a distinct identity, and the Jewish autonomous *oblast*, since it is the only autonomous *oblast* established within the Russian federation, were selected.

Despite the variations in names, in terms of subnational autonomy all subjects of the federation enjoy the same level of autonomy, as is also evident from the subnational autonomy scores. Indeed, autonomy is medium in all three dimensions, with the highest score in powers and fiscal arrangements (0.50 in both cases). Overall, the degree of subnational autonomy is medium.



| RUSSIA                 |                            |                                           |                             |
|------------------------|----------------------------|-------------------------------------------|-----------------------------|
| Dimensions of autonomy | Autonomy value<br>Tatastan | Autonomy value<br>Jewish auton.<br>Oblast | Constitutional<br>asymmetry |
| Status                 | 0.38                       | 0.38                                      | 0                           |
| Powers                 | 0.50                       | 0.50                                      | 0                           |
| Fiscal arrangements    | 0.50                       | 0.50                                      | 0                           |
| Overall scores         | 0.46                       | 0.46                                      | 0                           |
| Overall degree         | Medium                     | Medium                                    | Symmetrical                 |

Table 28: Subnational autonomy and constitutional asymmetry scores for Russia

As for the other three constitutional systems, Russia is also a completely symmetrical case. However, further research has shown that Russian federalism was considerably more asymmetrical up until 2001, when the annulment of the previous bilateral agreements between subnational entities and the central level that introduced constitutional asymmetries in the system put an end to the phase of “wild federalism” characterized by higher asymmetry.<sup>569</sup>

#### Comparative overview

A comparative look at the degrees of subnational autonomy in the four symmetrical cases shows that subnational autonomy tends to be medium in all dimensions, with some exceptions (a low degree in status and high degree in fiscal arrangements in Nigeria), as well as at the country level (the green line in the Figure 32 below).

In terms of constitutional asymmetry, all four cases would benefit from further research to assess the degree of constitutional asymmetry in the past, as choices in constitutional design were made to reduce asymmetries to a complete symmetry among subnational entities, despite the existing differences within the system.

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<sup>569</sup> Kremyanskaya, “Constitutional Asymmetry in Russia,” 403-405.

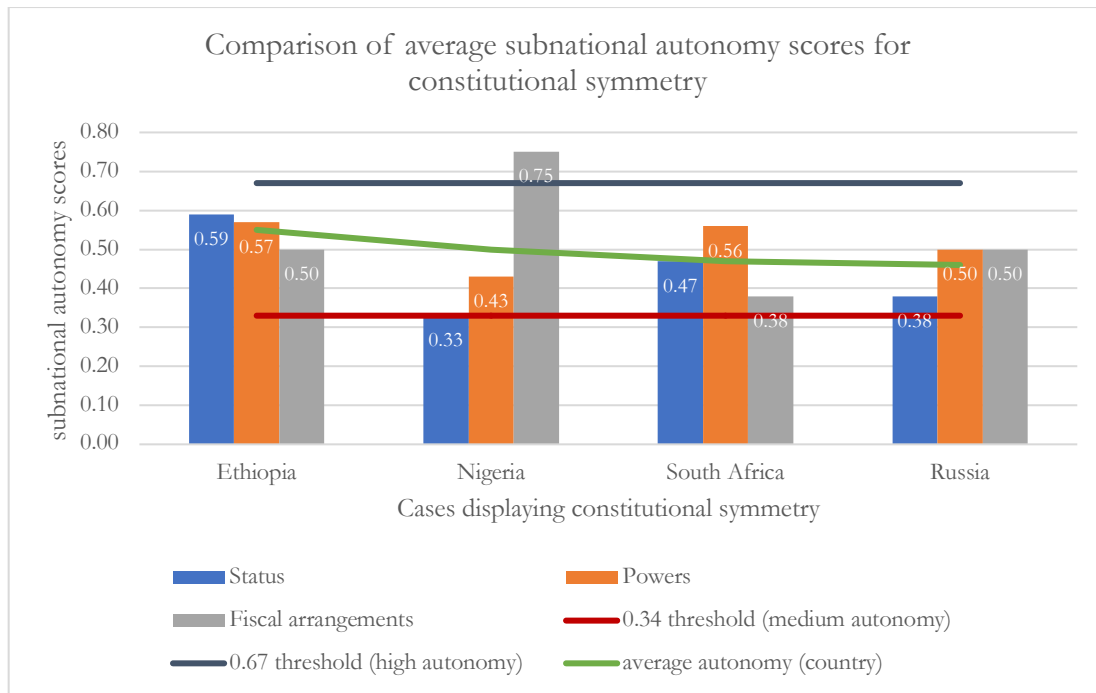


Figure 32: Comparison of average subnational autonomy scores - constitutional symmetry

#### 5.4.2 Constitutional symmetry “in action”

Despite being divided societies, in three of these four cases, namely Ethiopia, South Africa and Nigeria, constitutional designers chose to introduce complete constitutional symmetry, to cement an ideal of equality among subnational entities.

In Ethiopia, political asymmetries are evident in terms of size, population, demographic composition, and socioeconomic development. For example, the largest subnational entity, Oromia, is 1200 times bigger than Harari, the smallest entity, and is almost twice the size of the second largest entity, the state of Amhara. Moreover, seven of the eleven Ethiopian states are home to a particular ethnic community, i.e., Tigray, Afar, Amhara, Oromia, Somali, Harari, and Sidama, while the remaining states are multiethnic. In socioeconomic terms, there is a marked disparity between the highland states (i.e., Amhara, Oromia, Tigray, Harari, Sidama, and SNNPR) which are relatively strong in terms of social and physical infrastructures, and the lowland states (i.e., Somali, Afar, Gambella, Benishangul-Gumuz) in which the effects of the developmental programs of the government were less beneficial.<sup>570</sup> Despite these differences, the Ethiopian constitution grants equal status, powers and fiscal autonomy to each state, irrespective of their demographic and socio-economic structure. However, Fessha and Bezabih note that “despite the declared constitutional symmetry among subnational entities, the constitutional asymmetry among

<sup>570</sup> Yonatan T. Fessha and Biniyam N. Bezabih, “Federation Among Unequals. A Country Study of Constitutional Asymmetry in Ethiopia,” in *Constitutional Asymmetry in Multinational Federalism*, ed. Patricia Popelier and Maja Sahadžić (Cham: Palgrave Macmillan, 2019), 141-143.

the constituent communities may, to some extent, be tantamount to asymmetry among constitutional entities”.<sup>571</sup> In this respect, the demographic composition of the subnational entities is rather relevant, since state-owning ethnic communities enjoy powers and rights that are constitutionally guaranteed to the ethnic communities and states. Conversely, non-state-owning ethnic communities are limited to the rights that are granted to ethnic communities only. This also means that the powers enjoyed by local administrations in multiethnic states are not comparable with homogeneous states. This asymmetrical outcome also emerges in the fiscal dimension, since state-owning ethnic communities receive a more substantial share of the federal transfer than those that are made to exercise their right to self-administration at the local level.<sup>572</sup> As Fessha and Bezabih observe, “the asymmetry that characterizes the Ethiopian Federation has been moderated by the dominance of a highly centralized ruling party that has effectively equalized the unequal subnational entities”,<sup>573</sup> to prevent the larger states from prevailing over the smaller ones. This symmetrization was fulfilled to the extent that the constitutional asymmetries “in disguise” present in the Ethiopian system were not traceable in the present analysis, as at the formal level all states are equals.

Moving to the South African and Nigerian experiences, these show that constitutional designers deliberately addressed internal ethnocultural divisions through constitutional symmetry, rather than constitutional asymmetry, to unequivocally break with their past when differences led to dramatic consequences, as violence, discrimination, and segregation. For post-apartheid South Africa, symmetry among subnational entities was eventually the solution, in order to mark a clear discontinuity from a past of discrimination and inequality. Initially, room for constitutional asymmetry was created by the 1994 amendments to the 1993 interim constitution. These granted greater powers in the drafting of subnational constitutions, with the risk of creating asymmetrical provincial constitutions.<sup>574</sup> With the adoption of the 1996 final Constitution, the asymmetries previously provided for in the interim constitution disappeared in favor of constitutional symmetry, so that “no group would get special treatment”.<sup>575</sup> Therefore, in South Africa asymmetrical federal features were employed in the peacemaking process, and later abandoned to ensure full equality among groups. Regarding Nigeria, Suberu states that “it has been an explicit goal of federal design in Nigeria not only to create constitutionally symmetrical states, but also to

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<sup>571</sup> Fessha and Bezabih, “Federation Among Unequals,” 144.

<sup>572</sup> Fessha and Bezabih, “Federation Among Unequals,” 145.

<sup>573</sup> Fessha and Bezabih, “Federation Among Unequals,” 157.

<sup>574</sup> Nico Steytler and Johann Mettler, “Federal Arrangements as a Peacemaking Device During South Africa’s Transition to Democracy,” *Publius: The Journal of Federalism* 31, no. 4 (2001): 96.

<sup>575</sup> Steytler and Mettler, “Federal Arrangements as a Peacemaking Device,” 106.

restrict the development of *de facto*, political asymmetries among sub-units.”<sup>576</sup> The author further adds that “constitutional asymmetry, from a Nigerian perspective, is normatively undesirable, historically unviable, functionally problematic, and politically contentious and unsustainable”.<sup>577</sup> For this reason, the Nigerian federal structure entrenched symmetry even in the design of the subnational entities, providing 36 states with approximately equal populations. Specifically, the former hegemonic northern region has been subdivided into 19 states, and the three major ethnic groups are fragmented into more than five states. In this way, “the Nigerian federation is remarkably free of any flagrant inter-unit demographic disparities that can threaten capture of the center by a single or few subunits and, thus, thwart national unity”.<sup>578</sup>

Finally, in the Russian Federation, the choice over constitutional symmetry mainly derives from the political risk of losing territory after a phase of “wild federalism”, i.e., a period subsequent to the dissolution of the Soviet Union, when subnational entities bilaterally negotiated rights and competences with the central government, creating wide asymmetries within the system. Moreover, in 1992, the Federal Treaty formalized constitutional asymmetries in status by recognizing more rights for ethnic subnational entities than those granted to territorial subnational entities.<sup>579</sup> The trend of the 1990s constitutional developments, strengthening asymmetries within a loose federation, started to break in 2000, with the first presidency of Vladimir Putin. The new adopted legislation gave increasingly more powers to the central executive, reducing the space for subnational autonomy and eliminating pre-existing asymmetries among subnational entities. Therefore, it can be observed that re-symmetrization followed the overall centralizing trend in Russia, to better control power over the territory and mark a significant dominance of the central level over the subnational level.

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<sup>576</sup> Suberu, “Federalism in Africa,” 73.

<sup>577</sup> Suberu, “Federalism in Africa,” 73.

<sup>578</sup> Suberu, “Federalism in Africa,” 73.

<sup>579</sup> Kremyanskaya, “Constitutional Asymmetry in Russia,” 404.

### *5.5 Concluding remarks*

This last chapter provided a comparative overview of the case studies analyzed in the research, identifying four groups of divided multi-tiered systems, namely those displaying a high, medium, and low degree of constitutional asymmetry, and those displaying constitutional symmetry. For each case, it was interesting to observe the variations in subnational autonomy at the subnational entity-level and at the country-level, identifying the dimensions where constitutional asymmetry is present. What clearly emerges from this chapter is that, as anticipated, constitutional asymmetries can vary significantly not only among cases but also among the dimensions of autonomy, as they are not necessarily present in all three dimensions but may be concentrated in just one or two dimensions, as is the case in Canada, Indonesia, Bosnia-Herzegovina, and Spain. Conversely, there are cases where constitutional asymmetries are pervasive in all three dimensions, as in Italy, Pakistan, Belgium, and Myanmar, and sometimes to a high degree, as is the case in India, the United Kingdom and Iraq.

It was also interesting to observe the reality of the implementation of asymmetries, beyond the formal level. Indeed, it is possible to trace a dominant re-symmetrization trend, with constitutional symmetry framed as a synonym for equality. It is particularly interesting to notice that three of the four symmetrical cases (i.e., Ethiopia, Nigeria, and South Africa) deliberately ruled out the introduction of constitutional asymmetries to their constitutional framework in order to break with their past, when asymmetries were intertwined with inequalities and discrimination. However, despite their formal symmetry, political asymmetries remain strong.

Even though an in-depth analysis would be required to properly assess the degree and appreciate the implementation of constitutional asymmetries, this chapter constitutes a first exploration of the complexity of asymmetries in a variety of divided multi-tiered systems, taking primarily an institutional perspective but also recognizing the importance of the non-institutional level of implementation.

## CONCLUSION

### *Summary of the findings*

One of the founding arguments of this research is that constitutional asymmetries can be considered a distinctive model of constitutional design for divided societies, as they provide a middle ground between integration and accommodation.<sup>580</sup> The literature shows that asymmetrical solutions can be found in integrationist as well as accommodationist constitutional systems.<sup>581</sup> This finds further support in the outcome of this research, since constitutional asymmetries are present in constitutional systems more generally associated with the accommodationist model of constitutional design (e.g., Belgium, Bosnia-Herzegovina), and in those generally associated with the integrationist model (e.g., the United Kingdom, Malaysia). Moreover, constitutional asymmetries are present in many constitutional systems that despite defining themselves as unitary systems (or at least, not as federations) introduced asymmetries to deal with deep internal diversity, as happened in Spain, Italy, and Indonesia. Therefore, it could be argued that the outcome of this research confirms that constitutional asymmetries tend to be an instrument for managing internal diversity that is much more accepted than the institutional structure of a federation.<sup>582</sup>

Moreover, this research confirmed that constitutional asymmetries can be introduced to different degrees, by offering a clearer picture of the dimensions in which asymmetry can be displayed. Indeed, the comparative analysis carried out in chapter five shows that constitutional asymmetries can be present in one or two dimensions, such as Canada displaying constitutional asymmetry only in status, Spain only in the fiscal arrangements dimension, or Bosnia-Herzegovina only in status and powers, or else in all three dimensions, such as Belgium, Pakistan, and India. Furthermore, it was demonstrated that, if present, the degree of constitutional asymmetry can also vary across dimensions. For example, in Myanmar, constitutional asymmetry is low in status and powers, while considerably higher in the fiscal arrangements dimension, whereas in Italy asymmetry is high in powers, while low in status and fiscal arrangements. In some other (exceptional) cases, constitutional asymmetry can be of the same degree in all three dimensions, for instance Iraq which displays a high degree of asymmetry in all dimensions.

It is worth mentioning that this research also included four case studies that, at least at a formal level, display complete constitutional symmetry across all the three dimensions of status, powers, and fiscal arrangements, namely South Africa, Ethiopia, Nigeria, and Russia. Despite

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<sup>580</sup> See chapter 1.3.3.

<sup>581</sup> See Choudhry, "Bridging," 32-35.

<sup>582</sup> See Wolff, "Cases of Asymmetrical Territorial Autonomy," 24.

qualifying as divided multi-tiered systems, these systems do not display any degree of constitutional asymmetry. This appears to challenge the assumption that divided systems generally display constitutional asymmetries.<sup>583</sup> However, looking closely at these four cases, it is interesting to notice that the choice not to adopt constitutional asymmetries was deliberately made in the process of constitutional design, often to break with their past where asymmetries were associated with inequalities and discrimination (as in South Africa). As outlined in chapter five, these four cases do display a significant degree of political asymmetry, especially in terms of socio-economic and ethnocultural differences, and often displayed constitutional asymmetries in the past (as in the case of Russia). Moreover, it should be highlighted how symmetry “on paper” can sometimes lead to asymmetry “in practice”. Indeed, in Ethiopia, the difference between state-owning ethnic communities and non-state-owning communities leads to some degree of asymmetry, even though the constitution grants equal status, powers, and fiscal autonomy to each subnational entity. The most evident asymmetrical outcome of constitutional symmetry can be found in Nigeria, where states have equal status and powers, and constitutional asymmetry was deliberately ruled out in the most recent process of constitutional design. However, only some northern states exercised the limited powers granted to them by the Nigerian constitution and extended Shari’a to their criminal codes, thus creating an “unusual asymmetry”<sup>584</sup> within the system with consequent critical issues in terms of equal rights and citizenship.

Overall, the comparative analysis of the 16 constitutional systems offered a more nuanced picture of constitutional asymmetry, as well as constitutional symmetry, in divided multi-tiered systems in different areas of the world.

Then, coming to the answer to the research question, namely what legal factors are most likely to explain a different degree of constitutional (a)symmetry, the Qualitative Comparative Analysis confirmed a path of complex causality since the different degrees of constitutional asymmetry always depend on more than one legal factor. Indeed, the QCA found that the legal factors that are most likely to produce a high degree of constitutional asymmetry are a limited distribution of differentiated autonomy (i.e., to one or very few subnational entities), and a constitution-making process led only by national actors (i.e., an internal constitution-making process). Another additional factor that can produce a medium-high degree of constitutional asymmetry is the introduction of differentiated autonomy through bilateral agreements or ordinary legislation. Moreover, the QCA found that a homogeneous design of subnational entities in terms of ethnocultural distribution tends to reinforce internal differences and therefore increase the

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<sup>583</sup> See Stepan, “Towards a New Comparative Politics of Federalism,” 40.

<sup>584</sup> See Bolaji, “Shari’ah in Northern Nigeria,” 122-123.

degree of constitutional asymmetries. Conversely, a heterogeneous design of subnational entities and the involvement of international or subnational actors are the two factors that are most likely to produce a low degree of constitutional asymmetry, or even constitutional symmetry. Not surprisingly, the difference between a low degree of asymmetry and constitutional symmetry lies in the legal recognition (or not) of differentiated autonomy within the system.

Furthermore, the analysis provided by this research allowed to test empirically through the Qualitative Comparative Analysis the theoretical expectations that were formulated in chapter two, concerning the impact of the legal factors on the degree of constitutional asymmetry. Two of these expectations were confirmed by the QCA, namely that (1) a limited distribution of differentiated autonomy, and (2) the presence of ethnically homogeneous subnational entities lead to a higher degree of asymmetry. This outcome is not particularly surprising, since both appear to be linked to the legal recognition of a distinctive (subnational) identity, creating and reinforcing a wider gap between the subnational entity (of very few subnational entities) and the rest of the multi-tiered system. Conversely, the other two expectations were not completely confirmed and offer a more complex picture of the phenomenon. First, legal procedures, and specifically the entrenchment of constitutional asymmetries in the constitutional text, were expected to weigh more than what emerged from the QCA. Indeed, a higher degree of asymmetry was found also in case studies where asymmetries were introduced through bilateral agreements (i.e., Myanmar) and through ordinary legislation (i.e., the UK).<sup>585</sup> Moreover, a constitutional entrenchment of asymmetry was also associated to lower degrees of asymmetries, such as in Bosnia-Herzegovina and Malaysia, where asymmetries among subnational entities are explicitly mentioned in the constitution. Therefore, legal procedures, i.e., how constitutional asymmetries are introduced in the multi-tiered system, appears not to play a definite role in determining the degree of asymmetry, but it does confirm that the introduction of asymmetries follow a variety of pathways as argued in the literature. Finally, the other theoretical expectation that was not met concerned the involvement of international and subnational actors in the constitution-making process as an explanatory factor for higher degrees of asymmetry. As anticipated in chapter two, the role played by “other” actors (i.e., non-national actors) has not drawn much attention in the literature on asymmetric federalism. In exploring this gap, this research was interested in testing whether international and subnational actors would have acted as guarantors of the spaces of autonomy for minorities, thus reinforcing the degree of asymmetry. Contrary to this hypothesis, the QCA shows that the presence of

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<sup>585</sup> It could be argued that in the case of the United Kingdom the ordinary legislation introducing devolution of powers has constitutional nature. However, being the only case with a non-written constitution, it was decided to maintain this peculiarity also in the framing of the set-membership scores of the legal factors on legal procedures.



international and subnational actors in the constitution-making process appears to impact on lower degrees of asymmetry, or even constitutional symmetry. Indeed, the presence of international actors is an explanatory factor for the low degree of asymmetry in Bosnia-Herzegovina and Malaysia, and the presence of subnational actors is an explanatory factor for the low degree of asymmetry in Malaysia and for constitutional symmetry in Nigeria, Russia, South Africa, Ethiopia, and Canada. Therefore, contrary to the initial expectation, international and subnational actors appear to act as guarantors of equality and parity among subnational entities, thus reinforcing symmetry or reducing the space of asymmetry within the system. Since the involvement of “non-national” actors (i.e., international, and subnational) is still underdeveloped, future research could further engage with this topic by refining the extent to which actors are involved, to better assess their role.

| Expectations                                                                                 | Confirmed by results? | Possible explanations                                                                                                                                               |
|----------------------------------------------------------------------------------------------|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| A limited distribution of differentiated autonomy leads to higher degrees of asymmetry       | Yes                   | This creates a gap between SNEs enjoying differentiated autonomy and the rest of the system                                                                         |
| The presence of ethnically homogeneous SNEs leads to higher degrees of asymmetry             | Yes                   | The concentration of ethnocultural groups in the SNEs creates distinctive identities                                                                                |
| A constitutional recognition of asymmetries leads to higher degrees of asymmetry             | Not necessarily       | Constitutional recognition was found in all degrees of asymmetries, and strong asymmetries can derive from ordinary legislation or bilateral agreements             |
| The involvement of international and subnational actors leads to higher degrees of asymmetry | No                    | The involvement of international and subnational actors seems more frequent in cases of lower degrees or symmetrical systems, perhaps to ensure equality among SNEs |

*Table 29: Summary of expectations and results*

In conclusion, of the legal factors originally identified by the research, those that appears to have the greatest impact on the degree of constitutional asymmetry appears to be the (more or less limited) distribution of differentiated autonomy and the (homogeneous or heterogeneous) design of subnational entities. The legal procedures allowing the introduction of asymmetries appears not to be clearly associated with a specific degree of asymmetry, since the recognition of asymmetries in the constitution can be found in cases of high asymmetry (as in Iraq) as well as medium (as in Italy and Belgium) and low constitutional asymmetry (as in Bosnia-Herzegovina). Conversely, non-constitutional provisions such as ordinary legislation or bilateral agreements can produce a high degree of constitutional asymmetry (as in the UK and Myanmar). Furthermore, “other” actors,

such as international and subnational actors, appear not to play a determining role when it comes to medium-high asymmetry, but they do when it comes to constitutional symmetry, or a low degree of constitutional asymmetry.

