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## **Imperfect Federalism and the Struggle for Independence in Scotland and Catalonia**

### The “Federal” Experience

The beginning of what I call “federal experience” in Spain and the UK dates back to the 1970s, when sub-state territories inside these countries started to acquire certain competences that gradually developed into the spinal cord of their autonomous governance. In Spain, the death of General Francisco Franco and the consecutive end to his heavily centralized autocratic regime opened the way for a new, democratic period in 1975. During Franco’s rule, Catalonia couldn’t have its own political and cultural institutions. The *Generalitat* (the Catalan government) went into exile, where it was harassed by Nazi authorities during the Second World War, Catalan language was banned in public usage, and any showing of Catalan identity was severely punished.<sup>1</sup> Catalonia was thus eager to welcome the dawn of a new, democratic period after 1975, and took an important role in the redefinition of the constitutional settings of Spain, including its territorial reorganization into seventeen autonomous communities and two autonomous cities. The Generalitat led by Josep Tarradellas was recognized by the new Spanish government of Adolfo Suárez and came back from exile. Even before the approbation of the new Spanish Constitution in 1978 and Catalonia’s Statute of Autonomy in 1979, Catalonia’s historical autonomy was recognized in the form a pre-autonomous status.<sup>2</sup>

Catalonia could also profit from the faster of the two ways the Constitution prescribed for the formation of Autonomous Communities. According to its Statute of Autonomy, elaborated on the basis of Article 151 and the Second Transitory Disposition of the new Constitution and approved by the Spanish Cortes as *Ley Orgánica 4/1979*, it did not have to wait for a ‘probationary’ period of five years in order to access to important competences ceded by the central government. The Statute also acknowledged the existence of

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<sup>1</sup> GUIBERNAU, Montserrat: Prospects for an Independent Catalonia. *International Journal of Politics, Culture & Society* Vol. 27., 1 (2014) 10-11.

<sup>2</sup> VASCONCELOS ROMÃO, Felipe: A transformação dos mecanismos de materialização política das identidades nacionais: o Estado autônomo espanhol e a emergência das autonomias-nação basca e catalã. *Revista Brasileira de Política Internacional* Vol. 56., 2 (2013) 72.

Catalonia's collective identity and the inalienability of its self-governance.<sup>3</sup> The Statute complied with the Spanish Constitution, which designed a single Spanish nation as the only source of sovereignty in its Article 2, and referred to all other national identities in Spain as "nationalities," underlining the cultural sense of the term, and defining Spain as a unitary nation, and not in any measure a federation. However, during the following decades the new constitutional framework of Catalan autonomy was widely accepted by Catalan politicians and citizens, expressing a "balanced dual identity (i.e. "equally Spanish and Catalan")".<sup>4</sup>

In Scotland, the struggle for Scottish autonomy was not missing from the imminent post-World War II political agenda because Scotland was subordinated to a repressive, anti-democratic central regime like Catalonia, but rather because Scottish political identity felt relatively comfortable integrated into an overarching British imperial identity, which had been shaped at least since the Act of Union of 1707,<sup>5</sup> and which was reinforced due to the shared suffering and efforts of the war against the Axis powers.<sup>6</sup> It is often argued that the postwar creation and development of the British welfare state, the benefits of which were particularly important in a relatively underdeveloped Scotland, also cemented the importance attached to common, British institutions and "helped to reinforce the commitment of Scots to the Union."<sup>7</sup> With the decrease of the determining value of British colonialism, the demand for handling Scotland's issues on their own merit started to (re)appear. With the benefit of hindsight, we can say that an ominous sign of this process was the first victory of the Scottish National Party (SNP) in 1967 in a by-election in Hamilton. Conservative Prime Minister Harold Wilson (1964-70 and 1974-76) seemed to take notice of the demands for more autonomy at the end of the 1960s, but the promises he made in his 1968 speech in Perth for more decentralization were soon forgotten by the Tories, albeit a Royal Commission on the Constitution<sup>8</sup> was created in 1969 "to examine the present functions of the central legislature and government in relation to several countries, nations and regions of the United Kingdom".<sup>9</sup>

The Commission's report was published in 1973. Its most consequential finding was emphasizing the need for a constitutional design "which would recognize different needs for Scotland, Northern Ireland, Wales and the English regions," without, however, implying that this design should be a federal one. Instead, an asymmetric model of devolution was proposed; for Scotland, this meant the suggestion of a Scottish legislative assembly that could hold the Scottish Office (the department of the UK government responsible for Scottish affairs) to account.<sup>10</sup> In line with the Commission's observations, the Labour government

<sup>3</sup> Id. 73.

<sup>4</sup> SERRANO, Ivan: Just a Matter of Identity? Support for Independence in Catalonia. *Regional & Federal Studies* Vol. 23., 5 (2013) 527.