The research carried out in this thesis presents three main innovative elements.

First, it provided for a more precise measure of constitutional asymmetry, employing Popelier' standardized indexes on subnational autonomy on a medium-N universe of cases. This allowed for a rigorous comparison across cases, relying on the same categories of analysis, by framing constitutional asymmetries in terms of low, medium, and high degree, and not only in terms of weak and strong asymmetry as previously observed. Moreover, the use of these indexes confirmed the complexity of constitutional asymmetries, as it was possible to observe more clearly the variations in degrees of asymmetry not only across cases, but also within cases. Indeed, asymmetry may be visible in only one or two dimensions, or in all three dimensions, and can be present to different degrees among dimensions. An additional contribution is the analysis of subnational autonomy (and thus the resulting asymmetry) both at the subnational entity level and at the country level, by looking at the detailed data as well as the aggregate data.

Second, this research focused on the legal factors having an impact on constitutional asymmetries, rather than on extra-legal factors. As already mentioned, focusing on the legal factors allows the provision of a more comprehensive understanding of a complex constitutional phenomenon such as constitutional asymmetries, and potentially offers further instruments to constitutional designers. Moreover, the analysis of the legal factors was carried out on a variety of constitutional systems across different parts of the world, covering not only the "classical cases" in the literature, which tend to be overwhelmingly in the Western world (such as Canada, Belgium, Italy, Spain, the UK), but also constitutional systems in Eastern Europe (i.e., Bosnia and Herzegovina), in the Middle-East (i.e., Iraq), on the African continent (i.e., Ethiopia, Nigeria, South Africa), in Eurasia (i.e., Russia), and in the South and South-East Asian regions (i.e., India, Indonesia, Malaysia, Myanmar, Pakistan). In this particular respect, it is interesting to notice that no area of the world seems to be clearly associated with the presence of a specific degree of constitutional asymmetry, which can be found to different degrees in all areas.<sup>586</sup>

Third, this research is placed in the domain of empirical legal studies, a growing field which is gaining more and more traction and is in constant development. The use of a variety of qualitative methods typical of the social sciences (i.e., QCA, standardized indexes, structured interviews) raised a series of challenges. Indeed, employing standardized indexes entails relying on

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<sup>586</sup> Low asymmetries are present in the North America (i.e., Canada), Eastern Europe (i.e., Bosnia-Herzegovina), and South-East Asia (i.e., Indonesia, and Malaysia). Medium asymmetries are present in Western Europe (i.e., Spain, Italy, and Belgium), and in South Asia (i.e., Pakistan). High asymmetries are present in South and South-East Asia (i.e., India, and Myanmar), in Western Europe (i.e., the United Kingdom), and in the Middle East (i.e., Iraq).

some degree of generalization, and when applied to constitutional systems it can be sometimes difficult to capture the complexity and specificities of concrete experiences. This proved to be especially challenging during the interviews with national experts, who were not familiar with the indexes and even if they were provided with a codebook on how to interpret the indexes, sometimes still faced difficulties. The most prominent issue that emerged was related to terminology, especially the use of “subnational entity”. In the present research, the term generally refers to the second tier of government, which is referred to in different ways in different jurisdictions (e.g., states, regions, provinces, nations, autonomous communities, union territories). However, the term “subnational” was not always perceived as neutral, since it can be seen as making reference to the concept of nationality. For example, the Spanish national expert observed that for Spain the most appropriate term would be “substate”, as the constitutional system recognizes a difference between “nationalities and regions”, with much meaning attached to such a distinction. However, the use of the term “substate” may prove to be problematic in other systems, such as Belgium, where it could indicate the system is confederal rather than federal, a recurrent issue in Belgian constitutional politics. The same could be said if the chosen term were “constituent unit”, which might imply that these units have constituent power. Overall, the terminological suggestions that came from national experts have been a fascinating snapshot of the never-ending debate on the difficulties of finding shared definitions when it comes to federal theory.<sup>587</sup>

Certainly, the focus on the legal factors and on the constitutional level of analysis, as well as the employment of empirical qualitative methods, was a challenge in complexity management. On the one hand, the interplay between law on the books and law in action is not easy to grasp through standardized indexes and required a deeper look at each constitutional experience. On the other hand, empirical methods *per se* are not sufficient to provide a complex and nuanced analysis, but are surely helpful in supporting traditional legal research, offering useful resources to add some degree of generalization, provide a new explanation or confirm a hypothesis that will have often been built on the analysis of only a few cases. In this respect, the comparative nature of the research proved to be essential, as it was possible to study a variety of constitutional systems and assess not only the implementation of the outcome of the QCA, but also the expressions of constitutional asymmetry across different constitutional experiences.

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<sup>587</sup> See Anna Gamper, “A ‘Global Theory of Federalism’: The Nature and Challenges of a Federal State,” *German Law Journal* 6, no. 10 (2005): 1297–1318.

### *Limitations and further developments*

Being an exploratory study, further research is needed to fill some of the gaps that are present in this thesis.

A first limitation of this study is its static nature, as it is a synchronic comparison only providing a photograph of asymmetry currently in place. However, as mentioned in the theoretical and comparative chapter, constitutional asymmetries are a dynamic phenomenon and vary over time, as visible in Italy, Nigeria, Russia, Myanmar, and India. Further research would be needed to explore the evolution of constitutional asymmetries in the case studies, to assess how they changed and whether they followed a re-symmetrization or asymmetrization trend. A static picture of the current provisions does not offer such dynamic perspective.

A second substantial limitation of the research concerns the limited analysis of fiscal arrangements in the case studies. Indeed, the indexes of fiscal arrangements are rather complex and comprehensive, including borrowing powers, shared revenues, and conditional grants. As explained in chapter two, the selection of taxing powers had to do with feasibility and can provide a proxy of asymmetry in the dimension of fiscal arrangements. However, it should be remembered that this is an approximation of reality, and therefore does not provide a complete picture of asymmetries in the fiscal domain.

Finally, another limitation concerns the case selection, as other case studies could have been included, such as Finland and Papua New Guinea. These two constitutional systems can be framed as partially divided societies, addressing distinct identity claims within the territory (i.e., the Åland island in Finland, and the Autonomous Region of Bougainville in Papua New Guinea). These two cases were eventually excluded due to time-restraints but would be extremely interesting to include in further research on constitutional asymmetries in divided multi-tiered systems.

Aside from addressing these three identified limitations, concerning the temporal perspective, the analysis of fiscal arrangements, and the expansion of the case studies, there are other further developments that could foreseeably emerge from this exploratory study. For example, it could be possible to assess other legal factors, leading to different conditions in the QCA model, or else the existing model could be modified. Indeed, it would be interesting to drop the conditions on actors, as they proved to be non-determining, while including a separate condition on bilateral agreements, since these might occur even in systems where constitutional asymmetries are entrenched in the constitution (as happened in Russia before 2000). This would provide a deeper analysis of the impact of bilateral agreements on the degree of constitutional asymmetry. Moreover, it would be of great interest to further comparatively explore the role of constitutional courts in divided multi-tiered systems when it comes to constitutional asymmetries,

to identify centralist or federalist attitudes in cases concerning asymmetries. This aspect was only briefly mentioned in the research, but it would be extremely interesting to dedicate much more attention to it, as courts have the potential to shape the degree of asymmetry and therefore determine re-symmetrization or asymmetrization trends. Finally, another aspect that was only touched upon concerns the coexistence of different legal systems or legal traditions within a system as a source of constitutional asymmetry. Indeed, the localized implementation of Islamic law in Nigeria and Indonesia, the presence of civil law in Québec and Scotland, and the recognition of historic rights in Spain are all linked to the introduction of asymmetries within the system. A deeper analysis of these cases, and others, would provide a more comprehensive understanding of the role that these elements play in the degree of constitutional asymmetry within the system.

In conclusion, this thesis can be regarded as a first step, laying the foundations for further exploration of the different tiles that together compose the complex mosaic of constitutional asymmetries in divided multi-tiered systems.

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## **LEGISLATION**

### **Belgium**

Constitution of Belgium (updated following the 2021 constitutional amendments).

### **Bosnia and Herzegovina**

Constitution of Bosnia and Herzegovina (updated following the 2009 constitutional amendments).

Constitution of the Federation of Bosnia and Herzegovina (1994 and subsequent amendments through 2003).

Statute of the Brčko District (1999).

### **Canada**

Constitution of Canada (updated following the 2011 constitutional amendments).

### **Ethiopia**

Constitution of Ethiopia (1994).

### **India**

Constitution of India (updated following the 2016 constitutional amendments).

### **Indonesia**

Constitution of Indonesia (updated following the 2002 constitutional amendments).

Law No. 11 of 2006 on the Governing of Aceh.

Law No. 23 of 2014 on Regional Autonomy.

### **Iraq**

Constitution of Iraq (2005).

Law of the Executive Procedures regarding the Formations of Regions, Law No. 13 of 2008.

Law of Governorates not Incorporated into a Region, Law No. 21 of 2008.

### **Italy**

Constitution of Italy (updated following the 2012 constitutional amendments).

Statute of Autonomy of Lombardy (2008).



Special Statute of Autonomy of Aosta Valley (1948).

## **Malaysia**

Constitution of Malaysia (updated following the 2007 constitutional amendments).

Constitution of the State of Sarawak (1963).

Malaysia Agreement (1963).

## **Myanmar**

Constitution of Myanmar (updated following the 2015 constitutional amendments).

Constitution of the Shan State (2008).

## **Nigeria**

Constitution of Nigeria (updated following the 2011 constitutional amendments).

## **Pakistan**

Constitution of Pakistan (updated following the 2018 constitutional amendments).

Gilgit-Baltistan Empowerment and Self-Governance Order (September 2009).

## **Russian Federation**

Constitution of the Russian Federation (updated following the 2020 constitutional amendments).

## **South Africa**

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## **Spain**

Constitution of Spain (updated following the 2011 constitutional amendments).

Statute of Autonomy of the Basque Country (1979).

Statute of Autonomy of Andalusia (2006).

## **United Kingdom**

Government of Wales Act 2006 – Schedules 7A and 7B.

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## **CASE LAW**

### ***Constitutional Courts***

#### **Bosnia and Herzegovina**

Decision U5/98, 1 July 2000.

#### **Indonesia**

Decision of the Constitutional Court No. 14/PHPU.D-XI/2013.

#### **Italy**

Judgment 37/2021, 24 February 2021.

#### **Russian Federation**

Resolution N 12-P, 14 July 1997.

Resolution N 26-P, 17 November 1998.

#### **Spain**

Judgment 103/2008, 11 September 2008.

Judgment 31/2010, 16 July 2010.

### ***European Court of Human Rights***

Case No. 9267/81, *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987.

Case No. 3681/06, *Zorić v. Bosnia and Herzegovina*, 15 July 2014.

Case No. 41939/07, *Pilav v. Bosnia and Herzegovina*, 9 June 2016.

Case No. 30100/18, *Baralija v. Bosnia and Herzegovina*, 29 October 2019.

Case No. 55799/18, *Pudarić v. Bosnia and Herzegovina*, 8 December 2020.

## APPENDICES

### *Appendix 1: National experts*

#### List of national experts involved in the study

| Country                | National expert                   | Affiliation                                   |
|------------------------|-----------------------------------|-----------------------------------------------|
| Belgium                | Patricia Popelier                 | University of Antwerp (Belgium)               |
| Bosnia and Herzegovina | Maja Sahadžić                     | University of Antwerp (Belgium)               |
| Canada                 | Jean-François Gaudreault-DesBiens | University of Montréal (Canada)               |
| Ethiopia               | Yonatan Fessha                    | University of Western Cape (South Africa)     |
| India                  | Rajendra Kumar Pandey             | Chaudhary Charan Singh University (India)     |
| Indonesia              | Tim Lindsey                       | University of Melbourne (Australia)           |
| Iraq                   | Brendan O'Leary                   | University of Pennsylvania (United States)    |
| Italy                  | Francesco Palermo                 | University of Verona (Italy)                  |
| Malaysia               | Arnold Puyok                      | University of Malaysia Sarawak (Malaysia)     |
| Myanmar                | Micheal G. Breen                  | University of Melbourne (Australia)           |
| Nigeria                | Rotimi Suberu                     | Bennington College (United States)            |
| Pakistan               | Zubair Shahid                     | United Nations System Staff College (Germany) |
| Russian Federation     | Elena A. Kremyanskaya             | MGIMO-University Moscow (Russian Federation)  |
| South Africa           | Nico Steytler                     | University of Western Cape (South Africa)     |
| Spain                  | Pau Bossacoma Busquets            | Pompeu Fabra University (Spain)               |
| United Kingdom         | Brice Dickson                     | Queen's University Belfast (United Kingdom)   |

**Model of the country autonomy sheets employed for the measure of autonomy and then sent to the national experts for validation**

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Dear National Expert,

Your expertise in assessing this country “autonomy sheet”, which was preliminarily completed by me, is highly appreciated.

The sheet evaluates the degree of autonomy of two selected subnational entities (SNEs), based on three indicators (status, powers, fiscal arrangements). For each indicator, you are invited to check the scores I assigned to each category and subcategory.

You will find the description of each category and subcategory after these instructions. After the description, you will find the completed answer sheets for each subnational entity. For each indicator in the answer sheets, a short comment justifying the choices for the assignment of that particular score is provided.

The data will be processed as a part of research for a doctoral thesis, to derive the degree of constitutional asymmetry and evaluate the legal factors conducive to a certain degree of constitutional asymmetry (low, medium, high).

Thank you in advance for your time.

**Instructions**

1. *How to proceed*

For the assessment to proceed as easily as possible, it is highly recommended to first print this entire document. In this way, you will have the description of the indicators and the relevant scores assigned by me side by side, without having to go back and forth in the document.

Once familiarized with the indicators and the structure of the autonomy sheet, you are invited to check whether the scores assigned by me are correct, or whether you would suggest differently. Whenever relevant, you are welcome to leave comments and/or make changes directly in the text of the answer sheets, provided that it is in track-change mode. In this way, it will be possible to notice more effectively your suggestions, and it will be easier to discuss them during the interview.

2. *Number of subnational entities*

Ideally, the scores would have been assigned to each subnational entity existing in the country of interest. However, due to time limitations, I had to select only two subnational entities. Whenever possible, the most different subnational entities were selected, to better grasp the wider divide in terms of autonomy and thus asymmetry (e.g., a subnational entity enjoying a special status of autonomy and another which does not enjoy the same status; the smallest and the largest subnational entity in terms of population and/or territorial size). For each country, the selection criteria will be explicitly mentioned. You are invited to advise a different selection of subnational entities if you think it would help grasp a wider divide in terms of autonomy.

3. *Using the autonomy indexes for both subnational entities*

To evaluate the autonomy of each subnational entity, the study employs a selection of the categories for the indicators of status, powers and fiscal arrangements developed by

Patricia Popelier in her book *Dynamic Federalism* (Popelier, 2021). The description of each category for each indicator is indicated in the text of the country autonomy sheet, allowing the expert to check the scores I assigned to each subnational entity. Please bear in mind that the wording present in the comments of the answer sheet often recalls the description of each category provided by Popelier. Therefore, the terminology might need some adjustment to better fit the specific context of the country. You are more than welcome to provide assistance in this respect as well.

4. *Discussing answers with third parties*

As the autonomy sheet consists of three parts, each addressing specific areas of expertise, you are encouraged to discuss the assignment of scores with relevant colleagues, whenever needed (e.g., the third part of the autonomy sheet about fiscal autonomy might require further clarification from an expert in the legal framework of fiscal law in a particular country).

Should you have any further question about how to fill in the autonomy sheet, please do not hesitate to contact Lidia Bonifati at [lidia.bonifati@uantwerpen.be](mailto:lidia.bonifati@uantwerpen.be) or +39 334 1539224.

When you have completed the assessment, please submit the autonomy sheet by email at [lidia.bonifati@uantwerpen.be](mailto:lidia.bonifati@uantwerpen.be).

### Contact information

Your role as national expert will be acknowledged in the appendix of the thesis in the relevant country sheet, unless your choice is to stand anonymous (this option is offered in the next question). Please fill in your contact information in the table below.

| Contact information |  |
|---------------------|--|
| Name                |  |
| Surname             |  |
| Position            |  |
| Institution         |  |
| Email               |  |

### Confidentiality

Please indicate whether you would like your contact information (name and institution) to appear in the relevant appendix of the thesis. To do so, tick the box that corresponds to the appropriate answer.

| Confidentiality                                                                                       |                          |
|-------------------------------------------------------------------------------------------------------|--------------------------|
| I would like my contact information to be appear in the thesis (name and institution will be listed). | <input type="checkbox"/> |
| I would like to remain anonymous.                                                                     | <input type="checkbox"/> |

# DESCRIPTION OF POPELIER'S AUTONOMY INDICATORS

## PART 1: STATUS

### 1. Self-definition

#### **A. Recognition**

|                                                                                                               |    |
|---------------------------------------------------------------------------------------------------------------|----|
| The SNEs are not recognized as autonomous constituent parts of the system                                     | 0  |
| The SNEs are recognized but the central government can abolish or merge them without constitutional amendment | 1  |
| The SNEs are recognized as autonomous constituent parts of the system                                         | 2  |
| The particular SNE is recognized as autonomous constituent part of the system                                 | 3  |
| Recognition of the SNEs is locked by an eternity clause                                                       | +1 |

#### **B. Secession**

|                                                                                                                               |   |
|-------------------------------------------------------------------------------------------------------------------------------|---|
| Secession is explicitly prohibited                                                                                            | 0 |
| There is no (written or unwritten) secession clause                                                                           | 1 |
| There is a secession option, conditional to intergovernmental approval                                                        | 2 |
| There is a unilateral secession option, conditional to obstacles imposed by the central government or constitution            | 3 |
| There is a unilateral secession option, unconditional, or conditional to requirements imposed by the subnational constitution | 4 |

### 2. Subnational Constitutional Autonomy

#### **A. Content**

|                                                                                          |   |
|------------------------------------------------------------------------------------------|---|
| The SNE has no subnational constitutional autonomy                                       | 0 |
| The SNE can make non-substantial arrangements in some of the 4 categories <sup>588</sup> | 1 |

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<sup>588</sup> The four categories are: identity clauses, representative structures and the organization of public authority, fundamental rights, and policy principles.

|                                                                       |   |
|-----------------------------------------------------------------------|---|
| The SNE can make non-substantial arrangements in all 4 categories     | 2 |
| The SNE can make substantial arrangements in one of the 4 categories  | 3 |
| The SNE can make substantial arrangements in some of the 4 categories | 4 |
| The SNE can make substantial arrangements in all of the 4 categories  | 5 |

## **B. Procedure**

|                                                                                                                                                                                               |   |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| The SNE cannot adopt its own constitution                                                                                                                                                     | 0 |
| The SNE can adopt its own constitution, but the central or other external authorities have a discretionary veto power                                                                         | 1 |
| The subnational constitution can only take effect after a legality test by a central body or the central government can refer it to a central body for a legality test before it takes effect | 2 |
| The SNE can adopt its own constitution without central interference according to a procedure designed at the central level                                                                    | 3 |
| The SNE can adopt its own constitution without central interference according to the amendment procedure decided by its own bodies                                                            | 4 |

## **3. The legislative level**

### **A. Representation in the central law-making body**

|                                                                            |    |
|----------------------------------------------------------------------------|----|
| The SNE or its electorate has no voice in the central law-making procedure | 0  |
| The electorate of the SNE can initiate laws or create hurdles              | 1  |
| The SNEs can initiate laws or create hurdles through collective vote       | 2  |
| The SNE alone can initiate laws or create hurdles                          | 3  |
| The electorate of the SNE can veto the law                                 | 4  |
| The SNE can veto the law through a collective vote                         | 5  |
| The SNE alone can veto the law                                             | 6  |
| The SNE is consulted in matters that affect its interests or competences   | +1 |
| The SNE's representatives are bound by the instructions of the SNE         | +1 |



## **B. Subnational representation**

|                                                                                                                                                                 |    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| The SNE has no law-making assembly, or an assembly appointed by the central government                                                                          | 0  |
| The SNE has an assembly partly appointed by the central government                                                                                              | 1  |
| The SNE has an indirectly elected assembly                                                                                                                      | 2  |
| The SNE has a directly elected assembly                                                                                                                         | 3  |
| For all except the first hypothesis: The subnational assembly, as a rule, makes laws without prior central oversight, but with central oversight <i>ex post</i> | +1 |
| For all, except the first hypothesis: The subnational assembly, as a rule, makes laws without central oversight                                                 | +2 |
| The SNE's law-making assembly cannot be dissolved by a central body, unless in exceptional circumstances                                                        | +1 |

## **4. The Executive Level**

### **A. Representation in the central executive body**

|                                                                                                                                                      |    |
|------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| The SNE is not represented in the central executive body and is not involved in its appointment                                                      | 0  |
| The SNE's electorate is indirectly represented in the central executive body through geographical or identitarian criteria that overlap with the SNE | 1  |
| The SNE is not or indirectly represented in the central executive body, but is involved in its appointment through collective subnational vote       | 2  |
| The SNE is not or indirectly represented in the central executive body, but is involved in its appointment with an individual veto                   | 3  |
| The SNE in itself is substantially represented in the central executive body                                                                         | 4  |
| The SNE is consulted for matters that affect its interests or competences                                                                            | +1 |
| The SNE co-decides in matters that affect its interests or competences                                                                               | +2 |

## **B. Subnational representation**

|                                                                                                                                  |    |
|----------------------------------------------------------------------------------------------------------------------------------|----|
| The SNE has no executive of its own or an executive appointed by the central government                                          | 0  |
| The SNE has an executive appointed by the central government and by, or accountable to, a subnational assembly                   | 1  |
| The SNE has an executive appointed by a subnational assembly or directly elected                                                 | 2  |
| The subnational executive, as a rule, makes decisions without prior central oversight, but with central oversight <i>ex post</i> | +1 |
| The subnational executive, as a rule, makes decisions without central oversight                                                  | +2 |

## **5. Organization of courts**

|                                                                                                                                                          |    |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Courts are entirely organized at the central level                                                                                                       | 0  |
| Courts are organized at the central level, but the SNE is involved in its organization                                                                   | 1  |
| Courts are organized at the central level, but in such a way that they are embedded within the subnational legal space                                   | 2  |
| The SNE has its own court system, but supreme courts are organized at the central level                                                                  | 3  |
| The SNE has its own court system, (almost) completely separate from the central level                                                                    | 5  |
| The SNE is represented in central supreme courts, through regional criteria or relevant identity markers, at least in panels that hear subnational cases | +1 |

## PART 2: POWERS

### 6. Scope of powers

|                                                                                                                                                                                                                                                                    |   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| The SNE has no substantial powers in any of the categories of economic purposes, <sup>589</sup> political control, <sup>590</sup> multinational conflict management, <sup>591</sup> territorial management, <sup>592</sup> or the residual category <sup>593</sup> | 1 |
| The SNE has substantial powers in one of these 5 categories                                                                                                                                                                                                        | 2 |
| The SNE has substantial powers in two of these 5 categories                                                                                                                                                                                                        | 3 |
| The SNE has substantial powers in three of these 5 categories                                                                                                                                                                                                      | 4 |
| The SNE has substantial powers in four of these 5 categories                                                                                                                                                                                                       | 5 |
| The SNE has substantial powers in all five categories                                                                                                                                                                                                              | 6 |

### 7. Allocation techniques

|                                                                                                                                                                    |   |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| The SNE has mostly administrative or implementation powers, without a guarantee for substantial discretionary space                                                | 0 |
| The SNE has mostly administrative or implementation powers                                                                                                         | 1 |
| The SNE has mostly concurrent powers with priority given to central rule                                                                                           | 2 |
| The SNE has mostly concurrent powers with priority given to central rule, but central interference is conditional to subsidiarity or necessity conditions          | 3 |
| The SNE has mostly concurrent powers with priority given to central rule, but central interference is conditional to detailed subsidiarity or necessity conditions | 4 |

---

<sup>589</sup> Core competences in this category are economic expansion, import and export policy, regional aspects of credit policy, natural resources, commerce, tourism, transport, and energy.

<sup>590</sup> This category includes urban and spatial planning, traffic regulations, local police and public order, public services, establishment conditions, waste management, sports, and recreation.

<sup>591</sup> Core competences in this category are linked to the protection of regional identity, such as culture, religion, education, and language.

<sup>592</sup> This category can contain very diverse competences that may overlap with previous categories (such as spatial planning, transport, natural resources). The core territory-related competences not already included in the others would concern environment protection, land policy, agriculture and fisheries, local administration.

<sup>593</sup> This category includes all the competences that are not already caught by one of the former categories.

|                                                                                                    |    |
|----------------------------------------------------------------------------------------------------|----|
| The SNE has mostly exclusive powers (or concurrent powers with priority given to subnational rule) | 5  |
| There is no political central oversight                                                            | +1 |

### **8. Political federalism dispute resolution**

|                                                                                                                                                                          |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| There is no formal political mechanism to resolve conflicts of interests or competences                                                                                  | 0  |
| The SNE is heard if a procedure is initiated against its actions but is not otherwise involved in federalism disputes                                                    | 1  |
| The political dispute resolution mechanism implies unbalanced intergovernmental dialogue, with a dominant position for the central authorities                           | 2  |
| The political dispute resolution mechanism implies unbalanced intergovernmental dialogue, with prominent representation for SNEs                                         | 3  |
| The particular SNE has a dominant position in the political dispute resolution mechanism                                                                                 | 4  |
| The SNE can initiate the political dispute resolution mechanisms if the central authorities have harmed its interests or exceeded its competences, or are about to do so | +1 |

### **9. Judicial federalism dispute resolution**

|                                                                                                                                                                     |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| The SNE has no say in the appointment of judges                                                                                                                     | 0  |
| The SNE is consulted on the appointment of (some) judges                                                                                                            | 1  |
| The electorate of the SNE is involved in the appointment of judges                                                                                                  | 2  |
| The SNE is involved in the appointment of judges, through collective vote                                                                                           | 3  |
| The SNE is involved in the appointment of judges, with an individual veto right                                                                                     | 4  |
| In cases that affect the SNE, the court gives its decisions in a chamber with a judge that is, in terms of geography or identity markers, representative of the SNE | +1 |
| The SNE has a substantial say in the rules that determine the functioning of the court                                                                              | +1 |

## PART 3: FISCAL ARRANGEMENTS

### 10. Subnational Taxes

|                                                                                                                                                                                                                         |    |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| The SNE has no power to set the base and/or rate of taxes                                                                                                                                                               | 0  |
| The SNE has the power to set the base and/or rate of minor taxes only, with upper or lower limitations set by the central authority                                                                                     | 1  |
| The SNE has the power to set the base and/or rate of minor taxes only, without upper or lower limitations set by the central authority                                                                                  | 2  |
| The SNE has the power to set the base and/or rate of at least one major tax (personal income, corporate, value added, or sale tax) with upper or lower limitations or other constraints set by the central authority    | 3  |
| The SNE has the power to set the base and/or rate of at least one major tax (personal income, corporate, value added, or sale tax) without upper or lower limitations or other constraints set by the central authority | 4  |
| The SNE has the power to introduce new taxes                                                                                                                                                                            | +1 |
| The SNE has the power to set tax reliefs                                                                                                                                                                                | +1 |
| There is no pre-emption through central taxation                                                                                                                                                                        | +1 |
| The levying of specific taxes is reserved to the SNE, or other mechanisms are in place to protect subnational capacity to raise taxes                                                                                   | +1 |

## ANSWER SHEET – SNE 1

| Country | Subnational entity | Selection criteria |
|---------|--------------------|--------------------|
|         |                    |                    |

Please, assess the scores to each category on the basis of the indicators and categories provided in the previous pages.

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     |       |   |
| Subnational constitutional autonomy |       |   |
| Legislative level                   |       |   |
| Executive level                     |       |   |
| Organization of courts              |       |   |

Comment:

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         |       |
| Allocation techniques                   |       |
| Political federalism dispute resolution |       |
| Judicial federalism dispute resolution  |       |

Comment:

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes |       |

Comment:

## ANSWER SHEET – SNE 2

| Country | Subnational entity | Selection criteria |
|---------|--------------------|--------------------|
|         |                    |                    |

Please, assess the scores to each category on the basis of the indicators and categories provided in the previous pages.

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     |       |   |
| Subnational constitutional autonomy |       |   |
| Legislative level                   |       |   |
| Executive level                     |       |   |
| Organization of courts              |       |   |

Comment:

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         |       |
| Allocation techniques                   |       |
| Political federalism dispute resolution |       |
| Judicial federalism dispute resolution  |       |

Comment:

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes |       |

Comment:

**Country autonomy sheets resulting from the measure of autonomy\***

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**BOSNIA AND HERZEGOVINA**

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\* **Disclaimer:** please be aware that the following country sheets do not necessarily reflect the opinion of the national experts participating in the study, and that I noted whenever the opinion of the national expert was different than the choices I made in the analysis.



## ANSWER SHEET – BRČKO DISTRICT

| Country                | Subnational entity | Selection criteria          |
|------------------------|--------------------|-----------------------------|
| Bosnia and Herzegovina | Brčko District     | Smallest subnational entity |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 1    |
| Subnational constitutional autonomy | 5     | 4    |
| Legislative level                   | 0     | 3 +1 |
| Executive level                     | 0     | 2 +1 |
| Organization of courts              | 5     |      |

Comment: in terms of **self-definition**, Brčko District is constitutionally entrenched as a subnational entity, along with the other two entities (thus 2 points and not 3, because it is not a particular SNE singled out from the rest of the territory). There is no written or unwritten secession clause (1 point). In terms of **subnational constitutional autonomy**, Brčko District has constitutional autonomy and can make substantial arrangements in the four categories (identity clauses, representative structures and the organization of public authorities, fundamental rights, and policy principles) (5 points), and it can adopt its own constitution (called statute) without central interference (4 points). In terms of representation in the **legislative** and in the **executive**, Brčko District is not represented as a SNE in central level institutions (0 points), but it has its own assembly and executive at a subnational level (3 and 2 points respectively), which make decisions without prior central oversight, but *ex post*. (+1 point respectively). In terms of **organization of courts**, Brčko District has its own judicial branch, almost completely separate from the central level (5 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

Comment: in terms of **scope of powers**, Brčko District has substantial powers in four of the five categories (the “economic purposes” category belongs to state’s competences) (5 points). In terms of **allocation techniques**, the SNE has broad exclusive competences (even though the

constitution formally identifies them as residual) (5 points). Concerning **political federalism dispute resolution**, there are no formal political mechanisms to resolve conflict of interest or competences, because it is exclusive competence of the constitutional court of BiH (0 points). In terms of **judicial federalism dispute resolution**, Brčko District is not represented as a SNE and has no say in the appointment of judges in the constitutional court of BiH (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 4 +1<br>+1 |

Comment: in terms of **subnational taxes**, Brčko District has broad fiscal autonomy, having the power to set the base and rate of personal and corporate income tax, without upper or lower limitations or other constraints (4 points). Brčko District can introduce new taxes (+1 point) and tax reliefs (+1 point).

### OVERVIEW – AUTONOMY FOR BRČKO DISTRICT

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 1 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 5 | 4 | 9                    | 9                  | 1.00        |
| Legislative level                   | 0 | 4 | 4                    | 15                 | 0.27        |
| Executive level                     | 0 | 3 | 3                    | 12                 | 0.25        |
| Organization of courts              | 5 |   | 5                    | 6                  | 0.83        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.55</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                    | 6               | 0.83        |
| Allocation techniques        | 5 | 5                    | 6               | 0.83        |
| Political dispute resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.42</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 6 | 6                    | 8               | 0.75  |

## ANSWER SHEET – FEDERATION OF BOSNIA AND HERZEGOVINA

| Country                | Subnational entity                   | Selection criteria         |
|------------------------|--------------------------------------|----------------------------|
| Bosnia and Herzegovina | Federation of Bosnia and Herzegovina | Biggest subnational entity |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 1    |
| Subnational constitutional autonomy | 5     | 4    |
| Legislative level                   | 4     | 3 +1 |
| Executive level                     | 4 +2  | 2 +1 |
| Organization of courts              | 5 +1  |      |

Comment: in terms of **self-definition**, the Federation of Bosnia and Herzegovina is constitutionally entrenched as a subnational entity, along with the other entity and Brčko District (thus 2 points and not 3, because it is not a particular SNE singled out from the rest of the territory). There is no written or unwritten secession clause (1 point). In terms of **subnational constitutional autonomy**, the Federation has constitutional autonomy and can make substantial arrangements in the four categories (identity clauses, representative structures and the organization of public authorities, fundamental rights, and policy principles) (5 points), and it can adopt its own constitution without central interference (4 points). In terms of representation in the **legislative** and in the **executive**, the electorate of the Federation is represented in the national parliament and can veto a law through “entity voting” or a vital interest veto procedure (4 points), and it has its own assembly and executive (3 and 2 points respectively), which make decisions without prior central oversight, but ex post (+1 point respectively). In terms of **court system**, the Federation has its own judicial branch, almost completely separate from the central level (5 points), and it is represented in central supreme courts (+1 point).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 3     |

Comment: in terms of **scope of powers**, the Federation has substantial powers in four of the five categories (the “economic purposes” category belongs to state’s competences) (5 points). In terms of **allocation techniques**, the SNE has broad exclusive competences (even though the

constitution formally identifies them as residual) (5 points). Concerning **political federalism dispute resolution**, there are no formal political mechanisms to resolve conflict of interest or competences, because it is exclusive competence of the constitutional court of BiH (0 points). In terms of **judicial federalism** dispute resolution, the Federation is represented as a SNE and has a say in the appointment of judges in the constitutional court of BiH through collective vote (the four judges from the Federation are appointed in the subnational parliament) (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 4 +1<br>+1 |

Comment: in terms of **subnational taxes**, the Federation has broad fiscal autonomy, having the power to set the base and rate of personal and corporate income tax, without upper or lower limitations or other constraints (4 points). The Federation can introduce new taxes (+1 point) and tax reliefs (+1 point).

### OVERVIEW – AUTONOMY FOR FEDERATION OF BOSNIA-HERZEGOVINA

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 1 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 5 | 4 | 9                    | 9                  | 1.00        |
| Legislative level                   | 4 | 4 | 8                    | 15                 | 0.53        |
| Executive level                     | 6 | 3 | 9                    | 12                 | 0.75        |
| Organization of courts              | 6 |   | 6                    | 6                  | 1.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.73</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                    | 6               | 0.83        |
| Allocation techniques        | 5 | 5                    | 6               | 0.83        |
| Political dispute resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                 |   |                      |                 | <b>0.54</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted) Total | (Converted) Max | Value       |
|-------------------|---|-------------------|-----------------|-------------|
| Subnational taxes | 6 | 6                 | 8               | <b>0.75</b> |

## CONSTITUTIONAL ASYMMETRY BOSNIA AND HERZEGOVINA

|                        | Autonomy value<br>FBiH | Autonomy value<br>Brčko District | CA          |
|------------------------|------------------------|----------------------------------|-------------|
| Status                 | 0.73                   | 0.55                             | <b>0.18</b> |
| Powers                 | 0.54                   | 0.42                             | <b>0.12</b> |
| Fiscal<br>arrangements | 0.75                   | 0.75                             | <b>0.00</b> |
| <b>Overall</b>         | 0.67                   | 0.57                             | <b>0.10</b> |

## CANADA

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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – QUEBEC

| Country | Subnational entity | Selection criteria                                                                                                                                                               |
|---------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Canada  | Quebec             | One of the largest, richest and most populated provinces;<br>the only province of French-majority;<br>the one province interested in advancing asymmetries and decentralization. |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 3     | 2    |
| Subnational autonomy   | 4     | 3    |
| Legislative level      | 1     | 3 +2 |
| Executive level        | 0     | 2 +2 |
| Organization of courts | 5 +1  |      |

**Comment:** in terms of **self-definition**, the Canadian constitution (II.6) recognizes Quebec as a constitutive part of the federal system (3 points). Concerning secession, I assigned the score 2 because in 1998 Secession Reference the Supreme Court recognized the legitimacy of a negotiated secession for Quebec. In terms of **subnational constitutional autonomy**, Quebec has substantial constitutional autonomy (representative structures, identity clauses, fundamental rights) (4 points) and can adopt its constitution without central interference, provided that it does not violate the federal constitution (3 points). In terms of **legislative level**, the electorate of Quebec is represented in both chambers of the federal Parliament and can initiate laws or create hurdles (1 point). Quebec has its own assembly, directly elected (3 points). The National Assembly of Quebec makes laws without prior central oversight (+2 points). In terms of **executive level**, Quebec is not represented in the central executive body, and it is not involved in its appointment (0 points), while it has its own executive appointed by the National Assembly (2 point). The subnational executive makes decisions without prior central oversight (+2 points). In terms of **organization of courts**, Quebec has its own court system, which is almost completely separate from the central level, although there are provincial courts that are appointed by the federal government (5 points). Quebec is the only province to which three seats of the Supreme Court are reserved (+1 point).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |



|                                        |   |
|----------------------------------------|---|
| Judicial federalism dispute resolution | 0 |
|----------------------------------------|---|

**Comment:** in terms of **scope of powers**, Quebec has substantial powers in four of the five (economic purposes, political control, multinational conflict resolution, territorial management) (5 points). In terms of **allocation techniques**, provinces have mostly exclusive powers (5 points). In terms of **political federalism dispute resolutions**, political mechanisms of dispute resolutions exist informally and are not entrenched in the legal framework (0 points). In terms of **judicial federalism dispute resolution**, provinces have no say in the appointment of judges, who are appointed by the federal government (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score         |
|-------------------|---------------|
| Subnational Taxes | 3 +1<br>+1 +1 |

**Comment:** in terms of **subnational taxes**, Canadian provinces have the power to set the base/rate of at least one major tax (personal income) (3 points) and may introduce new subnational taxes (+1 points) and tax relief (+1 point). Moreover, there are mechanisms in place to protect subnational capacity to raise taxes (+1 point).

### OVERVIEW – AUTONOMY FOR QUEBEC

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 3 | 2 | 5                 | 8               | 0.63        |
| Subnational constitutional autonomy | 4 | 3 | 7                 | 9               | 0.78        |
| Legislative level                   | 1 | 5 | 6                 | 15              | 0.40        |
| Executive level                     | 0 | 4 | 4                 | 12              | 0.33        |
| Organization of courts              | 6 |   | 6                 | 6               | 1.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.63</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 5 | 5                    | 6               | 0.83        |
| Allocation techniques           | 5 | 5                    | 6               | 0.83        |
| Political dispute<br>resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute<br>resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                    | 0 |                      |                 | <b>0.42</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 6 | 6                    | 8               | <b>0.75</b> |

## ANSWER SHEET – NOVA SCOTIA

| Country | Subnational entity | Selection criteria                                                                         |
|---------|--------------------|--------------------------------------------------------------------------------------------|
| Canada  | Nova Scotia        | One of the smallest, less rich and least populated province;<br>majority English-speaking. |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 3     | 1    |
| Subnational autonomy   | 4     | 3    |
| Legislative level      | 1     | 3 +2 |
| Executive level        | 0     | 2 +2 |
| Organization of courts | 5     |      |

**Comment:** in terms of **self-definition**, the Canadian constitution (II.6) recognizes Nova Scotia as a constitutive part of the federal system (3 points). Concerning secession, there is no secession clause (1 point). In terms of **subnational autonomy**, Nova Scotia has substantial constitutional autonomy (representative structures, identity clauses, fundamental rights) (4 points) and can adopt its constitution without central interference, provided that it does not violate the federal constitution (3 points). In terms of **legislative level**, the electorate of Nova Scotia is represented in both chambers of the federal Parliament and can initiate laws or create hurdles (1 point). Nova Scotia has its own assembly, directly elected (3 points). The Nova Scotia House of Assembly makes laws without prior central oversight (+2 points). In terms of **executive level**, Nova Scotia is not represented in the central executive body, and it is not involved in its appointment (0 points), while it has its own executive appointed by the Assembly (2 point). The subnational executive makes decisions without prior central oversight (+2 points). In terms of **organization of courts**, Nova Scotia has its own court system, which is almost completely separate from the central level, although there are provincial courts that are appointed by the federal government (5 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Nova Scotia has substantial powers in four of the five (economic purposes, political control, territorial management, residual category) (5 points). In

terms of **allocation techniques**, provinces have mostly exclusive powers (5 points). In terms of **political federalism dispute resolutions**, political mechanisms of dispute resolutions exist informally and are not entrenched in the legal framework (0 points). In terms of **judicial federalism dispute resolution**, provinces have no say in the appointment of judges, who are appointed by the central government (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score         |
|-------------------|---------------|
| Subnational Taxes | 3 +1<br>+1 +1 |

**Comment:** in terms of **subnational taxes**, Canadian provinces have the power to set the base/rate of at least one major tax (personal income) (3 points) and may introduce new subnational taxes (+1 points) and tax relief (+1 point). Moreover, there are mechanisms in place to protect subnational capacity to raise taxes (+1 point).