<sup>5</sup> MUNRO, Colin R: *Scottish Devolution: Accommodating a Restless Nation*. In: Stephen Tierney (ed.): *Accommodating National Identity: New Approaches in International and Domestic Law*, Kluwer Law International, The Hague/London/Boston, 2000. 136-140.

<sup>6</sup> DIXON, Keith: Le pari risqué des nationalistes écossais: L'indépendance ou rien? *Politique étrangère* 4 (2013) 53.; DIXON, Keith: Le retour du chardon: nationalisme et dévolution en Écosse (1967-1999). *Études anglaises* Vol. 59., 4 (2006) 443.

<sup>7</sup> MCEWEN, Nicola: State Welfare Nationalism: The Territorial Impact of Welfare Development in Scotland. *Regional & Federal Studies* Vol. 12., 1 (2002) 67.

<sup>8</sup> Usually referred to as the Kilbrandon Commission, after Lord Kilbrandon who became its chair in 1972.

<sup>9</sup> HIMSWORTH, Chris – O'NEILL, Christine: *Scotland's Constitution: Law and Practice*. Bloomsbury Professional, Haywards Heath (West Sussex), 2015. 52.

<sup>10</sup> Id.

proposed a “Scotland and Wales Bill” that was debated in Parliament in 1977-78. The Bill eventually took shape as two separate acts, the Scotland Act and the Wales Act. However, in the end no steps could be taken towards the implementation of these Acts, and consequently towards major decentralization.<sup>11</sup> Both Acts were required to be approved by a referendum where at least 40% of those entitled to vote would have had to give their support to the Scotland and Wales Acts of 1978. Neither of the two referenda could provide for such an endorsement on March 1, 1979, and both Acts were consequently repealed.

The Conservative victory in the 1979 UK general election meant the total dismantling of the devolution projects; the emergence of the New Right and Margaret Thatcher’s premiership that lasted for more than a decade is usually seen as a catalyst accounting for more radical demands for self-governance in a Scotland particularly badly hit by Thatcherite economic policies and the curbing of the British welfare state.<sup>12</sup> It was only after the Tories lost power in 1997 that Scottish (and Welsh) devolution reappeared on the agenda of the British government. On the basis of constitutional propositions emanating from Scotland after the 1979 referendum (such as the 1988 “A Claim of Right for Scotland” and the 1995 Scotland’s Parliament: Scotland’s Right), Tony Blair’s government published its Scotland Bill, this time not before but after a successful referendum where Scots voted in favor of a Scottish Parliament (almost 75%) with tax-varying powers (more than 63%). The bill was passed in the Westminster Parliament in 1998 and came into force gradually until April 1, 2000.<sup>13</sup> It devolved all executive and legislative competences to the Scottish Government and Parliament except for a set of competences reserved to Westminster, including the most important constitutional matters (the Union, EU membership, etc.).

While Scotland had to wait until 1998 to achieve major competences hitherto reserved for Westminster and have its own Parliament, Catalonia could use its own, reestablished institutional framework to proceed in certain matters of self-governance. After its promulgation on September 18, 1979, the Statute of Autonomy of Catalonia (*Estatut d’Autonomia de Catalunya*) was submitted to a referendum in the Community where more than 88% of the participants voted in favor of it; consequently, it entered into force on December 31 of the same year.<sup>14</sup> The Estatut was and still is subordinated the Spanish Constitution in the legal hierarchy, while also completing it as the supreme legal framework of Catalonia. In its Preamble, the Estatut is evoked as “*the expression of the collective identity of Catalonia [that] defines its institutions and its relations with the Spanish State in the context of free solidarity with the other nationalities and regions.*” On the basis of this *free* solidarity is built “*the genuine unity of all the peoples of Spain.*” The institutions of the Government of Catalonia are the repositories of a “*link with a history of affirmation of and respect for the basic rights and public freedoms of persons and peoples.*” “Catalonia’s *inalienable* right to self-government” is presented as affirmed by the Spanish and Catalan Parliaments and the Catalan people.<sup>15</sup> (Emphases

<sup>11</sup> DIXON, 2006. 446.

<sup>12</sup> MCEWEN, 2002. 69-70.; LEYDIER, Gilles: Les années Thatcher en Écosse: L’union remise en question. *Revue française de science politique* Vol. 44., 6 (1994) 1045.

<sup>13</sup> HIMSWORTH – O’NEILL, 2015. 53-54.

<sup>14</sup> The participation rate was slightly below 60%. [http://governacio.gencat.cat/ca/pgov\\_ambits\\_d\\_actuacio/pgov\\_eleccions/pgov\\_dades\\_electorals/resultats-2/?a=a&cid\\_eleccions=R19791&cid\\_territori=CA09](http://governacio.gencat.cat/ca/pgov_ambits_d_actuacio/pgov_eleccions/pgov_dades_electorals/resultats-2/?a=a&cid_eleccions=R19791&cid_territori=CA09) (09. 03. 2017.)

<sup>15</sup> Preamble EAC (Statute of Autonomy of Catalonia) 1979.

added.) In the Preliminary Section, Catalonia is referred to as an Autonomous Community constituted on the basis of nationality. The powers of the Generalitat, “*the institution into which Catalan self-government is politically organized*,” emanate from a triple source: the Constitution, the Estatut and the (Catalonian) people.<sup>16</sup> While Catalan is established as the official language of Catalonia, co-official status and equality for Castilian and special protection for Aranese is also provided.<sup>17</sup> The flag of Catalonia is also described in the Estatut.<sup>18</sup> The exclusive competences of the Generalitat, ceded by the Spanish State are enlisted in 34 points, englobing a wide range of affairs from health care through education to the protection of cultural heritage.<sup>19</sup> In other fields, the Generalitat has complementary or executive competence.<sup>20</sup>

While one can argue that by the end of the 20<sup>th</sup> century both the UK and Spain gained a functionally federal design based on an increased level of power sharing between the central and the regional governments, the latter having their own say on a wide range of matters of importance, the prospective evaluation of Scotland and Catalonia’s constitutional status started to show remarkable differences quite soon after the initial designs of devolution and autonomous governance were implemented. In Catalonia, a revision of the Estatut started in 2003, when a left-wing coalition government took office after more than two decades of central-right nationalist governance by the *Convergència i Unió* party alliance and its leader Jordi Pujol. A new Statute of Autonomy was approved in the Parliament of Catalonia and sent to the Spanish *Cortes Generales*, where it was passed after having been significantly diluted. It was then approved by a referendum in Catalonia in 2006, just in order to be denounced by the then opposition People’s Party (PP), the *Defensor del Pueblo* (the Spanish Ombudsman) and several autonomous communities at the Spanish Constitutional Court. The latter declared several core features of the new Estatut unconstitutional or void of judicial value after four years of deliberation in 2010, causing serious outrage in Catalonia.

As for Scotland, where the SNP won the elections for the first time and formed a minority government in 2007, a Commission on Scottish Devolution<sup>21</sup> was established in 2008 to revise and expand the scope of the 1998 Scotland Act. The Commission proposed “*a new ‘Scottish rate of income tax’ to replace the existing, and unused, limited power to vary the UK rate*” alongside other important reforms providing for a more autonomous Scottish fiscal system. The SNP’s election victory in 2011 and its upgrading from minority to majority government further contributed to the process that eventually culminated in the Scotland Act of 2012, which retained most of the Commission’s proposals for further devolution. Matters of taxation were indeed the central feature of the new Act: taxes on land transactions and on disposals to landfill were devolved, as well as the power to set Scottish rates of income tax.<sup>22</sup> Aside from this, Scotland gained increased powers to borrow,<sup>23</sup> and other legislative and executive competences were also expanded.<sup>24</sup>

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<sup>16</sup> Art.1 EAC 1979.

<sup>17</sup> Art.3 EAC 1979.

<sup>18</sup> Art.4 EAC 1979.

<sup>19</sup> Art.9 EAC 1979.

<sup>20</sup> Arts 10-11 EAC 1979.

<sup>21</sup> The Calman Commission.

<sup>22</sup> See Part 3, Sections 28-31, SA (Scotland Act) 2012.

<sup>23</sup> Part 3, Section 32, SA 2012.

<sup>24</sup> Part 1 and 2 (Sections 1-22), SA 2012.

The development of devolved governance in Scotland contrasts sharply with the Catalanian scenario. The 2006 Statute of Autonomy was found unconstitutional in most of its aspects that would have brought about greater autonomy. The Constitutional Court was especially harsh regarding the symbolic novelties that took some otherwise rather modest steps toward Catalonia's recognition as a nation. One of the other important differences, and an important reason that arguably accounted for the gradual but steady turn towards secessionism was Catalan President Artur Mas' failure to renegotiate the fiscal pact regulating taxation in Catalonia and money transfers to the central budget: attempts to expand Catalonia's meager competences regarding taxation, much like the demands for its recognition as a nation, were vehemently rejected by the Spanish government of Mariano Rajoy, usually on the basis of dogmatic references to the constitution.