### OVERVIEW – AUTONOMY FOR NOVA SCOTIA

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 3 | 1 | 4                 | 8               | 0.50        |
| Subnational constitutional autonomy | 4 | 3 | 7                 | 9               | 0.78        |
| Legislative level                   | 1 | 5 | 6                 | 15              | 0.40        |
| Executive level                     | 0 | 4 | 4                 | 12              | 0.33        |
| Organization of courts              | 5 |   | 5                 | 6               | 0.83        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.57</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 5 | 5                 | 6               | 0.83        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 | 0 |                   |                 | <b>0.42</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 6 | 6                    | 8               | 0.75  |

## CONSTITUTIONAL ASYMMETRY – CANADA

|                        | Autonomy value<br>Quebec | Autonomy value<br>Nova Scotia | CA   |
|------------------------|--------------------------|-------------------------------|------|
| Status                 | 0.63                     | 0.57                          | 0.06 |
| Powers                 | 0.42                     | 0.42                          | 0.00 |
| Fiscal<br>arrangements | 0.75                     | 0.75                          | 0.00 |
| <b>Overall</b>         | 0.60                     | 0.58                          | 0.02 |

## **ETHIOPIA**

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| <b>Confidentiality</b>                                                                                |                                     |
|-------------------------------------------------------------------------------------------------------|-------------------------------------|
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – SNNPR

| Country  | Subnational entity | Selection criteria                                                                                            |
|----------|--------------------|---------------------------------------------------------------------------------------------------------------|
| Ethiopia | SNNPR              | <ul style="list-style-type: none"> <li>- One of the most populous SNE</li> <li>- Heterogeneous SNE</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 2    |
| Subnational constitutional autonomy | 4     | 4    |
| Legislative level                   | 1     | 3 +1 |
| Executive level                     | 0     | 2 +1 |
| Organization of courts              | 5     |      |

**Comment:** in terms of **self-definition**, SNNPR is recognized by art. 47 of the Ethiopian constitution as an autonomous part of the system (3 points). Art. 39 allows an ‘unconditional right to self-determination, including the right to secession’ to every ethnic community, and provides for a procedure to exercise such right but is subject to negotiation (2 points). In terms of **subnational constitutional autonomy**, Ethiopian SNEs can make substantial arrangements in all some categories (identity clauses, representative structures and the organization of public authority, and policy principles) (4 points), and they can adopt their own constitution (art. 50.5 Ethiopian constitution) without central interference and according to the procedure established by the State Council (4 points). In terms of **legislative level**, Ethiopian states’ electorate can initiate laws through their elected representatives in the House of Peoples’ Representatives (1 point) and have their own directly elected legislative assembly (3 points). These make laws without central oversight a priori but there is the possibility of *ex post* revision by the House of Federation in case of unconstitutionality assessment of state laws (+1 point). In terms of **executive level**, the states are not represented in the executive (0 points). Ethiopian states have their own executive, appointed by the subnational assembly (2 points), making decisions without central oversight a priori but there is the possibility of *ex post* revision by the House of Federation in case of unconstitutionality assessment of state laws (+1 point). In terms of **organization of courts**, Ethiopian SNEs have their own court system almost completely separate from central level (5 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 3     |

|                                        |   |
|----------------------------------------|---|
| Judicial federalism dispute resolution | 0 |
|----------------------------------------|---|

**Comment:** in terms of **scope of powers**, Ethiopian states have substantial powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, the states have mostly exclusive powers (5 points). In terms of **political federalism dispute resolution**, the House of Federation acts as a body of dispute resolution among SNEs (3 points). In terms of **judicial federalism dispute resolution**, the SNEs have no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 2 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Ethiopian states have power to set the base and/or rate of minor taxes (2 points) but have the power to introduce new taxes (+1 point) and levy (+1 point).

### OVERVIEW – AUTONOMY FOR SNNPR

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 2 | 5                    | 8                  | 0.63        |
| Subnational constitutional autonomy | 4 | 4 | 8                    | 9                  | 0.89        |
| Legislative level                   | 1 | 4 | 5                    | 15                 | 0.33        |
| Executive level                     | 0 | 3 | 3                    | 12                 | 0.25        |
| Organization of courts              | 5 |   | 5                    | 6                  | 0.83        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.59</b> |



## POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                    | 6               | 0.83        |
| Allocation techniques        | 5 | 5                    | 6               | 0.83        |
| Political dispute resolution | 3 | 3                    | 5               | 0.60        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.57</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 4 | 4                    | 8               | <b>0.50</b> |

## ANSWER SHEET – HARARI

| Country  | Subnational entity | Selection criteria                                                                                                                                          |
|----------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Ethiopia | Harari             | <ul style="list-style-type: none"> <li>- Smallest and least populated SNE</li> <li>- Ethnic owned state (even though not completely homogeneous)</li> </ul> |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 3     | 2    |
| Subnational autonomy   | 4     | 4    |
| Legislative level      | 1     | 3 +1 |
| Executive level        | 0     | 2 +1 |
| Organization of courts | 5     |      |

**Comment:** in terms of **self-definition**, SNNPR is recognized by art. 47 of the Ethiopian constitution as an autonomous part of the system (3 points). Art. 39 allows an ‘unconditional right to self-determination, including the right to secession’ to every ethnic community, and provides for a procedure to exercise such right but is subject to negotiation (2 points). In terms of **subnational constitutional autonomy**, Ethiopian SNEs can make substantial arrangements in all some categories (identity clauses, representative structures and the organization of public authority, and policy principles) (4 points), and they can adopt their own constitution (art. 50.5 Ethiopian constitution) without central interference and according to the procedure established by the State Council (4 points). In terms of **legislative level**, Ethiopian states’ electorate can initiate laws through their elected representatives in the House of Peoples’ Representatives (1 point) and have their own directly elected legislative assembly (3 points). These make laws without central oversight a priori but there is the possibility of *ex post* revision by the House of Federation in case of unconstitutionality assessment of state laws (+1 point). In terms of **executive level**, the states are not represented in the executive (0 points). Ethiopian states have their own executive, appointed by the subnational assembly (2 points), making decisions without central oversight a priori but there is the possibility of *ex post* revision by the House of Federation in case of unconstitutionality assessment of state laws (+1 point). In terms of **organization of courts**, Ethiopian SNEs have their own court system almost completely separate from central level (5 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 3     |

|                                        |   |
|----------------------------------------|---|
| Judicial federalism dispute resolution | 0 |
|----------------------------------------|---|

**Comment:** in terms of **scope of powers**, Ethiopian states have substantial powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, the states have mostly exclusive powers (5 points). In terms of **political federalism dispute resolution**, the House of Federation acts as a body of dispute resolution among SNEs (3 points). In terms of **judicial federalism dispute resolution**, the SNEs have no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 2 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Ethiopian states have power to set the base and/or rate of minor taxes (2 points) but have the power to introduce new taxes (+1 point) and levy (+1 point).

### OVERVIEW – AUTONOMY FOR HARARI

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 2 | 5                    | 8                  | 0.63        |
| Subnational constitutional autonomy | 4 | 4 | 8                    | 9                  | 0.89        |
| Legislative level                   | 1 | 4 | 5                    | 15                 | 0.33        |
| Executive level                     | 0 | 3 | 3                    | 12                 | 0.25        |
| Organization of courts              | 5 |   | 5                    | 6                  | 0.83        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.59</b> |

## POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 5 | 5                 | 6               | 0.83        |
| Political dispute resolution | 3 | 3                 | 5               | 0.60        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.57</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted) Total | (Converted) Max | Value       |
|-------------------|---|-------------------|-----------------|-------------|
| Subnational taxes | 4 | 4                 | 8               | <b>0.50</b> |

## CONSTITUTIONAL ASYMMETRY – ETHIOPIA

|                     | Autonomy value SNNPR | Autonomy value Harari | CA          |
|---------------------|----------------------|-----------------------|-------------|
| Status              | 0.59                 | 0.59                  | <b>0.00</b> |
| Powers              | 0.57                 | 0.57                  | <b>0.00</b> |
| Fiscal arrangements | 0.50                 | 0.50                  | <b>0.00</b> |
| <b>Overall</b>      | 0.55                 | 0.55                  | <b>0.00</b> |

## INDIA

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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – NAGALAND

| Country | Subnational entity | Selection criteria                                                                                                                                         |
|---------|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| India   | Nagaland           | <ul style="list-style-type: none"> <li>- State</li> <li>- Differential autonomy to secure its distinct status</li> <li>- Former hub of violence</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 0     | 0    |
| Legislative level                   | 1     | 3 +1 |
| Executive level                     | 0     | 2 +1 |
| Organization of courts              | 2     |      |

**Comment:** in terms of **self-definition**, the constitution lists the name of the states and union territories in the First Schedule, recognizing them as autonomous parts of the territory (3 points). Even though there is no specific legal reference to it, in India secession is prohibited and unity of the system is sacrosanct (0 points). In terms of **subnational constitutional autonomy**, Indian subnational entities have no substantial constitutional autonomy (0 points) and cannot adopt their own constitution (0 points). In terms of **legislative level**, the representatives of states and union territories can initiate laws in either house of parliament (1 point). At the subnational level, states have a directly elected assembly (3 points), which as a rule makes decisions without central oversight but with potential oversight *ex post* (+1 point). In terms of **executive level**, states are not represented in the central executive (0 points), even though in practice states are represented in the Council of Ministers (also ex art. 74.2 constitution). At the subnational level, states have an executive (the Governor) directly elected (2 points), which as a rule makes decisions without central oversight but with potential oversight *ex post* (+1 point). In terms of **organization of courts**, courts are organized at the central level according to an integrated system (2 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Nagaland has substantial powers in four of the five categories (economic purposes, political control, territorial management, multinational conflict management) (5 points). In terms of **allocation techniques**, states have mostly exclusive powers (5 points). In terms of **political federalism dispute resolution**, there are several IGR bodies with dominant position of central government (2 points). In terms of **judicial federalism dispute resolution**, SNEs have no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 1 +1  |

**Comment:** in terms of **subnational taxes**, Nagaland has limited powers to set the base/rate of minor taxes only (1 point) and can introduce subnational taxes (+1 point).

### OVERVIEW – AUTONOMY FOR NAGALAND

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                 | 8               | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 1 | 4 | 5                 | 15              | 0.33        |
| Executive level                     | 0 | 3 | 3                 | 12              | 0.25        |
| Organization of courts              | 2 |   | 2                 | 6               | 0.33        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.26</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Topic                        | 5 | 5                 | 6               | 0.83        |
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 2 | 2                 | 5               | 0.40        |
| Political dispute resolution | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.52</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 2 | 2                    | 8               | 0.25  |



## ANSWER SHEET – CHANDIGARH

| Country | Subnational entity | Selection criteria                                                                                                                                 |
|---------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
| India   | Chandigarh         | <ul style="list-style-type: none"> <li>- Union territory</li> <li>- Administered by the central govt</li> <li>- Strategically important</li> </ul> |

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     | 3     | 0 |
| Subnational constitutional autonomy | 0     | 0 |
| Legislative level                   | 1     | 0 |
| Executive level                     | 0     | 0 |
| Organization of courts              | 0     |   |

**Comment:** in terms of **self-definition**, the constitution lists the name of the states and union territories in the First Schedule, recognizing them as autonomous parts of the territory (3 points). Even though there is no specific legal reference to it, in India secession is prohibited and unity of the system is sacrosanct (0 points). In terms of **subnational constitutional autonomy**, Indian subnational entities have no substantial constitutional autonomy (0 points) and cannot adopt their own constitution (0 points). In terms of **legislative level**, the representatives of states and union territories can initiate laws in either house of parliament (1 point). At the subnational level, Chandigarh does not have a law-making assembly (0 points). In terms of **executive level**, Chandigarh is not represented in the central executive (0 points) and has no executive of its own, as it is administered by the central level (0 points). In terms of **organization of courts**, courts are organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 1     |
| Allocation techniques                   | 0     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, union territories do not have substantial powers in any of the categories (1 point). In terms of **allocation techniques**, union territories have mostly administration or implementation powers, being administered by the central government (0 points). In terms of **political federalism dispute resolution**, there are several IGR bodies with

dominant position of central government (2 points). In terms of **judicial federalism dispute resolution**, SNEs have no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 0     |

**Comment:** in terms of **subnational taxes**, union territories have no substantial taxing powers (0 points).

### OVERVIEW – AUTONOMY FOR CHANDIGARH

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                 | 8               | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 1 | 0 | 1                 | 15              | 0.07        |
| Executive level                     | 0 | 0 | 0                 | 12              | 0.00        |
| Organization of courts              | 0 |   | 0                 | 6               | 0.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.09</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 1 | 1                 | 6               | 0.17        |
| Allocation techniques        | 0 | 0                 | 6               | 0.00        |
| Political dispute resolution | 2 | 2                 | 5               | 0.40        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.14</b> |

### FISCAL ARRANGEMENTS

| Topic             | A | (Converted) Total | (Converted) Max | Value    |
|-------------------|---|-------------------|-----------------|----------|
| Subnational taxes | 0 | 0                 | 8               | <b>0</b> |

## CONSTITUTIONAL ASYMMETRY – INDIA

|                        | Autonomy value<br>Nagaland | Autonomy value<br>Chandigarh | CA          |
|------------------------|----------------------------|------------------------------|-------------|
| Status                 | 0.26                       | 0.09                         | <b>0.17</b> |
| Powers                 | 0.52                       | 0.14                         | <b>0.38</b> |
| Fiscal<br>arrangements | 0.25                       | 0.00                         | <b>0.25</b> |
| <b>Overall</b>         | 0.34                       | 0.08                         | <b>0.27</b> |

## INDONESIA

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| Confidentiality                                                                                       |                                     |
|-------------------------------------------------------------------------------------------------------|-------------------------------------|
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – ACEH

| Country   | Subnational entity | Selection criteria                                                                                                                                                     |
|-----------|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Indonesia | Aceh               | <ul style="list-style-type: none"> <li>- enjoys special autonomy;</li> <li>- asymmetry introduced to address separatist claims;</li> <li>- poorly developed</li> </ul> |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 3     | 0    |
| Subnational autonomy   | 0     | 0    |
| Legislative level      | 0 +1  | 3 +2 |
| Executive level        | 0 +1  | 2 +2 |
| Organization of courts | 0     |      |

**Comment:** in terms of **self-definition**, the constitution recognizes the existence of special provinces at art. 18B and the 2014 law on Regional Autonomy recognizes Aceh as a Special Province at art. 399 thus isolating it (along with the other special provinces) from the rest of the provinces (3 points). Although secession is not explicitly mentioned, its prohibition could be derived by art. 37(5) of the constitution, prohibiting constitutional amendments on the unitary nature of the state (0 points). In terms of **subnational constitutional autonomy**, the provinces do to have subnational constitutional autonomy (0 points) and cannot adopt its own constitution, even though they can enact laws and regulations (0 points). In terms of **legislative level**, although subnational governments are represented in the Regional Representative Council (DPD), this body cannot enact or vetoes laws and is not fully part of the legislative process (0 points). However, art. 8 of law 11/2006 provides that “Draft laws prepared by the DPR that direct involve the governance of Aceh shall be developed with the consultation and advisement from the DPRA”, therefore an additional point was applied (+1 point). At the subnational level, the provinces have their own assembly directly elected (3 points). As a rule, they make laws without central oversight (+2 points). In terms of **executive level**, the provinces are not represented in the central executive body (0 points). However, as for the legislative level, art. 8 of law 11/2006 provides that “Administrative policies that directly involve the governance of Aceh to be enacted by the Government shall be developed with the consultation and advisement from the Governor”, therefore an additional point was applied (+1 point). At the subnational level, provinces have a democratically elected head of government (2 points) and as a rule they make decisions without central oversight (+2 points). In terms of **organization of courts**, Aceh is a peculiar case because of the Syari’ya Court adjudicating Islamic law cases, but the 2006 law on Governing Aceh establishes that “Administration of Islamic Law in Aceh shall be a part of the national judicial system” (art. 128), therefore also such court is organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Aceh has substantial powers in of all the five categories (economic purposes, political control, multinational conflict management, territorial management, implementation of Islamic criminal law) (6 points). In terms of **allocation techniques**, the subnational entities have mostly concurrent powers, with priority given to subnational rule (5 points) (after a decision of constitutional court striking down the central oversight). In terms of **political federalism dispute resolution**, there is no formal political mechanism to resolve conflicts of interests or competences (0 points). In terms of **judicial federalism dispute resolution**, the subnational entity has no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational** taxes, Aceh cannot set the base and/or rate of taxes (0 points), but it can introduce new taxes (+1 point) and levies (+1 point).

### OVERVIEW – AUTONOMY FOR ACEH

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                    | 9                  | 0.00        |
| Legislative level                   | 1 | 5 | 6                    | 15                 | 0.40        |
| Executive level                     | 1 | 4 | 5                    | 12                 | 0.42        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.24</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 6 | 6                    | 6               | 1.00        |
| Allocation techniques           | 5 | 5                    | 6               | 0.83        |
| Political dispute<br>resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute<br>resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                    |   |                      |                 | <b>0.46</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted)<br>Max | Value       |
|-------------------|---|----------------------|--------------------|-------------|
| Subnational taxes | 2 | 2                    | 8                  | <b>0.25</b> |

## ANSWER SHEET – EAST KALIMANTAN

| Country   | Subnational entity | Selection criteria                                                                                                                     |
|-----------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| Indonesia | East Kalimantan    | <ul style="list-style-type: none"> <li>- ‘Ordinary’ province</li> <li>- One of the richest provinces (resources and assets)</li> </ul> |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 2     | 0    |
| Subnational autonomy   | 0     | 0    |
| Legislative level      | 0     | 3 +2 |
| Executive level        | 0     | 2 +2 |
| Organization of courts | 0     |      |

**Comment:** in terms of **self-definition**, the constitution and the 2014 law on Regional Autonomy generally recognize the existence of provinces as autonomous parts of Indonesia, without listing them (apart from the Special provinces) (2 points). Although secession is not explicitly mentioned, its prohibition could be derived by art. 37(5) of the constitution, prohibiting constitutional amendments on the unitary nature of the state (0 points). In terms of **subnational constitutional autonomy**, the provinces do to have subnational constitutional autonomy (0 points) and cannot adopt its own constitution, even though they can enact laws and regulations (0 points). In terms of **legislative level**, although subnational governments are represented in the Regional Representative Council (DPD), this body cannot enact laws and is not fully part of the legislative (0 points). At the subnational level, the provinces have their own assembly directly elected (3 points). As a rule, they make laws without central oversight (+2 points). In terms of **executive level**, the provinces are not represented in the central executive body (0 points). At the subnational level, provinces have a democratically elected head of government (2 points). As a rule, they make laws without central oversight (+2 points). In terms of **organization of courts**, courts are organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |



**Comment:** in terms of **scope of powers**, provinces have substantial powers in of four the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, the subnational entities have mostly concurrent powers, with priority given to subnational rule (5 points) after a decision of constitutional court striking down the central oversight). In terms of **political federalism dispute resolution**, there is no formal political mechanism to resolve conflicts of interests or competences (0 points). In terms of **judicial federalism dispute resolution**, the subnational entity has no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, provinces have no power to set base and/or rate of taxes (0 points), but they can introduce new taxes (+1 point) and levies (+1 point).