#### Devolution and State of Autonomies vs "True" Federalism

In any event, we can conclude that both Scotland and Catalonia exercise powers that equal or are just short of matching the competences traditionally reserved for sovereign states. They have their own government and their own parliament, a political system distinguishable from the other parts of the country, national symbols and a wide set of meaningful powers in various policy areas. So why the perpetuation of the claim for independence? This is where I see it appropriate to make the conceptual distinction between "functional" and "genuine" federations. I propose a couple of aspects that should be taken into consideration when judging which group Spain and Britain belong to. These aspects are: the vector of the federalizing dynamics, the selectivity of devolution and the conditions for revoking powers from the sub-units.

#### The vector of the federalizing dynamics

As I set forth above, the current federal arrangements in both the UK and Spain are the result of a constitutional-political process usually referred to as "devolution". Devolution is indeed a very accurate term to describe what we witness in terms of the development of power-sharing between different levels of government in these countries: competences are devolved, delegated from the central government to the government of the subunit. This way, the subunit becomes an autonomous unit inside the same state. When the devolved competences are truly of importance, as they are in the case of Scotland and Catalonia, the institutional setting undoubtedly resembles that of federal systems like Canada, Belgium, Germany, the United States, etc. But devolution is a top-down process: power is delegated from the top layer of government toward inferior layers. This implies the huge importance of the willingness of the central government to initiate power-sharing and make it meaningful; the repealing of the Scotland and Wales Acts in 1979 illustrates this clearly, as the failure of the referenda was at least in part due to the conditions the central government set for their validity.

In what I call "genuine" federations, the top-down process of devolution is substituted with a bottom-up constitutive process that determines what powers the actual or potential subunits want to delegate upwards, to the central state. This is not to suggest that true federalism presupposes the existence of actual independent states that come together to pool some of their sovereignty. (Although, arguably, this is what happened when the Thirteen Colonies became the United States of America or what we see in the case of European integration, the outcome of which is far from clear.) Belgium did not become a

federation when Wallonia, Flanders and Brussels came together and decided to build a federation: they had been part of the same political unit prior to that. But the constitutive process that resulted in the creation of the Belgian federation did involve the different subunits as quasi-sovereign entities, distinct political communities that exercise their power to become part of a compound state, a federation. The same more or less applies to the Canadian (con)federation. “Genuine” federalism is indeed a legal fiction in most of the cases.

Yet it is crucially important for that legal fiction to be there, especially in the case of political systems where an important drive for power sharing is the multinational feature of the state. This became obvious in both cases at hand. Central power structures in the UK and Spain have been always very reluctant to agree to the redesigning of the institutional aspect of power sharing when it involved any pretention from the subunits to claim that the, perhaps indeed more optimal, refashioning of the distribution of competences is the consequence of the voluntary association of the subunit, the expression of its national sovereignty, and not some kind of goodwill of the center. The 2006 Catalan Statute of Autonomy was designed to update the previous one from 1979 specifically in order to give a more solid recognition to the Catalan “nation” and the “national reality” of Catalonia based on its “historical rights”.<sup>25</sup> Eventually, the Spanish Constitutional Court “castrated” the reformed Statute after four years of deliberation and after it had been approved by the Catalan Parliament, both houses of the Spanish Cortes and also a referendum in Catalonia.<sup>26</sup> This has been one of the most spectacular manifestations of how the “State of Autonomies” and devolution provided for certain mechanisms that were efficiently used by the then-opposition People’s Party and several other Autonomous Communities to curb Catalonia’s aspirations for national recognition and the shift toward the federalization of the exercise of power.

In Scotland, the recognition of Scots as a nation has never really been an issue, as neither the traditional interpretations of the UK constitution nor mainstream British political thought have ever really questioned that. From a historical perspective, this can certainly be explained by the circumstances and conditions of the creation of the Union between England and Scotland. Nevertheless, Scottish devolution has also been marked by Westminster being very cautious about explicitly recognizing some inherent, even if limited, sovereignty derived from Scotland’s perception of national reality as the constitutional basis of the delegation of powers. “*The supreme law-making function in the UK lies indivisibly in the hands of the central legislature,*” which means that only the Westminster Parliament is truly sovereign, making Britain fail “*one of the classical tests of federalism.*”<sup>27</sup> Functional, top-down federalism can easily hurt established national communities by denying them the expression of their sovereignty inside the existing constitutional framework, and, consequently, it can act towards pushing them out of that framework, even if the existence of a distinct national reality *per se* is recognized, as in the case of Scotland.

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<sup>25</sup> See the Preamble of the Statute of Autonomy of 2006, and TAJADURA TEJADA, Javier: El pronunciamiento del Tribunal Constitucional sobre el Preámbulo del Estatuto de Autonomía de Cataluña: Nación, realidad nacional y derechos históricos. *Teoría y Realidad Constitucional* 27 (2011) 430.

<sup>26</sup> CARRILLO, Marc: La sentencia del Tribunal Constitucional español sobre el Estatuto de Autonomía de Cataluña. *Estudios Constitucionales* 1 (2011) 365.