### OVERVIEW – AUTONOMY FOR EAST KALIMANTAN

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Category                            | 2 | 0 | 2                 | 8               | 0.25        |
| Constitutional self-identification  | 0 | 0 | 0                 | 9               | 0.00        |
| Subnational constitutional autonomy | 0 | 5 | 5                 | 15              | 0.33        |
| Legislative level                   | 0 | 4 | 4                 | 12              | 0.33        |
| Executive level                     | 0 |   | 0                 | 6               | 0.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.18</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 5 | 5                 | 6               | 0.83        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.42</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 2 | 2                    | 8               | 0.25  |

## CONSTITUTIONAL ASYMMETRY – INDONESIA

|                        | Autonomy value<br>Aceh | Autonomy value<br>East Kalimantan | CA   |
|------------------------|------------------------|-----------------------------------|------|
| Status                 | 0.24                   | 0.18                              | 0.06 |
| Powers                 | 0.46                   | 0.42                              | 0.04 |
| Fiscal<br>arrangements | 0.25                   | 0.25                              | 0.00 |
| <b>Overall</b>         | 0.32                   | 0.28                              | 0.03 |

## IRAQ

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## ANSWER SHEET – KURDISTAN REGION

| Country | Subnational entity | Selection criteria                                                                                                                                |
|---------|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| Iraq    | Kurdistan Region   | <ul style="list-style-type: none"> <li>- only federal region distinctly recognised in the constitution;</li> <li>- predominantly Sunni</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 3     | 4    |
| Legislative level                   | 2 +1  | 3 +2 |
| Executive level                     | 2 +1  | 2 +2 |
| Organization of courts              | 5 +1  |      |

**Comment:** in terms of **self-definition**, art. 117 of the constitution recognizes the Kurdistan Region as a federal region (3 points), while setting the possibility for the establishment of new regions. Secession is explicitly prohibited (art. 67 and art. 109 Const) (0 points). In terms of **subnational constitutional autonomy**, the constitution provides that each region can adopt its own constitution defining the structure of powers and its authorities (3 points). The Kurdistan region can adopt its own constitution without central interference (4 points). In terms of **legislative level**, the Kurdish Members of Parliament may initiate laws through collective vote in the Council of Representatives (art. 60.2 Const) (2 points). The Kurdistan Region is consulted in matters that affect its interests or competences (+1 point). The Kurdistan Region has a directly elected assembly (3 points), which as a rule makes laws without central oversight (+2 points). In terms of **executive level**, the Kurdistan Region is not represented in the central executive, but it is involved in its appointment through collective vote (2 points). The Kurdistan Region is consulted for matters that affect its interests or competences (+1 point). The Kurdistan Region has its own executive (2 points), which as a rule makes decision without central oversight (+2 points). In terms of **organization of courts**, the Kurdistan Region has its own court system (5 points), and it is represented in the transitional Federal Supreme Court (+1 point) (art. 92.2 constitution).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5 +1  |
| Political federalism dispute resolution | 0     |

|                                        |   |
|----------------------------------------|---|
| Judicial federalism dispute resolution | 3 |
|----------------------------------------|---|

**Comment:** in terms of **scope of powers**, the Kurdistan region has substantial powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, the Kurdistan Region has mostly concurrent powers with priority given to subnational rule (5 points), and there is no political central oversight (+1 point). In terms of **political federalism dispute resolution**, there are no formal political mechanisms to resolve conflicts of interests or competences (0 points), even though non-formalized meetings at government level do occur. In terms of **judicial federalism dispute resolution**, the Kurdistan Region is involved in the appointment of judges through collective vote in the Council of Representatives (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 4 +1  |

**Comment:** in terms of **subnational taxes**, the Kurdistan Region has the power to set the base/rate of at least one major tax without upper or lower limitations by the central authority (4 points), it has the power to introduce new taxes (+1 point).

## OVERVIEW – AUTONOMY FOR KURDISTAN REGION

### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                 | 8               | 0.38        |
| Subnational constitutional autonomy | 3 | 4 | 7                 | 9               | 0.78        |
| Legislative level                   | 3 | 5 | 8                 | 15              | 0.53        |
| Executive level                     | 3 | 4 | 7                 | 12              | 0.58        |
| Organization of courts              | 6 |   | 6                 | 6               | 1.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.65</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 5 | 5                    | 6               | 0.83        |
| Allocation techniques           | 6 | 6                    | 6               | 1.00        |
| Political dispute<br>resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute<br>resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                    |   |                      |                 | <b>0.58</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 5 | 5                    | 8               | <b>0.63</b> |

## ANSWER SHEET – GOVERNORATE OF AL-BASRAH

| Country | Subnational entity | Selection criteria                                                                                                   |
|---------|--------------------|----------------------------------------------------------------------------------------------------------------------|
| Iraq    | Al-Basrah          | <ul style="list-style-type: none"> <li>- distinctive identity;</li> <li>- Prevented from forming a region</li> </ul> |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 2     | 0    |
| Subnational autonomy   | 0     | 0    |
| Legislative level      | 2     | 3 +1 |
| Executive level        | 2     | 2 +1 |
| Organization of courts | 0     |      |

**Comment:** in terms of **self-definition**, art. 116 of the constitution recognizes governorates as autonomous part of the system (2 points). Secession is explicitly prohibited (art. 67 and art. 109 Const) (0 points). In terms of **subnational constitutional autonomy**, governorates have no substantial constitutional autonomy (0 points) and cannot adopt its own constitution (0 points). In terms of **legislative level**, Members of Parliament elected from the territories of the governorates may initiate laws through collective vote in the Council of Representatives (art. 60.2 Const) (2 points). Governorates have a directly elected assembly (3 points), which as a rule makes laws with central oversight *ex post* (+1 points). In terms of **executive level**, governorates are not represented in the central executive, but they are involved in its appointment through collective vote (2 points). The governorates have their own executive (2 points), which as a rule makes decision with central oversight *ex post* (+1 points). In terms of **organization of courts**, courts are organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 1     |
| Allocation techniques                   | 1     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers**, governorate have no substantial powers in any of the five categories (1 point). In terms of **allocation techniques**, governorates have mostly administrative or implementation powers (1 point). In terms of **political federalism dispute resolution**, there are no formal political mechanisms to resolve conflicts of interests or

competences (0 points). In terms of **judicial federalism dispute resolution**, governorates are involved in the appointment of judges through collective vote in the Council of Representatives (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 0     |

**Comment:** in terms of **subnational taxes**, governorates have no powers to set base/rate of major taxes or to introduce new taxes (0 points).

## OVERVIEW – AUTONOMY FOR KURDISTAN REGION

### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                 | 8               | 0.25        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 2 | 4 | 6                 | 15              | 0.40        |
| Executive level                     | 2 | 3 | 5                 | 12              | 0.42        |
| Organization of courts              | 0 |   | 0                 | 6               | 0.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.21</b> |

### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 1 | 1                 | 6               | 0.17        |
| Allocation techniques        | 1 | 1                 | 6               | 0.17        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 3 | 3                 | 6               | 0.50        |
| <b>Total</b>                 |   |                   |                 | <b>0.21</b> |



## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 0 | 0                    | 8               | 0     |

## CONSTITUTIONAL ASYMMETRY – IRAQ

|                        | Autonomy value<br>Kurdistan Region | Autonomy value<br>Governorate | CA   |
|------------------------|------------------------------------|-------------------------------|------|
| Status                 | 0.65                               | 0.21                          | 0.44 |
| Powers                 | 0.58                               | 0.21                          | 0.37 |
| Fiscal<br>arrangements | 0.63                               | 0.00                          | 0.63 |
| <b>Overall</b>         | 0.62                               | 0.14                          | 0.48 |

## ITALY

| Contact information |                                                                              |
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| Confidentiality                                                                                          |                                     |
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| I would like to remain anonymous.                                                                        | <input type="checkbox"/>            |

## ANSWER SHEET – AOSTA VALLEY

| Country | Subnational entity | Selection criteria                                                                                                              |
|---------|--------------------|---------------------------------------------------------------------------------------------------------------------------------|
| Italy   | Aosta Valley       | <ul style="list-style-type: none"> <li>- Special region;</li> <li>- Smallest region;</li> <li>- Smallest population.</li> </ul> |

### PART 1: STATUS

| Category                            | score   |         |
|-------------------------------------|---------|---------|
|                                     | A       | B       |
| Self-definition                     | 3       | 1       |
| Subnational constitutional autonomy | 4       | 2       |
| Legislative level                   | 2 +1    | 3 +1 +1 |
| Executive level                     | 0 +1 +2 | 2 +2    |
| Organization of courts              | 0       |         |

**Comment:** in terms of **self-definition**, Aosta Valley is specifically recognized as an autonomous constituent part of the system by art. 116.1 Const (3 points) and there is no written or unwritten secession clause (1 point). In terms of **subnational constitutional autonomy**, Aosta Valley can make substantial arrangements in some of the four categories (e.g., fundamental rights, identity clauses, representative structures and the organization of public authority) in the special statute (4 points), which is adopted by the national Parliament (2 points). In terms of **legislative level**, the Regional Council of Aosta Valley can initiate laws or create hurdles through collective vote (i.e., 5 Regional Councils) (2 points). For Aosta Valley, I also assigned an additional point because it has to be consulted in matters that affect its interests or competences, even though there are not specific provisions regulating this mechanism, operating at an intergovernmental level. Also, Aosta Valley has its own directly elected assembly (3 points), which can make laws without prior central oversight, but (potentially) ex post (art. 127 Constitution) (+1 point) and it cannot be dissolved unless in exceptional circumstances (art. 48 Autonomy Statute) (+1 points). In terms of **executive level**, Aosta Valley is not represented in the central executive (0 points), and it is consulted for matters that affect its interests or competences (+1 point). Moreover, due to the principle of specialty and of bilateral cooperation, it could be argued that as a special region it co-decides in matters that affect its interests or competences (+2 points). Aosta Valley has its own executive indirectly elected (2 points), which makes decision without prior oversight (+2 points). In terms of the **organization of courts**, they are entirely organized at the central level (0 points).

### PART 2: POWERS

| Category              | score |
|-----------------------|-------|
| Scope of powers       | 6     |
| Allocation techniques | 4     |

|                                         |      |
|-----------------------------------------|------|
| Political federalism dispute resolution | 4 +1 |
| Judicial federalism dispute resolution  | 3    |

**Comment:** in terms of **scope of powers**, the autonomy statute of Aosta Valley provides substantial powers in all five categories (6 points). In terms of **allocation techniques**, Aosta Valley has mostly concurrent powers with priority given to central rule, but central interference is conditional to detailed subsidiarity or necessity conditions, as also stated by the constitutional court case-law (4 points). It should be noted that Aosta Valley is granted more exclusive powers than ordinary regions, so in some matters it could be said that priority is given to subnational rule (and therefore it could be assigned 5 points). In terms of **political federalism dispute resolution**, it was difficult to assign a score. In fact, the principle of specialty provides for an equal and balanced relationship between the special region and the central authority, with an equal number of representatives on both sides. However, in respect to the other regions, it could be argued that the special regions have a dominant position in the political dispute resolution mechanism, since such equal relationship is not granted to ordinary regions (4 points). Moreover, the SNE can initiate the dispute resolution mechanism if the central authorities have harmed its interests or exceeded its competences (+1 point). In terms of **judicial federalism dispute resolution**, Aosta Valley's representatives are involved in the appointment of judges through collective vote in the central Parliament (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score         |
|-------------------|---------------|
| Subnational Taxes | 3 +1<br>+1 +1 |

**Comment:** in terms of **subnational taxes**, Aosta Valley can set base and/or rate of at least one major tax (e.g., personal income), with upper or lower limitations or constraints from the central authority (3 points). Moreover, it has the power to introduce new taxes (+1 point) conditional to national taxes and therefore in practice it is limited, to set tax reliefs (+1 point), and there are mechanisms in place to protect subnational capacity to raise taxes (+1 point).

## OVERVIEW – AUTONOMY FOR AOSTA VALLEY

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 1 | 4                    | 8                  | 0.50        |
| Subnational constitutional autonomy | 4 | 2 | 6                    | 9                  | 0.67        |
| Legislative level                   | 3 | 5 | 8                    | 15                 | 0.53        |
| Executive level                     | 3 | 4 | 7                    | 12                 | 0.58        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.46</b> |

### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 6 | 6                    | 6               | 1.00        |
| Allocation techniques        | 4 | 4                    | 6               | 0.67        |
| Political dispute resolution | 5 | 5                    | 5               | 1.00        |
| Judicial dispute resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                 |   |                      |                 | <b>0.79</b> |

### FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 6 | 6                    | 8               | <b>0.75</b> |

## ANSWER SHEET – LOMBARDY

| Country | Subnational entity | Selection criteria                                                                                                                                |
|---------|--------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| Italy   | Lombardy           | <ul style="list-style-type: none"> <li>- Ordinary region;</li> <li>- One of the largest regions;</li> <li>- One of the most populated.</li> </ul> |

### PART 1: STATUS

| Category                  | score |            |
|---------------------------|-------|------------|
|                           | A     | B          |
| Self-definition           | 2     | 1          |
| Subnational constitutions | 3     | 2          |
| Legislative level         | 2     | 3 +1<br>+1 |
| Executive level           | 0     | 2 +2       |
| Organization of courts    | 0     |            |

**Comment:** in terms of **self-definition**, Lombardy is generally recognized as an autonomous part of the system by art. 131 Const. (2 points) and there is no written or unwritten secession clause (1 point). In terms of **subnational constitutions**, Lombardy can make substantial arrangements in one of the four categories (i.e., representative structures and the organization of public authority) in the autonomy statute (3 points). The statute is adopted by the Regional Council and can only take effect after a legality test by a central body, or the central government can refer it to a central body for a legality test before it takes effect (2 points). In terms of **legislative level**, Lombardy has no institutional representation at the central level (0 points), but the Regional Council can initiate laws through collective vote (i.e., 5 Regional Councils) (2 points). Also, Lombardy has its own directly elected assembly (3 points), which can make laws without prior central oversight, but (potentially) ex post (art. 127) (+1 point) and it cannot be dissolved unless in exceptional circumstances (art. 126) (+1 point). In terms of **executive level**, Lombardy is not represented in the central executive (0 points). Lombardy has its own executive directly elected (3 points), which makes decision without prior oversight (+2 points). In terms of the **organization of courts**, they are entirely organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 3     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers**, constitution grants the ordinary regions substantial powers in two of the five categories (economic purposes, political control) (3 points). In terms of **allocation techniques**, Lombardy has mostly concurrent powers with priority given to central rule (2 points). In terms of **political federalism dispute resolution**, the dispute resolution mechanism implies an unbalanced and multilateral intergovernmental dialogue, with dominant position for the central authorities (2 points). In terms of **judicial federalism dispute resolution**, Lombardy's representatives are involved in the appointment of judges through collective vote in the central Parliament (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 3 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Lombardy has the power to set the base and/or rate for at least one major tax (e.g., personal income) with upper or lower limitations or constraints from the central authority (3 points). Moreover, it has the power to introduce new taxes (+1 point) conditional to national taxes and therefore in practice it is limited, and to set tax reliefs (+1 point).

### OVERVIEW – AUTONOMY FOR LOMBARDY

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 1 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 3 | 2 | 5                    | 9                  | 0.56        |
| Legislative level                   | 2 | 5 | 7                    | 15                 | 0.47        |
| Executive level                     | 0 | 4 | 5                    | 12                 | 0.33        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.35</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 3 | 3                    | 6               | 0.50        |
| Allocation techniques           | 2 | 2                    | 6               | 0.33        |
| Political dispute<br>resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute<br>resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                    |   |                      |                 | <b>0.43</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 5 | 5                    | 8               | <b>0.63</b> |

## CONSTITUTIONAL ASYMMETRY – ITALY

|                        | Autonomy value<br>Aosta Valley | Autonomy value<br>Lombardy | CA          |
|------------------------|--------------------------------|----------------------------|-------------|
| Status                 | 0.46                           | 0.35                       | <b>0.11</b> |
| Powers                 | 0.79                           | 0.43                       | <b>0.36</b> |
| Fiscal<br>arrangements | 0.75                           | 0.63                       | <b>0.12</b> |
| <b>Overall</b>         | 0.67                           | 0.47                       | <b>0.20</b> |



## **MALAYSIA**

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| <b>Confidentiality</b>                                                                                |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – SARAWAK

| Country  | Subnational entity | Selection criteria                                                                                    |
|----------|--------------------|-------------------------------------------------------------------------------------------------------|
| Malaysia | Sarawak            | <ul style="list-style-type: none"> <li>- Enjoying special status</li> <li>- Largest entity</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2 +1  | 0    |
| Subnational constitutional autonomy | 4     | 3    |
| Legislative level                   | 1 +1  | 3    |
| Executive level                     | 0     | 2 +2 |
| Organization of courts              | 3 +1  |      |

**Comment:** in terms of **self-definition**, at art.1(2) the Malaysian Constitution explicitly lists the names of the states (2 points). Concerning Sarawak, its special position within the Federation is locked by a *de facto* eternity clause by art. 161E of the Federal Constitution (+1 point). The constitution is silent about secession but is generally considered an act of treason so it could be argued it is implicitly prohibited (0 points). In terms of **subnational constitutional autonomy**, Sarawak can make substantial arrangements in some of the four categories (identity clauses, fundamental rights, representative structures) (4 points). The subnational entities can adopt their own constitution without central interference according to a procedure designed at the central level (3 points). In terms of **legislative level**, the electorate of the subnational entities is represented in the central law-making body and can initiate laws (1 point). Moreover, Sarawak is consulted in matters that affect its interests or competences (+1 point). Sarawak has its own legislative assembly, directly elected (3 points). In terms of **executive level**, the subnational entities are not represented in the central executive and are not involved in its appointment (0 points). Sarawak has an executive indirectly elected (2 points), which as a rule makes decisions without central oversight (+2 points). In terms of **organization of courts**, Sarawak has its own court system, but the apex courts are organized at the central level (3 points). Sarawak is represented in the Federal Court, through the Chief Judge of the High Court of Sabah and Sarawak (+1 point).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Sarawak has substantial powers in all five categories (economic purposes, political control, multinational conflict management, territorial management, residual category) (6 points). In terms of **allocation techniques**, the Malaysian States have mostly concurrent powers with priority given to central rule (2 points). In terms of **political federalism dispute resolution**, there are not formal mechanisms to resolve conflicts of interests or competences, since it is the Federal Court that resolves such conflicts (0 points). In terms of **judicial federalism dispute resolution**, Sarawak has no say in the appointment of judges in the apex courts, since they are appointed by the Yang di-Pertuan Agong (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Sarawak has no power to set the base and/or rate of taxes (0 points) but has the power to introduce new taxes (+1 point) and set tax reliefs (+1 points).

### OVERVIEW – AUTONOMY FOR SARAWAK

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 4 | 3 | 7                    | 9                  | 0.78        |
| Legislative level                   | 2 | 3 | 5                    | 15                 | 0.33        |
| Executive level                     | 0 | 4 | 4                    | 12                 | 0.33        |
| Organization of courts              | 4 | 0 | 4                    | 6                  | 0.67        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.50</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 6 | 6                    | 6               | 1.00        |
| Allocation techniques        | 2 | 2                    | 6               | 0.33        |
| Political dispute resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.33</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 2 | 2                    | 8               | 0.25  |

## ANSWER SHEET – PULAU PINANG

| Country  | Subnational entity | Selection criteria                                                                             |
|----------|--------------------|------------------------------------------------------------------------------------------------|
| Malaysia | Pulau Pinang       | <ul style="list-style-type: none"> <li>- smallest entity;</li> <li>- ordinary state</li> </ul> |

### PART 1: STATUS

| Category               | score |      |
|------------------------|-------|------|
|                        | A     | B    |
| Self-definition        | 2     | 0    |
| Subnational autonomy   | 3     | 3    |
| Legislative level      | 1     | 3    |
| Executive level        | 0     | 2 +2 |
| Organization of courts | 3     |      |

**Comment:** in terms of **self-definition**, at art.1(2) the Malaysian Constitution explicitly lists the names of the states (2 points). The constitution is silent about secession but is generally considered an act of treason so it could be argued it is implicitly prohibited (0 points). In terms of **subnational constitutional autonomy**, Pulau Pinang can make substantial arrangements in one of the four categories (representative structures) (3 points). The subnational entities can adopt its own constitution without central interference according to a procedure designed at the central level (3 points). In terms of **legislative level**, the electorate of the subnational entities is represented in the central law-making body and can initiate laws (1 point). Pulau Pinang has its own legislative assembly, directly elected (3 points). In terms of **executive level**, the subnational entities are not represented in the executive and are not involved in its appointment (0 points). Pulau Pinang has an executive indirectly elected (2 points), which as a rule makes decisions without central oversight (+2 points). In terms of **organization of courts**, Pulau Pinang has its own court system, but the apex courts are organized at the central level (3 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Pulau Pinang has substantial powers in four of the five categories (political control, multinational conflict management, territorial management, residual category) (5 points). In terms of **allocation techniques**, the Malaysian States have mostly

concurrent powers with priority given to central rule (2 points). In terms of **political federalism dispute resolution**, there are not formal mechanisms to resolve conflicts of interests or competences, since it is the Federal Court that resolves such conflicts (0 points). In terms of **judicial federalism dispute resolution**, Pulau Pinang has no say in the appointment of judges in the apex courts, since they are appointed by the Yang di-Pertuan Agong (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 0     |

**Comment:** in terms of **subnational taxes**, Pulau Pinang has no power to set the base and/or rate of taxes (0 points).