<sup>27</sup> TIERNEY, Stephen: Federalism in a Unitary State: a Paradox too Far? *Regional & Federal Studies* Vol. 19., 2 (2009) 238.

### The selectivity of devolution

The choice about which powers to share also tend to be a prerogative of the unit that delegates the powers; in the case of top-down “federations”, the hierarchically superior unit. When Scotland or Catalonia wants to acquire certain competences, London or Madrid must be lobbied for a start of negotiations, and eventually their approval is also necessary. The Spanish Constitution is a good example for this, as it cements the advantageous position of the center in a rather explicit manner. From the point of view of the functioning of the *Estado de las Autonomías*, Spain’s constitutional design “*deviates from standard cases of federalism*” from several aspects.<sup>28</sup> Most importantly from the perspective of selectivity, the distribution of powers between the center and the subunit is not defined in the Constitution itself, but in each of the statutes of autonomy of the seventeen communities and two autonomous cities. This helps to reinforce the central government’s position when it comes to devolving powers, as there are no constitutionally binding rules as to what exact competences must be devolved if requested by the subunit. The fact that “*the Autonomous Communities cannot freely frame and revise their own government*” also reinforces the importance of the goodwill of the central state. As we could see in the case of the 2006 Statute of Autonomy of Catalonia, the central legislature (and the governing majority in it) doesn’t only have to approve the draft statute that has already been passed in the regional parliament, but it can also amend and dilute it during the negotiations in the Cortes. And even if the Cortes finally approve the reformed statute and a referendum endorses it in the Autonomous Community, the Constitutional Court (logically) still has the tools to judge whether it conforms to the Constitution. Fiascos like the ominous 2010 decision of the Constitutional Court could only be avoided if the constitution itself were amended, but the Autonomous Communities have very little initiative in the procedures of constitutional reform, as it ultimately lays in the hands of the two chambers of the Cortes Generales, the Congress and the Senate. In most federal systems, the Senate is a forum where the federated entities or autonomous subunits can voice their concerns in general and related to constitutional reform in particular, but in Spain the Senate is not organized according to the principle of territorial representation like in the US, Germany or Canada, where the states/Länder/provinces send delegates to represent their interests.<sup>29</sup>

The advantageous position of the central state doesn’t necessarily mean that it will be very tight-fisted when it comes to devolving powers. In both cases at hand, rights related to culture and education have been passed down without too much grinding of teeth (or, in the case of Scotland, an important part of these competences have never even been taken away), but influence over matters of defense and foreign policy are virtually out of both Barcelona’s and Edinburgh’s reach. The recent “Brexit” referendum demonstrated it all too painfully in the case of Scotland, as Scots didn’t only vote to remain in the European Union with a significant majority (62%), but pro-EU votes won in every single constituency in Scotland.<sup>30</sup> Regardless, Scotland has to abide by the results as much as other parts of the UK; it has no veto power over withdrawal from the EU, as such matters have not been devolved.

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<sup>28</sup> FERRERES COMELLA, Victor: *The constitution of Spain: A Contextual Analysis*. Hart, Oxford/Portland, 2013. 47.

<sup>29</sup> Id. 47-48.

<sup>30</sup> For the EU referendum results. [http://www.bbc.com/news/politics/eu\\_referendum/results](http://www.bbc.com/news/politics/eu_referendum/results) (13. 03. 2017.)

This is not to say that in full-fledged federations such as the United States or Canada, important matters that concern the whole of the federal state, such as military affairs and foreign policy, can be exercised by the subunits. However, through certain institutional mechanisms, they have the chance to have some control over the federal government in these matters. On the other hand, the legal fiction behind is again important. Because the right to exercise these important competences ultimately still derives from an original bottom-up delegation of these competences. In the case of multinational federations, this is especially important, because a political community is required to deliberately agree to delegate these competences upwards, so they can be exercised instead and in the name of the national community that defines the contours of the subunit.

In “functionally” federal systems, the constitutional framework can easily serve as a handy tool to unilaterally limit the subunits’ actions when these don’t meet with the approval of the center. It is certainly alien from a truly federal logic that a Constitutional Court decide on whether Catalonia can or cannot have a department dedicated to the management of Catalonia’s foreign affairs.<sup>31</sup> Especially when Catalonia *per se* does not have any influence over the composition of said court<sup>32</sup> because, due to the selective nature of devolution, the judicial branch of power is not devolved to the level of Autonomous Communities unlike the executive and the legislative ones: “*both ordinary courts and the Constitutional Court are part of the national set of institutions. The Autonomous Communities do not have their own judiciaries.*”<sup>33</sup> This in itself is an important argument for not considering Spain a federation. Arguably, it also shows that the UK is closer to a federal type of distribution of power, as Scotland never completely lost its distinct legal system and its subordination to the highest UK jurisdictions is also less direct than Catalonia’s to the Spanish Constitutional Court and other higher judicial fora. But even in this respect, Scotland doesn’t retain a partially independent legal system in the same fashion as the US States where the US Supreme Court cannot decide in State cases, especially as the States have their own Supreme Courts.