### OVERVIEW – AUTONOMY FOR PULAU PINANG

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                 | 8               | 0.25        |
| Subnational constitutional autonomy | 3 | 3 | 6                 | 9               | 0.67        |
| Legislative level                   | 1 | 3 | 4                 | 15              | 0.27        |
| Executive level                     | 0 | 4 | 4                 | 12              | 0.33        |
| Organization of courts              | 3 | 0 | 3                 | 6               | 0.50        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.40</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 2 | 2                 | 6               | 0.33        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.29</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 0 | 0                    | 8               | 0     |

## CONSTITUTIONAL ASYMMETRY – MALAYSIA

|                        | Autonomy value<br>Sarawak | Autonomy value<br>Pulau Pinang | CA   |
|------------------------|---------------------------|--------------------------------|------|
| Status                 | 0.50                      | 0.40                           | 0.10 |
| Powers                 | 0.33                      | 0.29                           | 0.04 |
| Fiscal<br>arrangements | 0.25                      | 0.00                           | 0.25 |
| <b>Overall</b>         | 0.36                      | 0.23                           | 0.13 |

## MYANMAR

| Contact information |                                                                                |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |



## ANSWER SHEET – SHAN STATE

| Country | Subnational entity | Selection criteria        |
|---------|--------------------|---------------------------|
| Myanmar | Shan State         | Largest and richest state |

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     | 2     | 0 |
| Subnational constitutional autonomy | 0     | 0 |
| Legislative level                   | 1     | 3 |
| Executive level                     | 0     | 1 |
| Organization of courts              | 3     |   |

**Comment:** in terms of **self-definition**, art. 49(m) of the Constitution recognizes the Shan state as an autonomous constituent part of the system (2 points). Art. 10 of the Constitution explicitly prohibits secession of any part of the territory from the Union (0 points). In terms of **subnational constitutional autonomy**, the Shan state has no subnational constitutional autonomy (0 points). The subnational entities cannot adopt their own constitutions, even though they have drafted some constitutions, but they are not adopted (0 points). In terms of **legislative level**, the electorate of the Shan state is represented in the central law-making bodies and can initiate laws or create hurdles (1 points). The Shan state has its own assembly directly elected (3 points). In terms of **executive level**, the Shan state is not represented in the central executive and is not involved in its appointment (0 points). The Shan state has its own executive appointed by the central government and accountable to the subnational assembly (1 point). In terms of **organization of courts**, the Shan state has its own courts system, but the supreme court is organized at the central level (3 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 4     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, the Shan state has substantial powers in three of the five categories (economic purposes, political control, territorial management) (4 points). In terms of **allocation techniques**, the Shan state has mostly concurrent powers with priority given to central rule (2 points). In terms of **political federalism dispute resolution**, there is no formal political

mechanism to resolve conflicts of interest or competences (0 points). In terms of **judicial federalism dispute resolution**, the Shan state has no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 4 +1  |

**Comment:** in terms of **subnational taxes**, the Shan state has the power to set the base and/or rate of property tax, without upper or lower limitations set by the central authority (4 points). The levying of specific taxes is reserved to the Shan state, or other mechanisms are in place to protect subnational capacity to raise taxes (+1 point).

### OVERVIEW – AUTONOMY FOR SHAN STATE

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                 | 8               | 0.25        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 1 | 3 | 4                 | 15              | 0.27        |
| Executive level                     | 0 | 1 | 1                 | 12              | 0.08        |
| Organization of courts              | 3 |   | 3                 | 6               | 0.50        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.22</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 4 | 4                 | 6               | 0.67        |
| Allocation techniques        | 2 | 2                 | 6               | 0.33        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.25</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 5 | 5                    | 8               | 0.63  |

## ANSWER SHEET – WA SELF-ADMINISTERED DIVISION

| Country | Subnational entity            | Selection criteria             |
|---------|-------------------------------|--------------------------------|
| Myanmar | Wa Self-Administered Division | Largest self-administered area |

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     | 2     | 0 |
| Subnational constitutional autonomy | 0     | 0 |
| Legislative level                   | 0     | 2 |
| Executive level                     | 0     | 1 |
| Organization of courts              | 0     |   |

**Comment:** in terms of **self-definition**, art. 56(f) of the Constitution recognizes the Wa Self-Administered Division as an autonomous constituent part of the system (2 points). Art. 10 of the Constitution explicitly prohibits secession of any part of the territory from the Union (0 points). In terms of **subnational constitutional autonomy**, the Wa Self-Administered Division has no subnational constitutional autonomy (0 points) and cannot adopt its own constitution (0 points). In terms of **legislative level**, the electorate of the Wa Self-Administered Division is not directly represented in the central law-making bodies (0 points). The Wa Self-Administered Division has its own assembly indirectly elected (2 points). In terms of **executive level**, the Wa Self-Administered Division is not represented in the central executive and is not involved in its appointment (0 points). The Wa Self-Administered Division has its own executive appointed by the central government and accountable to the subnational assembly (1 point). In terms of **organization of courts**, the Wa Self-Administered Division does not have its own courts system (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 3     |
| Allocation techniques                   | 1     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, the Wa Self-Administered Division has substantial powers in two of the five categories (political control, territorial management) (3 points). In terms of **allocation techniques**, the Wa Self-Administered Division has mostly administrative or implementation powers (1 points). In terms of **political federalism dispute resolution**, there is no formal political mechanism to resolve conflicts of interest or competences (0 points). In terms of **judicial federalism dispute resolution**, the Wa Self-Administered Division has no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 0     |

**Comment:** in terms of **subnational taxes**, the Wa Self-Administered Division formally has not powers to collect taxes (0 points).

### OVERVIEW – AUTONOMY FOR WA SELF-ADMINISTERED DIVISION

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                 | 8               | 0.25        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 0 | 2 | 2                 | 15              | 0.13        |
| Executive level                     | 0 | 1 | 1                 | 12              | 0.08        |
| Organization of courts              | 0 |   | 0                 | 6               | 0.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.09</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 3 | 3                 | 6               | 0.50        |
| Allocation techniques        | 1 | 1                 | 6               | 0.17        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 0 | 0                 | 6               | 0.00        |
| <b>Total</b>                 |   |                   |                 | <b>0.17</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 0 | 0                    | 8               | 0     |

## CONSTITUTIONAL ASYMMETRY – MYANMAR

|                        | Autonomy value<br>Shan state | Autonomy value<br>Wa SAD | CA   |
|------------------------|------------------------------|--------------------------|------|
| Status                 | 0.22                         | 0.09                     | 0.13 |
| Powers                 | 0.25                         | 0.17                     | 0.08 |
| Fiscal<br>arrangements | 0.63                         | 0.00                     | 0.63 |
| <b>Overall</b>         | 0.37                         | 0.09                     | 0.28 |

## NIGERIA

| Contact information |                                                                    |
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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – LAGOS

| Country | Subnational entity | Selection criteria                                                                                                                                                         |
|---------|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Nigeria | Lagos              | <ul style="list-style-type: none"> <li>- smallest in size</li> <li>- highest population density</li> <li>- richest in terms of GPD</li> <li>- ethnically Yoruba</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 0     | 0    |
| Legislative level                   | 1     | 3 +1 |
| Executive level                     | 2     | 2 +1 |
| Organization of courts              | 3     |      |

**Comment:** in terms of **self-definition**, Nigerian states are listed in the constitution (art. 3.1 and Part I of Schedule I), recognizing the SNEs as autonomous parts of the system (3 points). Secession is not explicitly prohibited, but the constitution states that ‘Nigeria is *one indivisible and indissoluble* sovereign state’ (art. 2.1) (0 points). In terms of **subnational constitutional autonomy**, Nigerian states do not enjoy subnational constitutional autonomy (0 points) and cannot adopt their own constitutions (0 points). In terms of **legislative level**, the electorate of the states can initiate laws through their representatives in the central National Assembly (1 point). Nigerian states have their own legislative assembly directly elected (3 points), and as a rule make laws without central oversight (only *ex post*) (+1 point). In terms of **executive level**, Nigerian states are indirectly represented in the central presidency through collective subnational votes (2 points). Nigerian states have their own executive directly elected (2 points), and as a rule make laws without central oversight (only *ex post*) (+1 point). In terms of **organization of courts**, Nigerian states have their own court system, but supreme courts are organized at the central level (3 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 2     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 3     |



**Comment:** in terms of **scope of powers**, Nigerian states can make substantial powers in one of the five categories (residual category, i.e., criminal law) (2 point). In terms of **allocation techniques**, the Nigerian constitution lists extensive exclusive powers of the central level leaving few residual and concurrent powers to the states, with priority to central rule (2 points). In terms of **political federalism dispute resolution**, there are IGR bodies (Council of States, National Police Council, Economic Council) with a dominant position of the central state since only the President can convene them (2 points). In terms of **judicial federalism dispute resolution**, Nigerian states are involved in the appointment of the Nigerian Supreme Court judges through collective vote in the Senate (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score         |
|-------------------|---------------|
| Subnational Taxes | 3 +1<br>+1 +1 |

**Comment:** in terms of **subnational taxes**, Nigerian states have powers to set the base and/or rate of property taxes with upper limitations (3 points), and can introduce new taxes (+1 point), levies (+1 point), and tax reliefs (+1 point).

### OVERVIEW – AUTONOMY FOR LAGOS

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                    | 9                  | 0.00        |
| Legislative level                   | 1 | 4 | 5                    | 15                 | 0.33        |
| Executive level                     | 2 | 3 | 5                    | 12                 | 0.42        |
| Organization of courts              | 3 |   | 3                    | 6                  | 0.50        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.33</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 2 | 2                    | 6               | 0.33        |
| Allocation techniques        | 3 | 3                    | 6               | 0.50        |
| Political dispute resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                 |   |                      |                 | <b>0.43</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 6 | 6                    | 8               | 0.75  |

## ANSWER SHEET – NIGER

| Country | Subnational entity | Selection criteria                                                                                                                              |
|---------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| Nigeria | Niger              | <ul style="list-style-type: none"> <li>- largest in size</li> <li>- low population density</li> <li>- low GDP</li> <li>- multiethnic</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 0     | 0    |
| Legislative level                   | 1     | 3 +1 |
| Executive level                     | 2     | 2 +1 |
| Organization of courts              | 3     |      |

**Comment:** in terms of **self-definition**, Nigerian states are listed in the constitution (art. 3.1 and Part I of Schedule I), recognizing the SNEs as autonomous parts of the system (3 points). Secession is not explicitly prohibited, but the constitution states that ‘Nigeria is *one indivisible and indissoluble* sovereign state’ (art. 2.1) (0 points). In terms of **subnational constitutional autonomy**, Nigerian states do not enjoy subnational constitutional autonomy (0 points) and cannot adopt their own constitutions (0 points). In terms of **legislative level**, the electorate of the states can initiate laws through their representatives in the central National Assembly (1 point). Nigerian states have their own legislative assembly directly elected (3 points), and as a rule make laws without central oversight (only *ex post*) (+1 point). In terms of **executive level**, Nigerian states are indirectly represented in the central presidency through collective subnational votes (2 points). Nigerian states have their own executive directly elected (2 points), and as a rule make laws without central oversight (only *ex post*) (+1 point). In terms of **organization of courts**, Nigerian states have their own court system, but supreme courts are organized at the central level (3 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 2     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers** Nigerian states can make substantial powers in one of the five categories (residual category, i.e., criminal law) (2 point). In terms of **allocation techniques**, the Nigerian constitution lists extensive exclusive powers of the central level leaving few residual and concurrent powers to the states, with priority to central rule (2 points). In terms of **political federalism dispute resolution**, there are IGR bodies (Council of States, National Police Council, Economic Council) with a dominant position of the central state since only the president can convene them (2 points). In terms of **judicial federalism dispute resolution**, Nigerian states are involved in the appointment of the Nigerian Supreme Court judges through collective vote in the Senate (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score         |
|-------------------|---------------|
| Subnational Taxes | 3 +1<br>+1 +1 |

**Comment:** in terms of **subnational taxes**, Nigerian states have powers to set the base and/or rate of property taxes with upper limitations (3 points), and can introduce new taxes (+1 point), levies (+1 point), and tax reliefs (+1 point).

### OVERVIEW – AUTONOMY FOR NIGER

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                    | 9                  | 0.00        |
| Legislative level                   | 1 | 4 | 5                    | 15                 | 0.33        |
| Executive level                     | 2 | 3 | 5                    | 12                 | 0.42        |
| Organization of courts              | 3 |   | 3                    | 6                  | 0.50        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.33</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 2 | 2                    | 6               | 0.33        |
| Allocation techniques        | 3 | 3                    | 6               | 0.50        |
| Political dispute resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                 |   |                      |                 | <b>0.43</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 6 | 6                    | 8               | 0.75  |

## CONSTITUTIONAL ASYMMETRY – NIGERIA

|                        | Autonomy value<br>Lagos | Autonomy value<br>Niger | CA   |
|------------------------|-------------------------|-------------------------|------|
| Status                 | 0.33                    | 0.33                    | 0.00 |
| Powers                 | 0.43                    | 0.43                    | 0.00 |
| Fiscal<br>arrangements | 0.75                    | 0.75                    | 0.00 |
| <b>Overall</b>         | 0.50                    | 0.50                    | 0.00 |

## **PAKISTAN**

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| <b>Confidentiality</b>                                                                                |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – PUNJAB

| Country  | Subnational entity | Selection criteria                                                                                                            |
|----------|--------------------|-------------------------------------------------------------------------------------------------------------------------------|
| Pakistan | Punjab             | <ul style="list-style-type: none"> <li>- Province</li> <li>- Most populated SNE</li> <li>- High-medium development</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 1    |
| Subnational constitutional autonomy | 0     | 0    |
| Legislative level                   | 3     | 3 +1 |
| Executive level                     | 2     | 0 +2 |
| Organization of courts              | 3 +1  |      |

**Comment:** In terms of **self-definition**, the constitution lists the name of the provinces, recognizing them as autonomous constituent units of the system (3 points). There is no written or unwritten secession clause (1 points). In terms of **subnational constitutional autonomy**, provinces have no constitutional autonomy (0 points) and cannot adopt its own constitution (0 points). In terms of **legislative level**, given the proportional electoral system, representatives from Punjab *de facto* could alone initiate laws in the National Assembly (3 points). At the subnational level, provinces have their own directly elected assembly (3 points), which as a rule make laws with central oversight *ex post* (+1 point). In terms of **executive level**, the provinces are not directly represented in the central executive, but they are involved in its appointment through collective vote in subnational legislatures (2 points). At the subnational level, provincial governors are appointed by the President of Pakistan (0 points), and as a rule makes decision without central oversight (as they are expression of the central level) (+2 points). In terms of **organization of courts**, provinces have their own court systems, but the Supreme Court is organized at the central level (3 points), and they are represented in the Supreme Court (+1 point).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 5     |
| Political federalism dispute resolution | 3     |
| Judicial federalism dispute resolution  | 1     |

**Comment:** in terms of **scope of powers**, provinces have powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, provinces have mostly exclusive powers (5 points). In terms of **political federalism dispute resolution**, the SNEs can appeal to the Council of Common Interests and to the Supreme Court (3 points). In terms of **judicial federalism dispute resolution**, provinces are consulted on the appointment of judges (1 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 1 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, provinces have powers to set the base/rate of minor taxes (1 points), can introduce new taxes (+1 point) and levies (+1 point).

## OVERVIEW – AUTONOMY FOR PUNJAB

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 1 | 4                    | 8                  | 0.50        |
| Subnational constitutional autonomy | 0 | 0 | 0                    | 9                  | 0.00        |
| Legislative level                   | 3 | 4 | 7                    | 15                 | 0.47        |
| Executive level                     | 2 | 2 | 4                    | 12                 | 0.33        |
| Organization of courts              | 4 |   | 4                    | 6                  | 0.67        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.39</b> |

### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                    | 6               | 0.83        |
| Allocation techniques        | 5 | 5                    | 6               | 0.83        |
| Political dispute resolution | 3 | 3                    | 5               | 0.60        |
| Judicial dispute resolution  | 1 | 1                    | 6               | 0.17        |
| <b>Total</b>                 |   |                      |                 | <b>0.61</b> |



## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 3 | 3                    | 8               | 0.38  |

## ANSWER SHEET – GILGIT-BALTISTAN

| Country  | Subnational entity | Selection criteria                                                                                                                 |
|----------|--------------------|------------------------------------------------------------------------------------------------------------------------------------|
| Pakistan | Gilgit-Baltistan   | <ul style="list-style-type: none"> <li>- Autonomous region</li> <li>- Least populated</li> <li>- Low-medium development</li> </ul> |

Please, assess the scores to each category on the basis of the indicators and categories provided in the previous pages.

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 1    |
| Subnational constitutional autonomy | 0     | 0    |
| Legislative level                   | 0     | 3 +1 |
| Executive level                     | 0     | 0    |
| Organization of courts              | 0     |      |

**Comment:** In terms of **self-definition**, the Gilgit-Baltistan Empowerment and Self-Governance Order recognized the SNE as an autonomous constituent part of the territory (2 points). There is no written or unwritten secession clause (1 points). In terms of **subnational constitutional autonomy**, Gilgit-Baltistan has no constitutional autonomy (0 points) and cannot adopt its own constitution (0 points). In terms of **legislative level**, Gilgit-Baltistan is represented only in the Senate (second chamber), but the second chamber has not law-making powers (0 points). At the subnational level, the Gilgit-Baltistan has its own directly elected assembly (3 points) which as a rule make laws with central oversight *ex post* (+1 point). In terms of **executive level**, Gilgit-Baltistan is not represented in the central level executive and is not involved in its appointment (0 points). At the subnational level, the governor of Gilgit-Baltistan is appointed by the President of Pakistan (0 points). In terms of **organization of courts**, courts are organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 4     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 3     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of **scope of powers**, Gilgit-Baltistan has powers in three of the five categories (economic purposes, political control, territorial management) (4 points). In terms of **allocation techniques**, Gilgit-Baltistan has mostly concurrent powers with priority given to central rule (2 points). In terms of **political federalism dispute resolution**, the SNEs can appeal to the Council of Common Interests and to the Supreme Court (3 points). In terms of **judicial federalism dispute resolution**, Gilgit-Baltistan has no say in the appointment of judges (0 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Gilgit-Baltistan has no substantial powers to set the base/rate of taxes (0 points) but can introduce new subnational taxes (+1 point) and levies (+1 point).

### OVERVIEW – AUTONOMY FOR PUNJAB

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 1 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 0 | 0 | 0                    | 9                  | 0.00        |
| Legislative level                   | 0 | 3 | 3                    | 15                 | 0.20        |
| Executive level                     | 0 | 0 | 0                    | 12                 | 0.00        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.12</b> |

#### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 4 | 4                    | 6               | 0.67        |
| Allocation techniques        | 2 | 2                    | 6               | 0.33        |
| Political dispute resolution | 3 | 3                    | 5               | 0.60        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.40</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 2 | 2                    | 8               | 0.25  |

## CONSTITUTIONAL ASYMMETRY – PAKISTAN

|                        | Autonomy value<br>Punjab | Autonomy value<br>Gilgit-Baltistan | CA   |
|------------------------|--------------------------|------------------------------------|------|
| Status                 | 0.39                     | 0.12                               | 0.27 |
| Powers                 | 0.61                     | 0.40                               | 0.21 |
| Fiscal<br>arrangements | 0.38                     | 0.25                               | 0.13 |
| <b>Overall</b>         | 0.46                     | 0.26                               | 0.20 |

## RUSSIA

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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – REPUBLIC OF TATARSTAN

| Country | Subnational entity    | Selection criteria                                                                                                         |
|---------|-----------------------|----------------------------------------------------------------------------------------------------------------------------|
| Russia  | Republic of Tatarstan | <ul style="list-style-type: none"> <li>- Republic</li> <li>- National principle</li> <li>- Distinctive identity</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 4     | 4    |
| Legislative level                   | 1 +1  | 3 +1 |
| Executive level                     | 0     | 2 +1 |
| Organization of courts              | 0     |      |

**Comment:** in terms of **self-definition**, the Russian Constitution (art. 65) lists the names of the subnational entities (SNEs) (3 points). Although not explicitly prohibited, it could be argued that secession is implicitly prohibited, as art. 4(3) of the Constitution states that “The Russian Federation shall ensure the *integrity* and *inviolability* of its territory” (0 points). In terms of **subnational constitutional autonomy**, republics can make substantial arrangements in some of the four categories (identity clauses, representative structures and organization of public authority, fundamental rights) (4 points) and can adopt their own constitution without central interference (4 points). In terms of **legislative level**, Russian SNEs are represented on a SNE-basis in the Federal Council, while on a nation-wide basis in the State Duma, where their representatives can initiate laws (1 point). SNEs must be consulted in matters that fall within shared competences (+1 point). SNEs have their own directly elected assembly (3 points), which as a rule makes laws without central interference but with potential oversight *ex post* in case of conflict with federal legislation (+1 point). In terms of **executive level**, SNEs are not represented in the central executive (0 points) and have their own directly or indirectly elected executive (2 points), which as a rule makes decisions without central interference but with potential oversight *ex post* in case of conflict with federal executive decisions (+1 point). In terms of **organization of courts**, the Russian judicial system is organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 3     |
| Political federalism dispute resolution | 0     |

|                                        |   |
|----------------------------------------|---|
| Judicial federalism dispute resolution | 3 |
|----------------------------------------|---|

**Comment:** in terms of **scope of powers**, Russian SNEs have substantial powers in all the five categories (economic purposes, political control, multinational conflict management, territorial management, and residual category) (6 points). In terms of **allocation techniques**, Russian SNEs have mostly concurrent powers with priority given to central rule in case of inconsistency with federal law (3 points). In terms of **political federalism dispute resolution**, currently the State Council is merely a consultative body for the federal government (0 points) but may later develop as a body for intergovernmental relations and political dispute resolution. In terms of **judicial federalism dispute resolution**, SNEs are involved in the appointments of top-ranking courts (Russian Constitutional Court and Supreme Court) through collective vote in the Federation Council (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 2 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, SNEs can set the base and/or rate of minor taxes only without upper limitations set by the central government (2 points), they can introduce new taxes (+1 point) and levies (+1 point).

### OVERVIEW – AUTONOMY FOR TATARSTAN

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 4 | 4 | 8                    | 9                  | 0.89        |
| Legislative level                   | 2 | 4 | 6                    | 15                 | 0.40        |
| Executive level                     | 0 | 3 | 3                    | 12                 | 0.25        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.38</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 6 | 6                    | 6               | 1.00        |
| Allocation techniques           | 3 | 3                    | 6               | 0.50        |
| Political dispute<br>resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute<br>resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                    |   |                      |                 | <b>0.50</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 4 | 4                    | 8               | <b>0.50</b> |



## ANSWER SHEET – JEWISH AUTONOMOUS OBLAST

| Country | Subnational entity       | Selection criteria                                                                                          |
|---------|--------------------------|-------------------------------------------------------------------------------------------------------------|
| Russia  | Jewish autonomous oblast | <ul style="list-style-type: none"> <li>- Only autonomous oblast</li> <li>- Territorial principle</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 3     | 0    |
| Subnational constitutional autonomy | 4     | 4    |
| Legislative level                   | 1 +1  | 3 +1 |
| Executive level                     | 0     | 2 +1 |
| Organization of courts              | 0     |      |

**Comment:** in terms of **self-definition**, the Russian Constitution (art. 65) lists the names of the subnational entities (SNEs) (3 points). Although not explicitly prohibited, it could be argued that secession is implicitly prohibited, as art. 4(3) of the Constitution states that “The Russian Federation shall ensure the *integrity* and *inviolability* of its territory” (0 points). In terms of **subnational constitutional autonomy**, Russian SNEs also other than republics can make substantial arrangements in some of the four categories (identity clauses, representative structures and organization of public authority, fundamental rights) (4 points) and can adopt their own charter without central interference (4 points). In terms of **legislative level**, Russian SNEs are represented on a SNE basis in the Federal Council, while on a nation-wide basis in the State Duma, where their representatives can initiate laws (1 point). SNEs must be consulted in matters that fall within shared competences (+1 point). SNEs have their own directly elected assembly (3 points), which as a rule makes laws without central interference but with potential oversight *ex post* in case of conflict with federal legislation (+ 1 point). In terms of **executive level**, SNEs are not represented in the central executive (0 points) and have their own directly or indirectly elected executive (2 points), which as a rule makes decisions without central interference but with potential oversight *ex post* in case of conflict with federal executive decisions (+1 point). In terms of **organization of courts**, the Russian judicial system is organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 3     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers**, Russian SNEs have substantial powers in all the five categories (economic purposes, political control, multinational conflict management, territorial management, and residual category) (6 points). In terms of **allocation techniques**, Russian SNEs have mostly concurrent powers with priority given to central rule in case of inconsistency with federal law (3 points). In terms of **political federalism dispute resolution**, currently the State Council is merely a consultative body for the federal government (0 points) but may later develop as a body for intergovernmental relations and political dispute resolution. In terms of **judicial federalism dispute resolution**, SNEs are involved in the appointments of top-ranking courts through collective vote in the Federation Council (3 points).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 2 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, SNEs can set the base and/or rate of minor taxes only without upper limitations set by the central government (2 points), they can introduce new taxes (+1 point) and levies (+1 point).

### OVERVIEW – AUTONOMY FOR JEWISH OBLAST

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 0 | 3                    | 8                  | 0.38        |
| Subnational constitutional autonomy | 4 | 4 | 8                    | 9                  | 0.89        |
| Legislative level                   | 2 | 4 | 6                    | 15                 | 0.40        |
| Executive level                     | 0 | 3 | 3                    | 12                 | 0.25        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.38</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 6 | 6                    | 6               | 1.00        |
| Allocation techniques           | 3 | 3                    | 6               | 0.50        |
| Political dispute<br>resolution | 0 | 0                    | 5               | 0.00        |
| Judicial dispute<br>resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                    |   |                      |                 | <b>0.50</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 4 | 4                    | 8               | <b>0.50</b> |

## CONSTITUTIONAL ASYMMETRY – RUSSIA

|                        | Autonomy value<br>Tatastan | Autonomy value<br>Jewish Oblast | CA          |
|------------------------|----------------------------|---------------------------------|-------------|
| Status                 | 0.38                       | 0.38                            | <b>0.00</b> |
| Powers                 | 0.50                       | 0.50                            | <b>0.00</b> |
| Fiscal<br>arrangements | 0.50                       | 0.50                            | <b>0.00</b> |
| <b>Overall</b>         | 0.46                       | 0.46                            | <b>0.00</b> |

## SOUTH AFRICA

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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – GAUTENG

| Country      | Subnational entity | Selection criteria                                                                              |
|--------------|--------------------|-------------------------------------------------------------------------------------------------|
| South Africa | Gauteng            | <ul style="list-style-type: none"> <li>- Smallest province</li> <li>- Most populated</li> </ul> |

### PART 1: STATUS

| Category                            | score |            |
|-------------------------------------|-------|------------|
|                                     | A     | B          |
| Self-definition                     | 3     | 2          |
| Subnational constitutional autonomy | 3     | 3          |
| Legislative level                   | 5 +1  | 3 +1<br>+1 |
| Executive level                     | 0 +1  | 2 +1       |
| Organization of courts              | 0     |            |

**Comment:** in terms of **self-definition**, the constitution lists the names of the nine provinces (section 103), identifying them as autonomous parts of the system (3 points). Secession is not explicitly mentioned, but section 1 of the constitution states that “The Republic of South Africa is *one*, sovereign, democratic state”. However, section 235 allows for self-determination through national legislation, therefore 2 points were deemed more appropriate by the national expert. In terms of **subnational constitutional autonomy**, provinces have substantial constitutional autonomy in one of the four categories, i.e., representative structures and the organization of public authority (3 points). Provinces can adopt their own constitution without central interference according to a procedure designed by the central constitution (3 points). In terms of **legislative level**, the provinces can veto laws through two-thirds majority in the National Council of Provinces (see section 74.8) (5 points), and provinces are consulted in matters that affect their interested in the National Council of Provinces (+1 point). At the subnational level, provinces have their own directly elected assembly (3 points), which as a rule makes with potential central oversight *ex post* (+1 point) and cannot be dissolved by the central body (+1 point). In terms of **executive level**, provinces are not directly represented in the central executive and are not involved in the appointment (0 points). Provinces are consulted in matters that affect their interested in the National Council of Provinces (+1 point). At the subnational level, provinces have their own executive, appointed by the provincial legislature (2 points), which makes decisions with potential central oversight *ex post* (see section 100) (+1 point). In terms of **organization of courts**, courts are organized at the central level (0 points).

## PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 3     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers**, provinces have substantial powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, provinces have mostly concurrent powers with priority given to central rule with qualified override (3 points). In terms of **political federalism dispute resolution**, the constitution establishes the Mediation Committee in case of intergovernmental disputes (2 points). In terms of **judicial federalism dispute resolution**, the electorate of the provinces is involved in the appointment of judges through collective vote in the Judicial Service Commission (3 points).

## PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 1 +1<br>+1 |

**Comment:** in terms of subnational taxes, provinces only have limited powers to set base/rate of minor taxes with upper limitations and constraints from the central governments, it all depends on national legislation (1 points) and can introduce new taxes (+1 point) and levies in their areas of competences (+1 point).

## OVERVIEW – AUTONOMY FOR GAUTENG

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 2 | 5                    | 8                  | 0.63        |
| Subnational constitutional autonomy | 3 | 3 | 6                    | 9                  | 0.67        |
| Legislative level                   | 6 | 5 | 11                   | 15                 | 0.73        |
| Executive level                     | 1 | 3 | 4                    | 12                 | 0.33        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.47</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 5 | 5                    | 6               | 0.83        |
| Allocation techniques           | 3 | 3                    | 6               | 0.50        |
| Political dispute<br>resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute<br>resolution  | 3 | 3                    | 6               | 0.50        |
| <b>Total</b>                    |   |                      |                 | <b>0.56</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 3 | 3                    | 8               | <b>0.38</b> |

## ANSWER SHEET – NORTHERN CAPE

| Country      | Subnational entity | Selection criteria                                                                              |
|--------------|--------------------|-------------------------------------------------------------------------------------------------|
| South Africa | Northern Cape      | <ul style="list-style-type: none"> <li>- Biggest province</li> <li>- least populated</li> </ul> |

### PART 1: STATUS

| Category                            | score |            |
|-------------------------------------|-------|------------|
|                                     | A     | B          |
| Self-definition                     | 3     | 2          |
| Subnational constitutional autonomy | 3     | 3          |
| Legislative level                   | 5 +1  | 3 +1<br>+1 |
| Executive level                     | 0 +1  | 2 +1       |
| Organization of courts              | 0     |            |

**Comment:** in terms of **self-definition**, the constitution lists the names of the nine provinces (section 103), identifying them as autonomous parts of the system (3 points). Secession is not explicitly mentioned, but section 1 of the constitution states that “The Republic of South Africa is *one*, sovereign, democratic state”. However, section 235 allows for self-determination through national legislation, therefore 2 points were deemed more appropriate by the national expert. In terms of **subnational constitutional autonomy**, provinces have substantial constitutional autonomy in one of the four categories, i.e., representative structures and the organization of public authority (3 points). Provinces can adopt their own constitution without central interference according to a procedure designed by the central constitution (3 points). In terms of **legislative level**, the provinces can veto laws through two-thirds majority in the National Council of Provinces (see section 74.8) (5 points), and provinces are consulted in matters that affect their interested in the National Council of Provinces (+1 point). At the subnational level, provinces have their own directly elected assembly (3 points), which as a rule makes with potential central oversight *ex post* (+1 point) and cannot be dissolved by the central body (+1 point). In terms of **executive level**, provinces are not directly represented in the central executive and are not involved in the appointment (0 points). Provinces are consulted in matters that affect their interested in the National Council of Provinces (+1 point). At the subnational level, provinces have their own executive, appointed by the provincial legislature (2 points), which makes decisions with potential central oversight *ex post* (see section 100) (+1 point). In terms of **organization of courts**, courts are organized at the central level (0 points).



## PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 5     |
| Allocation techniques                   | 3     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 3     |

**Comment:** in terms of **scope of powers**, provinces have substantial powers in four of the five categories (economic purposes, political control, multinational conflict management, territorial management) (5 points). In terms of **allocation techniques**, provinces have mostly concurrent powers with priority given to central rule with qualified override (3 points). In terms of **political federalism dispute resolution**, the constitution establishes the Mediation Committee in case of intergovernmental disputes (2 points). In terms of **judicial federalism dispute resolution**, the electorate of the provinces is involved in the appointment of judges through collective vote in the Judicial Service Commission (3 points).

## PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 1 +1<br>+1 |

**Comment:** in terms of subnational taxes, provinces only have limited powers to set base/rate of minor taxes with upper limitations and constraints from the central governments, it all depends on national legislation (1 points) and can introduce new taxes (+1 point) and levies in their areas of competences (+1 point).

## OVERVIEW – AUTONOMY FOR NORTHERN CAPE

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 3 | 2 | 5                    | 8                  | 0.63        |
| Subnational constitutional autonomy | 3 | 3 | 6                    | 9                  | 0.67        |
| Legislative level                   | 6 | 5 | 11                   | 15                 | 0.73        |
| Executive level                     | 1 | 3 | 4                    | 12                 | 0.33        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.47</b> |

## POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 5 | 5                 | 6               | 0.83        |
| Allocation techniques        | 3 | 3                 | 6               | 0.50        |
| Political dispute resolution | 2 | 2                 | 5               | 0.40        |
| Judicial dispute resolution  | 3 | 3                 | 6               | 0.50        |
| <b>Total</b>                 |   |                   |                 | <b>0.56</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted) Total | (Converted) Max | Value       |
|-------------------|---|-------------------|-----------------|-------------|
| Subnational taxes | 3 | 3                 | 8               | <b>0.38</b> |

## CONSTITUTIONAL ASYMMETRY – SOUTH AFRICA

|                     | Autonomy value Gauteng | Autonomy value Northern Cape | CA          |
|---------------------|------------------------|------------------------------|-------------|
| Status              | 0.47                   | 0.47                         | <b>0.00</b> |
| Powers              | 0.56                   | 0.56                         | <b>0.00</b> |
| Fiscal arrangements | 0.38                   | 0.38                         | <b>0.00</b> |
| <b>Overall</b>      | 0.47                   | 0.47                         | <b>0.00</b> |

## SPAIN

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| Confidentiality                                                                                       |                                     |
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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – BASQUE COUNTRY

| Country | Subnational entity | Selection criteria                                                                                                                                                                                                    |
|---------|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Spain   | Basque Country     | <ul style="list-style-type: none"> <li>- One of smallest SNEs in terms of population and territorial size</li> <li>- one of SNEs with highest GDP per capita</li> <li>- SNE enjoying special fiscal regime</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 0    |
| Subnational constitutional autonomy | 3     | 1    |
| Legislative level                   | 0     | 3 +1 |
| Executive level                     | 0     | 2 +2 |
| Organization of courts              | 0     |      |

**Comment:** in terms of **self-definition**, art. 2 of the Spanish constitution establishes the right to self-government, and art. 143 provides the procedure to establish an autonomous community. Nonetheless, it should be noted that the Spanish constitution does not list the autonomous communities, and their identification and recognition are left to state legislation (somewhat agreed with the territory in question) (2 points). Secession is *de facto* prohibited since it is extremely difficult to secede by amending the constitution ex art. 168 Const. (which is considered a procedural eternity clause), even though there is no explicit prohibition (0 point). In terms of **subnational constitutional autonomy**, the Basque Country can make substantial arrangements in one of the four categories (representative structures and the organization of public authority) (3 points). Concerning the procedure, the autonomy statute of the Basque Country is a basic law enacted by the Spanish Parliament, under the initiative by the regional assembly, and the central government can refer it to the Spanish Constitutional Court for a legality test (1 points). In terms of **legislative level**, art. 69.1 of the Spanish constitution provides that the Senate (second chamber of the Spanish parliament) “is the chamber of territorial representation”, however *de facto* the Senate is does neither prioritize nor represents regional interests. Therefore, the autonomous communities as such do not have a voice in central law-making procedures since they cannot initiate laws or create hurdles (0 points). The Basque Country has its own assembly directly elected (3 points). Moreover, the Basque assembly makes laws without prior central oversight, but with central oversight *ex post* (+1 point). In terms of **executive level**, there are no legal requirement for the Basque country to be represented in the central executive and it is not involved in its appointment (0 point). However, it should be reminded that the Basque political parties often support central minority executives. The Basque Country has its own executive indirectly elected among the members of the subnational assembly (2 points). Moreover, the subnational executive makes decisions without central oversight (+2 points). In terms of **organization of courts**, the Spanish judicial system is centralized (0 points). Even though the Basque Country has a quasi-judicial body (the Arbitral Commission) having jurisdiction over the disputes on the allocation of powers between the

Autonomous Community and the so-called Historical Territories, and among Historical Territories, it is not enough to argue that the Basque Country has its own court system. Moreover, even though it is a constitutional practice that the Basque Country is present in the Spanish Constitutional Court with one Basque judge, the Basque Country is less often present than Catalonia (thus no additional points).

## PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of the **scope of powers**, art. 10 of the Basque statute of autonomy provides that the Basque Country has sole jurisdiction in all five categories (economic purposes, political control, multinational conflict management, territorial management, and the residual category) (6 points). In terms of **allocation techniques**, the Basque Country has mostly shared competences, with priority given to central rule (2 points). In terms **political federalism dispute resolution**, in case of disputes, before going before the Constitutional Court, a Bilateral Commission is initiated in order to reach an agreement, and the central government has the upper hand if no agreement is reached (2 points). In terms of **judicial federalism dispute resolution**, the Basque Country has no direct say in the appointment of the judges of Constitutional Court (0 points).

## PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 4 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, the Basque Country enjoys significant fiscal autonomy through a special regime that only the autonomous community of Navarre also has. The Basque statute of autonomy provides that the autonomous community has the power to set the base and/or rate of at least one major tax (personal and corporate income), without upper or lower limitations or other constraints set by the central authority (4 points). Moreover, the SNE has the power to introduce new taxes (+1 point), and the levying of specific taxes is reserved to the SNE (+1 point).

## OVERVIEW – AUTONOMY FOR THE BASQUE COUNTRY

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                    | 8                  | 0.25        |
| Subnational constitutional autonomy | 3 | 1 | 4                    | 9                  | 0.44        |
| Legislative level                   | 0 | 4 | 4                    | 15                 | 0.27        |
| Executive level                     | 0 | 4 | 4                    | 12                 | 0.33        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.26</b> |

### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 6 | 6                    | 6               | 1.00        |
| Allocation techniques        | 2 | 2                    | 6               | 0.33        |
| Political dispute resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.43</b> |

### FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted)<br>Max | Value       |
|-------------------|---|----------------------|--------------------|-------------|
| Subnational taxes | 6 | 6                    | 8                  | <b>0.75</b> |

## ANSWER SHEET – ANDALUSIA

| Country | Subnational entity | Selection criteria                                                                                                                                                            |
|---------|--------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Spain   | Andalusia          | <ul style="list-style-type: none"> <li>- One of the largest SNEs in terms of population and territorial size</li> <li>- One of SNEs with the lowest GDP per capita</li> </ul> |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 0    |
| Subnational constitutional autonomy | 3     | 1    |
| Legislative level                   | 0     | 3 +1 |
| Executive level                     | 0     | 2 +2 |
| Organization of courts              | 0     |      |

**Comment:** in terms of **self-definition**, art. 2 of the Spanish constitution establishes the right to self-government, and art. 143 provides the procedure to establish an autonomous community. Nonetheless, it should be noted that the Spanish constitution does not list the autonomous communities, and their identification and recognition are left to state legislation (somewhat agreed with the territory in question) (2 points). Secession is *de facto* prohibited since it is extremely difficult to secede by amending the constitution ex art. 168 Const. (which is considered a procedural eternity clause), even though there is no explicit prohibition (0 point). In terms of **subnational constitutional autonomy**, Andalusia can make substantial arrangements in one of the four categories (representative structures and the organization of public authority) (3 points). Concerning the procedure, the autonomy statute of Andalusia is a basic law enacted by the Spanish Parliament, under the initiative by the regional assembly, and the central government can refer it to the Spanish Constitutional Court for a legality test (1 points). In terms of **legislative level**, art. 69.1 of the Spanish constitution provides that the Senate (second chamber of the Spanish parliament) “is the chamber of territorial representation”, however the Senate is does neither prioritize nor represents regional interests. Therefore, *de facto* the autonomous communities do not have a voice in central law-making procedures since they cannot initiate laws or create hurdles (0 points). Andalusia has its own assembly directly elected (3 points). Moreover, the Andalusian assembly makes laws without prior central oversight, but with central oversight *ex post* (+1 point). In terms of **executive level**, there are no legal requirement for Andalusia to be represented in the central executive and it is not involved in its appointment (0 point). Andalusia has its own executive indirectly elected among the members of the subnational assembly (2 points). Moreover, the subnational executive makes decisions without central oversight (+2 points). In terms of **organization of courts**, the Spanish judicial system is centralized (0 points).

## PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 2     |
| Political federalism dispute resolution | 2     |
| Judicial federalism dispute resolution  | 0     |

**Comment:** in terms of the **scope of powers**, chapter II of the Andalusian statute of autonomy provides that Andalusia may assume competences in all five categories (economic purposes, political control, multinational conflict management, territorial management, and the residual category) (6 points). In terms of **allocation techniques**, Andalusia has mostly shared competences, with priority given to central rule (2 points). In terms **political federalism dispute resolution**, in case of disputes, before going before the Constitutional Court, a Bilateral Commission is initiated in order to reach an agreement, and the central government has the upper hand if no agreement is reached (2 points). In terms of **judicial federalism dispute resolution**, the Basque Country has no direct say in the appointment of the judges of Constitutional Court (0 points).

## PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Andalusia falls within the common regime of fiscal autonomy, and has no power to set the base/rate of taxes (0 points) but only to slightly change it. Moreover, the Andalusian statute of autonomy has the power to introduce new taxes (+1 point), and the levying of minor taxes is reserved to the subnational entity (+1 point).



## OVERVIEW – AUTONOMY FOR ANDALUSIA

### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 0 | 2                    | 8                  | 0.25        |
| Subnational constitutional autonomy | 3 | 1 | 4                    | 9                  | 0.44        |
| Legislative level                   | 0 | 4 | 4                    | 15                 | 0.27        |
| Executive level                     | 0 | 4 | 4                    | 12                 | 0.33        |
| Organization of courts              | 0 |   | 0                    | 6                  | 0.00        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.26</b> |

### POWERS

| Topic                        | A | (Converted)<br>total | (Converted) max | Value       |
|------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers              | 6 | 6                    | 6               | 1.00        |
| Allocation techniques        | 2 | 2                    | 6               | 0.33        |
| Political dispute resolution | 2 | 2                    | 5               | 0.40        |
| Judicial dispute resolution  | 0 | 0                    | 6               | 0.00        |
| <b>Total</b>                 |   |                      |                 | <b>0.43</b> |

### FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted)<br>Max | Value       |
|-------------------|---|----------------------|--------------------|-------------|
| Subnational taxes | 2 | 2                    | 8                  | <b>0.25</b> |

## CONSTITUTIONAL ASYMMETRY – SPAIN

|                        | Autonomy value<br>Basque Country | Autonomy value<br>Andalusia | CA          |
|------------------------|----------------------------------|-----------------------------|-------------|
| Status                 | 0.26                             | 0.26                        | <b>0.00</b> |
| Powers                 | 0.43                             | 0.43                        | <b>0.00</b> |
| Fiscal<br>arrangements | 0.75                             | 0.25                        | <b>0.50</b> |
| <b>Overall</b>         | 0.48                             | 0.31                        | <b>0.17</b> |

## THE UNITED KINGDOM

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| I would like to remain anonymous.                                                                     | <input type="checkbox"/>            |

## ANSWER SHEET – NORTHERN IRELAND

| Country        | Subnational entity | Selection criteria           |
|----------------|--------------------|------------------------------|
| United Kingdom | Northern Ireland   | Highest degree of devolution |

### PART 1: STATUS

| Category                            | score |      |
|-------------------------------------|-------|------|
|                                     | A     | B    |
| Self-definition                     | 2     | 2    |
| Subnational constitutional autonomy | 4     | 3    |
| Legislative level                   | 1 +1  | 3 +2 |
| Executive level                     | 0     | 2 +2 |
| Organization of courts              | 3 +1  |      |

**Comment:** in terms of **self-definition**, Northern Ireland is recognized as an autonomous part of the constitutional system by the Northern Ireland Act 1998 (2 points). Concerning secession, the Belfast/Good Friday Agreement provides that Northern Ireland can decide on its constitutional status, i.e., it can decide for a reunification with Ireland by holding a referendum (2 points). In terms of **subnational autonomy**, the Northern Irish Assembly adopted a series of legislation on constitutional issues (fundamental rights, political organization, identity issues), that can be regarded as a subnational constitution (4 points). The procedure to adopt such legislation is designed at the central level and it is enacted without central interference (3 points). In terms of **legislative level**, the Northern Irish electorate is represented in the central parliament, and the MPs have the power to initiate laws (1 point). The central government has to consult NI Assembly in matters of its competence (+1 points). Northern Ireland has its own directly elected assembly (3 points), which as a rule makes laws without prior central oversight (+2 points). In terms of **executive level**, Northern Ireland is not represented in the central executive or directly involved in its appointment (0 points). It has its own executive appointed by the Northern Ireland Assembly (2 points), and it as a rule makes decision without prior central oversight (+2 points). In terms of **organization of courts**, Northern Ireland has its own court system, but the Supreme Court is organized at the central level (3 points), and Northern Ireland by custom and practice is represented in the UK Supreme Court with one judge (+1 point).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 6     |
| Allocation techniques                   | 5 +1  |
| Political federalism dispute resolution | 1     |
| Judicial federalism dispute resolution  | 1 +1  |

**Comment:** in terms of **scope of powers**, Northern Ireland has substantial powers in all five categories (economic purposes, political control, multinational conflict management, territorial management, and residual category) (6 points). In terms of **allocation techniques**, Northern Ireland has mostly exclusive powers (5 points). An additional point was added because there is no central oversight (+1 point). In terms of **political federalism dispute resolution**, Northern Ireland is heard if a procedure is initiated against its actions but is not otherwise involved in federalism disputes (1 point). In terms of **judicial federalism dispute resolution**, Northern Ireland is consulted on the appointment of the judges through the Judicial Appointments Commission in Northern Ireland, whose members are appointed by the First and Deputy First Ministers of Northern Ireland (1 point). In cases that affect Northern Ireland, the court gives its decisions in a chamber with a judge that is, in terms of geography or identity markers, representative of Northern Ireland (+1 point).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score      |
|-------------------|------------|
| Subnational Taxes | 0 +1<br>+1 |

**Comment:** in terms of **subnational taxes**, Northern Ireland has no power to set the base/rate of taxes (0 points) but can introduce new taxes (+1 point) and tax reliefs (+1 points).

### OVERVIEW – AUTONOMY FOR NORTHERN IRELAND

#### STATUS

| Category                            | A | B | (Converted)<br>total | (Converted)<br>max | Value       |
|-------------------------------------|---|---|----------------------|--------------------|-------------|
| Constitutional self-identification  | 2 | 2 | 4                    | 8                  | 0.50        |
| Subnational constitutional autonomy | 4 | 3 | 7                    | 9                  | 0.78        |
| Legislative level                   | 2 | 5 | 7                    | 15                 | 0.47        |
| Executive level                     | 0 | 4 | 4                    | 12                 | 0.33        |
| Organization of courts              | 4 |   | 4                    | 6                  | 0.67        |
| <b>Total</b>                        |   |   |                      |                    | <b>0.55</b> |

## POWERS

| Topic                           | A | (Converted)<br>total | (Converted) max | Value       |
|---------------------------------|---|----------------------|-----------------|-------------|
| Scope of powers                 | 6 | 6                    | 6               | 1.00        |
| Allocation techniques           | 6 | 6                    | 6               | 1.00        |
| Political dispute<br>resolution | 1 | 1                    | 5               | 0.20        |
| Judicial dispute<br>resolution  | 2 | 2                    | 6               | 0.33        |
| <b>Total</b>                    |   |                      |                 | <b>0.63</b> |

## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value       |
|-------------------|---|----------------------|-----------------|-------------|
| Subnational taxes | 2 | 2                    | 8               | <b>0.25</b> |

## ANSWER SHEET – ENGLAND<sup>594</sup>

| Country        | Subnational entity | Selection criteria                                              |
|----------------|--------------------|-----------------------------------------------------------------|
| United Kingdom | England            | No devolution as regional tier of government (only local tiers) |

### PART 1: STATUS

| Category                            | score |   |
|-------------------------------------|-------|---|
|                                     | A     | B |
| Self-definition                     | 0     | 1 |
| Subnational constitutional autonomy | 0     | 0 |
| Legislative level                   | 1     | 0 |
| Executive level                     | 0     | 0 |
| Organization of courts              | 0     |   |

**Comment:** in terms of **self-definition**, England is recognized as a constituent part of the constitutional system (2 points). Concerning secession, there is no written or unwritten secession clause (1 point). In terms of **subnational constitutional autonomy**, England has no substantial constitutional autonomy (0 points) and cannot adopt its own legislation on constitutional issues (0 points). In terms of **legislative level**, English electorate is represented in the central law-making bodies and can initiate laws (1 point). At the subnational level, England does not have a regional assembly (0 points). In terms of **executive level**, England is not represented in the central executive as a SNE and is not involved in its appointment (0 points). At the subnational level, England does not have its own executive, being governed directly by the central government (0 points). In terms of **organization of courts**, courts are organized at the central level (0 points).

### PART 2: POWERS

| Category                                | score |
|-----------------------------------------|-------|
| Scope of powers                         | 0     |
| Allocation techniques                   | 0     |
| Political federalism dispute resolution | 0     |
| Judicial federalism dispute resolution  | 1     |

**Comment:** in terms of **scope of powers**, England as a SNE has no substantial powers in any of the categories, as it is governed by the central government (0 points). In terms of **allocation techniques**, England has mostly administrative or implementation powers (0 points). In terms of

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<sup>594</sup> It should be noted that, differently to the scores I assigned, the national expert considered the English Parliament and government to be located in the UK Parliament and government. The reasons why I distanced the research from this perception of England have already been explained in chapter 5.1.1 (see p. 155).

**political federalism dispute resolution**, it does not exist a political mechanism of dispute resolution for England (0 points). In terms of **judicial federalism dispute resolution**, England is consulted on the appointment of the judges through the Judicial Appointments Commission for England and Wales and the First Minister of Wales (1 point).

### PART 3: FISCAL ARRANGEMENTS

| Category          | score |
|-------------------|-------|
| Subnational Taxes | 0     |

**Comment:** in terms of **subnational taxes**, England has not the power to set the base and/or rate of taxes (0 points).

### OVERVIEW – AUTONOMY FOR ENGLAND

#### STATUS

| Category                            | A | B | (Converted) total | (Converted) max | Value       |
|-------------------------------------|---|---|-------------------|-----------------|-------------|
| Constitutional self-identification  | 0 | 1 | 1                 | 8               | 0.13        |
| Subnational constitutional autonomy | 0 | 0 | 0                 | 9               | 0.00        |
| Legislative level                   | 1 | 0 | 1                 | 15              | 0.07        |
| Executive level                     | 0 | 0 | 0                 | 12              | 0.00        |
| Organization of courts              | 0 |   | 0                 | 6               | 0.00        |
| <b>Total</b>                        |   |   |                   |                 | <b>0.04</b> |

#### POWERS

| Topic                        | A | (Converted) total | (Converted) max | Value       |
|------------------------------|---|-------------------|-----------------|-------------|
| Scope of powers              | 0 | 0                 | 6               | 0.00        |
| Allocation techniques        | 0 | 0                 | 6               | 0.00        |
| Political dispute resolution | 0 | 0                 | 5               | 0.00        |
| Judicial dispute resolution  | 1 | 1                 | 6               | 0.17        |
| <b>Total</b>                 |   |                   |                 | <b>0.04</b> |



## FISCAL ARRANGEMENTS

| Topic             | A | (Converted)<br>Total | (Converted) Max | Value |
|-------------------|---|----------------------|-----------------|-------|
| Subnational taxes | 0 | 0                    | 8               | 0     |

## CONSTITUTIONAL ASYMMETRY – UNITED KINGDOM

|                        | Autonomy value<br>Northern Ireland | Autonomy<br>value England | CA   |
|------------------------|------------------------------------|---------------------------|------|
| Status                 | 0.55                               | 0.04                      | 0.51 |
| Powers                 | 0.63                               | 0.04                      | 0.59 |
| Fiscal<br>arrangements | 0.25                               | 0.00                      | 0.25 |
| <b>Overall</b>         | 0.48                               | 0.03                      | 0.45 |

*Appendix 4: Data matrix*

Data matrix resulting from the calibration of the conditions and outcome

| COUNTRY      | CONDITIONS   |             |             |               |             | OUTCOME |
|--------------|--------------|-------------|-------------|---------------|-------------|---------|
|              | DISTRIBUTION | RECOGNITION | HOMOGENEITY | INTERNATIONAL | SUBNATIONAL | HIGH_CA |
| Belgium      | 0.67         | 1           | 1           | 0             | 1           | 0.67    |
| BiH          | 0.33         | 1           | 0.33        | 1             | 0           | 0.33    |
| Canada       | 0.33         | 0.33        | 0.67        | 0             | 1           | 0.33    |
| Ethiopia     | 0            | 0           | 0.67        | 0             | 1           | 0.00    |
| India        | 0.67         | 1           | 0           | 0             | 1           | 1.00    |
| Indonesia    | 0.67         | 0.33        | 0.33        | 0             | 1           | 0.33    |
| Iraq         | 1            | 1           | 1           | 1             | 1           | 1.00    |
| Italy        | 0.67         | 1           | 0.67        | 0             | 0           | 0.67    |
| Malaysia     | 0.67         | 1           | 0.33        | 1             | 1           | 0.33    |
| Myanmar      | 0.67         | 0.33        | 0.33        | 0             | 0           | 1.00    |
| Nigeria      | 0            | 0           | 0           | 0             | 1           | 0.00    |
| Pakistan     | 1            | 0.33        | 0           | 0             | 1           | 0.67    |
| Russia       | 0            | 0           | 0           | 0             | 1           | 0.00    |
| South Africa | 0            | 0           | 0           | 0             | 1           | 0.00    |
| Spain        | 0.33         | 0.67        | 0.67        | 0             | 1           | 0.67    |
| UK           | 1            | 0.33        | 0.67        | 0             | 0           | 1.00    |

Appendix 5: Solution formulas

Solution formulas for the outcome HIGH\_CA

*Conservative solution*

|                                                             | inclS | PRI   | covS  | covU  | cases          |
|-------------------------------------------------------------|-------|-------|-------|-------|----------------|
| DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL* ~ SUBNATIONAL | 1     | 1     | 0.167 | 0.042 | Myanmar; UK    |
| DISTRIBUTION* RECOGNITION* HOMOGENEITY* ~ INTERNATIONAL     | 1     | 1     | 0.374 | 0     | Italy; Belgium |
| DISTRIBUTION* RECOGNITION* HOMOGENEITY* SUBNATIONAL         | 1     | 1     | 0.374 | 0.166 | Belgium; Iraq  |
| DISTRIBUTION* RECOGNITION* ~ INTERNATIONAL* SUBNATIONAL     | 1     | 1     | 0.332 | 0.125 | India; Belgium |
| RECOGNITION* HOMOGENEITY* ~ INTERNATIONAL* SUBNATIONAL      | 0.858 | 0.673 | 0.250 | 0.042 | Spain; Belgium |
| Solution                                                    | 0.951 | 0.924 | 0.792 |       |                |

*Most parsimonious solution*

|                              | inclS | PRI   | covS  | covU  | cases                        |
|------------------------------|-------|-------|-------|-------|------------------------------|
| DISTRIBUTION* HOMOGENEITY    | 1     | 1     | 0.624 | 0     | UK; Italy; Belgium; Iraq     |
| DISTRIBUTION* ~ SUBNATIONAL  | 1     | 1     | 0.334 | 0     | Myanmar; UK; Italy           |
| RECOGNITION* ~ INTERNATIONAL | 0.876 | 0.802 | 0.583 | 0.166 | Spain; India; Italy; Belgium |
| Solution                     | 0.921 | 0.884 | 0.958 |       |                              |

### *Intermediate solution*

#### **Directional expectations (1, 1, 1, 0, 0)**

| =====                                        |       |       |       |       |                       |
|----------------------------------------------|-------|-------|-------|-------|-----------------------|
|                                              | inclS | PRI   | covS  | covU  | cases                 |
| -----                                        |       |       |       |       |                       |
| DISTRIBUTION* RECOGNITION* HOMOGENEITY       | 1     | 1     | 0.581 | 0.208 | Italy; Belgium; Iraq  |
| DISTRIBUTION* RECOGNITION* ~ INTERNATIONAL   | 1     | 1     | 0.499 | 0.125 | India; Italy; Belgium |
| DISTRIBUTION* ~ INTERNATIONAL* ~ SUBNATIONAL | 1     | 1     | 0.292 | 0.126 | Myanmar; UK; Italy    |
| RECOGNITION* HOMOGENEITY* ~ INTERNATIONAL    | 0.910 | 0.836 | 0.416 | 0.042 | Spain; Italy; Belgium |
| Solution                                     | 0.955 | 0.930 | 0.875 |       |                       |
| -----                                        |       |       |       |       |                       |

#### **Directional expectations (1, 1, 0, 0, 0)**

| =====                                        |       |       |       |       |                              |
|----------------------------------------------|-------|-------|-------|-------|------------------------------|
|                                              | inclS | PRI   | covS  | covU  | cases                        |
| -----                                        |       |       |       |       |                              |
| RECOGNITION* ~ INTERNATIONAL                 | 0.876 | 0.802 | 0.583 | 0.209 | Spain; India; Italy; Belgium |
| DISTRIBUTION* RECOGNITION* HOMOGENEITY       | 1     | 1     | 0.581 | 0.208 | Italy; Belgium; Iraq         |
| DISTRIBUTION* ~ INTERNATIONAL* ~ SUBNATIONAL | 1     | 1     | 0.292 | 0.126 | Myanmar; UK; Italy           |
| Solution                                     | 0.917 | 0.877 | 0.916 |       |                              |
| -----                                        |       |       |       |       |                              |

Solution formulas for the outcome ~HIGH\_CA

Conservative solution

|                                                                          | inclS | PRI | covS  | covU  | cases                                        |
|--------------------------------------------------------------------------|-------|-----|-------|-------|----------------------------------------------|
| ~ DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL* SUBNATIONAL              | 1     | 1   | 0.666 | 0.666 | Nigeria,Russia,South Africa; Canada,Ethiopia |
| ~ DISTRIBUTION* RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL* ~ SUBNATIONAL | 1     | 1   | 0.084 | 0.084 | BiH                                          |
| DISTRIBUTION* RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL* SUBNATIONAL     | 1     | 1   | 0.084 | 0.084 | Malaysia                                     |
| Solution                                                                 | 1     | 1   | 0.834 |       |                                              |

Most parsimonious solution

|                               | inclS | PRI   | covS  | covU  | cases                                        |
|-------------------------------|-------|-------|-------|-------|----------------------------------------------|
| ~ DISTRIBUTION* ~ RECOGNITION | 0.942 | 0.929 | 0.666 | 0.666 | Nigeria,Russia,South Africa; Canada,Ethiopia |
| ~ HOMOGENEITY* INTERNATIONAL  | 1     | 1     | 0.167 | 0.167 | BiH; Malaysia                                |
| Solution                      | 0.953 | 0.938 | 0.834 |       |                                              |

*Intermediate solution*

**Directional expectations (1, 1, 1, 0, 0)**

|                                                          | inclS | PRI   | covS  | covU  | cases                                        |
|----------------------------------------------------------|-------|-------|-------|-------|----------------------------------------------|
| ~ DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL           | 0.942 | 0.929 | 0.666 | 0.666 | Nigeria,Russia,South Africa; Canada,Ethiopia |
| DISTRIBUTION* RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL  | 1     | 1     | 0.125 | 0.084 | Malaysia                                     |
| RECOGNITION* ~ HOMOGENEITY* INTERNATIONAL* ~ SUBNATIONAL | 1     | 1     | 0.084 | 0.042 | BiH                                          |
| Solution                                                 | 0.953 | 0.938 | 0.834 |       |                                              |

**Directional expectations (0, 0, 0, 0, 0)**

|                                                | inclS | PRI   | covS  | covU  | cases                                        |
|------------------------------------------------|-------|-------|-------|-------|----------------------------------------------|
| ~ HOMOGENEITY* INTERNATIONAL                   | 1     | 1     | 0.167 | 0.167 | BiH; Malaysia                                |
| ~ DISTRIBUTION* ~ RECOGNITION* ~ INTERNATIONAL | 0.942 | 0.929 | 0.666 | 0.666 | Nigeria,Russia,South Africa; Canada,Ethiopia |
| Solution                                       | 0.953 | 0.938 | 0.834 |       |                                              |