#### Conditions for revoking powers from the subunits

To complete the previous points, I believe a few words should also be said about the conditions under which the federal level can unilaterally revoke powers from the lower levels. A truly federal logic, we can assume, would not make it possible for such unilateralism or indeed the revocation of powers, as the powers were not delegated by the center. Federal governments cannot decide from one day to the other within the limit of their own competence whether something that has been done on the subunit level should be done on the federal level. Federal constitutions are federal because they contain very strong guarantees against such occurrences, which are seen as the misuse of power by the higher level. Such abuses contradict the federal spirit as it was expressed in the Latin word *foederati*, describing the allies and, at least in principle, not the servants of the Roman Empire.

<sup>31</sup> See BRUNET, José María: El TC suspende el Departament d’Afers Exteriors dirigit per Romeva, *La Vanguardia*, February 17, 2016. <http://www.lavanguardia.com/politica/20160216/302214718853/tc-suspende-departament-d-afers-exteriors-romeva.html> (13. 03. 2017.)

<sup>32</sup> NAGEL, Klaus-Jürgen: Espanya, federal? *Eines per a l’esquerra nacional* 10 (2009) 19. <http://www.raco.cat/index.php/Eines/article/view/144232> (13. 03. 2017.)

<sup>33</sup> FERRERES COMELLA, 2013. 48.

Certainly, in the case of both Britain and Spain, the constitutional rules regulating the competences of the subunits and their relations to the competences of the federal level provide a set of guarantees against unilateral revocations of power by the center. However, such revocations are ultimately not so difficult. In Spain, the central government can attack laws passed by the autonomous communities in the Constitutional Court, with a suspensive effect on the application of the piece(s) of legislation concerned.<sup>34</sup> This in itself doesn't contradict the principle of federal loyalty, but such dispositions can occur with a punitive edge to them. There have already been remarks from representatives of the Spanish government that in case Catalonia "disobeys", the competences of the Generalitat would be suspended and exercised by Madrid as long as necessary. This could indeed be done according to the Constitution.<sup>35</sup> The UK's constitutional approach is much less rigid and explicit from this aspect, so one can expect that once powers are devolved, no court would easily approve their revocation. But this guarantee is only to be expected, we don't have much empirical experience or explicit rule that would bind the relevant judicial instance to do so.

#### Constitutional Design and Economic Nationalism

Independence in Scotland and Catalonia is often regarded as a question of economics or of economic nationalism. Therefore I thought it opportune to complete the demonstration of the suboptimal federal design in the UK and Spain also from the perspective of economic and fiscal matters. The aim of this part is to underline that we cannot speak about a federal design in these countries even if only economic matters are concerned. Economic relations between the center and the subunit are very much dependent on the constitutional design, which points to the limits of economic concessions to curb secessionism without a truly federal reconfiguration of the constitutional environment.

To get a sense of how constitutional design influences economic matters between the center and the subunit, let us consider the most important economic grievances denounced by Scotland and Catalonia. First, both have been rather critical about the redistributive mechanisms of their respective central states. This is important for Scottish and Catalan nationalism for different reasons. In Catalonia, it is a prevalent point that the relatively wealthy autonomous community of Catalonia heavily subsidizes less developed communities, like Andalucía or Galicia. "*The financing system of the Generalitat has been a permanent cause of struggle between Catalonia and Spain; this is because it provides only a limited power to decide over the taxes that are paid in Catalonia (low quality of fiscal responsibility) and also because the amount received is considered unsatisfactory. This is in turn mainly due to the view that it leads to over-equalization.*"<sup>36</sup> As the independentist camp likes to point out, an independent Catalonia wouldn't have to transfer money to the Spanish budget, the revenues of which are redistributed according to policy objectives that aim at the benefit of the whole of Spain, and not just Catalonia. The *desconnexió* might indeed mean saving some 14 billion euros per

<sup>34</sup> Art.161(2) CE (Spanish Constitution) 1978.

<sup>35</sup> Art.155(1), (2) CE 1978. See also RÍOS, Pere: Los juristas alertan de la intervención de Cataluña si Mas no para su reto, *El País* 22 (2015) [http://ccaa.elpais.com/ccaa/2015/07/21/catalunya/1437508061\\_800916.html](http://ccaa.elpais.com/ccaa/2015/07/21/catalunya/1437508061_800916.html) (09. 03. 2017.)

<sup>36</sup> CASTELLS, Antoni: Catalonia and Spain at the crossroads: financial and economic aspects. *Oxford Review of Economic Policy* Vol. 30., 2 (2014) 284.

annum (Catalonia transfers that amount to the Spanish budget every year),<sup>37</sup> but this argument of course ignores the very significant supplementary costs Catalonia would have to cover from its own budget as an independent state (the maintenance of an army, a diplomatic apparatus and border control, just to name a few), let alone the transition costs of separation, such as “transaction costs, fiscal costs, and the effects of uncertainty,” which are very much dependent on the terms of separation.<sup>38</sup>

Having full autonomy over spending locally raised revenues is an important claim in Scotland, but with a very different edge to it. Unlike in the case of Catalonia, the funding mechanism regulating money transfers to Scotland from the UK budget tends to result in more per head public spending in Scotland than the UK average; as such it would be rather untenable to argue that Scotland subsidizes other UK regions, and not the other way round.<sup>39</sup> On the other hand, it used to be an important grievance in Scotland that, similarly to Catalonia, it had very limited competences when it came to determining taxes and their destination. “Critics often target the fact that the Scottish Parliament lacks tax-varying powers, with the only exception to central fiscal control being the power of the Scottish Parliament to vary the basic rate of income tax by three pence in the pound (Scotland Act, section 73).”<sup>40</sup> However, this question has been addressed by the 2012 Scotland Act in a rather satisfactory fashion. The claim to have all the benefits from its own resources is conceived in Scottish nationalist discourse more like as a sort of “resource nationalism”, “understood [...] as referring to a wide range of strategies that domestic elites employ in order to increase their control of natural resources.”<sup>41</sup> The most important natural resource in this respect would be North Sea oil and gas, most of which could theoretically end up under Scottish sovereignty after independence. In the period 2008-2012, the share of offshore oil and gas production “has been 15-20 per cent of GDP or £20-28 billion per year.”<sup>42</sup> Controlling this large source of revenue without the interference of London seems like a good deal: in an independent Scotland, oil could be the basis of the national economy. However, just as in the Catalan scenario, independence wouldn’t only bring financial benefits: Scotland would have to face the volatility of petrol and gas prices on its own, it would probably need to create some kind of a sovereign wealth fund to convert oil revenues into financial reserves to protect itself from the changes of prices, it would have to implement all related investments from its own budget, and it might even need to find new markets, because the access to the markets of the rest if the UK would largely depend on the terms of separation.<sup>43</sup>

Independence would also mean full authority to design and implement welfare policies. The need for this is emphasized in both Catalan and Scottish nationalist discourses. In Catalonia, this is mostly a sub-aspect of gaining control over fiscal matters, i.e. taxation, as

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<sup>37</sup> NAGY Sándor Gyula: A katalán választások eredménye és a függetlenség ára. *KKI-elemzések* 37 (2015) 5. [http://kki.gov.hu/download/6/c0/21000/37\\_KKI-elemzes\\_ESP\\_katalan\\_NSgy\\_20150929.pdf](http://kki.gov.hu/download/6/c0/21000/37_KKI-elemzes_ESP_katalan_NSgy_20150929.pdf) (09. 03. 2017.)

<sup>38</sup> YOUNG, Robert: Transition Costs in Secessions, with a Brief Application to Scotland. *Oxford Review of Economic Policy* Vol. 30., 2 (2014) 395.

<sup>39</sup> BELL, David N. F.: Territorial Finance and the Future of Barnett. *Political Quarterly* Vol. 86., 2 (2015) 211.

<sup>40</sup> TIERNEY, 2009. 249.

<sup>41</sup> DOMJAN, Paul – STONE, Matt: A comparative study of resource nationalism in Russia and Kazakhstan 2004-2008. *Europe-Asia Studies* Vol. 62., 1 (2010) 39.

<sup>42</sup> HUGHES, Gordon: The Energy Sector in Scotland’s Future. *Oxford Review of Economic Policy* Vol. 30., 2 (2014) 376.

<sup>43</sup> See HUGHES, 2014.

taxes paid in Catalonia should be spent on the pensions, hospitals, unemployment benefits, etc. of Catalans. In Scotland, a region traditionally more dependent on state-provided welfare than Catalonia, the development of the post-World War II British welfare system has had an even deeper imprint on Scottish national politics and identity. Social policy gained an important symbolic value in Scotland especially during Margaret Thatcher's premiership, when the rolling back of the British welfare state was seen to be particularly disadvantageous for Scotland, even though "*the impact of neo-liberalism with respect to the welfare state was perhaps more evident in the political rhetoric of the Thatcher/Major governments than in its public policies.*"<sup>44</sup> The need to gain control over welfare provisions in Scotland against a one-fits-all British model has been acutely present in Scottish political discourse.

All in all, there are many economic aspects that are either favorable or unfavorable for an independent Scotland and Catalonia, and the actual outcome of separation would be very context-dependent. Scotland and Catalonia differ greatly in terms of their position vis-à-vis central redistribution mechanisms, welfare provisions and claims to natural resources. Nevertheless, arguing for independence on economic grounds is rather salient in Scottish and Catalan nationalism, even if not always along the same logic. However, the fact that there are economic reasons for independence doesn't mean that the corresponding causes should be found in economics. In fact, the basis of all the important economic grievances isn't rooted in economics per se, but rather in the constitutional design of the states in question. Competences concerning taxation, fiscal transfers between the subunit and the central state, welfare provisions and the subunits' contribution to these or distributing oil revenues are all determined in pacts of constitutional value between the center and the sub-state entity. This is where we can get back to the initial question: why is secession a serious challenge in the UK and Spain, democratic, quasi-federal systems where regions such as Catalonia and Scotland enjoy wide and meaningful autonomy in many policy areas?

#### Final thoughts

The explanation directs us to nationalism, but not (only) because nationalism is inherently troublesome or problematic, but because it expresses national realities that are not properly taken into account by the constitutional design of either the UK or Spain. In Britain, the Westminster Parliament's sovereignty is indivisible; in Spain, national sovereignty stems from the indissoluble unity of the Spanish nation.<sup>45</sup> Consequently, the Scottish Parliament cannot legally express Scottish national sovereignty; the functioning of Catalonian political institutions, such as the Generalitat or the Parliament are not based on the Catalan nation's right to have such institutions. As I explained previously, the constitutional design contradicts the plurinational nature of the United Kingdom and Spain.

This also implies the absence of a federal logic when dealing with economic issues. Competences related to economic, fiscal and welfare policies are ultimately delegated from the hierarchically higher to the lower lever, which might result in a functionally federal arrangement, but the efficiency and meaningfulness always depends on the goodwill of the center, just as in the case of other competences. Consequently, as we could see, the center has a more important say in deciding the exact content of the devolved competences or their eventual revocation; an evident frustration for sub-state nations. Bell's observation on

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<sup>44</sup> MGEWEN, 2002. 74.

<sup>45</sup> See Art.2 CE 1978.

vertical and horizontal fiscal imbalances, present in both the British and the Spanish system, stands for all economic and political arrangements between center and subunit, or between subunits: “*their design is often a function of constitutional and political structures.*”<sup>46</sup> The real question is whether the British and Spanish constitutional structures are capable of producing such a design, or rather a redesigning of the current structures.

In the light of recent developments in Scotland and Catalonia, the answer is far from reassuring. On March 13, 2017, reflecting on the British government’s empty promises to include Scotland in the Brexit negotiations, Scottish First Minister Nicola Sturgeon announced that her government would seek another referendum on Scotland’s independence after the exact terms of the UK’s withdrawal from the EU are known. On the very same day, the Supreme Court of Catalonia made a decision in a case involving officials of the Catalan government who facilitated the organization of the November 9, 2014 quasi-referendum on Catalonia’s political future despite the ban issued by the Constitutional Court, condemning former president Artur Mas and his colleagues. These events show how little the political climate favors moving towards more federalism in these countries: the Spanish government’s toolkit to address independentism in Catalonia is still limited to an out-of-touch legalism, and the British government has still no intention of taking Scotland’s pro-EU stances into account, despite how it was a very important factor in Scots voting to remain part of the United Kingdom in 2014.

## BARNABÁS SZABÓ

### Imperfect Federalism and the Struggle for Independence in Scotland and Catalonia

(Summary)

In this paper, I consider the federal experiences of the United Kingdom and the Kingdom of Spain. I argue that the constitutional design of these states, federal only in functional terms and not from a constitutional-legal aspect, potentially accounts for the permanent dissatisfaction of stateless nations, specifically Scotland and Catalonia, with their position inside the British and Spanish constitutional structures, which contributes to the strengthening and the recurrence of the struggle for independent statehood in these territories. While a proper federal redesigning of the UK’s and Spain’s constitution could be a tool to curb the incentives for secession in Scotland and Catalonia, the political factors and the credibility of the federal option necessary for such a reshaping of the constitutional environment are missing. This is also true if independentism in these territories is approached as a question of primarily economic nature. However, the current constitutional designs based on devolution and autonomous governance have not necessarily reached their final limits, even though there are certain differences to observe in this respect between the Scottish and the Catalan scenarios.

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<sup>46</sup> BELL, David N. F.: Scotland and Small Country Independence: The Assessment. *Oxford Review of Economic Policy* Vol. 30., 2 (2014) 194.