

IMPERFECT FEDERALISM AND THE STRUGGLE FOR INDEPENDENCE
A COMPARATIVE ANALYSIS OF SCOTLAND AND CATALONIA

by

Barnabás Szabó

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ABSTRACT

In this thesis, I look into the federal experiences of the United Kingdom and the Kingdom of Spain. I argue that the federal design of these states, being only partially federal in functional terms but not “truly” federal from a constitutional-legal aspect, 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. As a result of my research, I find that 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. 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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INTRODUCTION

The recent independence referenda in Scotland and Catalonia¹ demonstrated the endurance of secessionist agendas in these territories and (re)directed attention both inside and outside the academic community to the complexity of the problem of secession. It has become obvious that many philosophical, legal, political, economic and cultural pros and cons can be called on when one tries to argue in favor of or against Scottish and Catalan independence. The proliferation of arguments suggests that on purely normative grounds it is rather problematic to attribute moral superiority to any of the sides in the debate and try to resolve the problem on the basis of “who is right”. Most of the evocable aspects can, however, provide explanation on some level to the more important question, “why?”

This is also the most perplexing question: why is it that in these two highly autonomous territories, possessing increased legislative, cultural and even economic competences and belonging to liberal democratic states (the United Kingdom and the Kingdom of Spain) the strive for independence is recurrent and has strengthened in the course of the last decades? Scotland and Catalonia are often seen “as exemplars first of the resurgence of stateless nationalisms and then of the use of territorial autonomy to resolve conflicts between state, majority and minority;”² as such, the answer is often found in “minority nationalism”: in regions of the UK and Spain nationalisms hostile to the national identity projected by the state are on the rise, and, attached to this, nationalist propaganda, national chauvinism and economic interests perceived and presented as national decrease the readiness for coming to terms with the central government of the state, despite the existence of otherwise

¹ The referendum on Scotland’s independence from the rest of the UK took place on September 18, 2014. In the case of Catalonia, “referenda” on independence were more like quasi-referenda: the November 9, 2014 “citizens’ participative process” and the September 27, 2015 Catalanian elections were promoted by pro-independence parties as substitutes for a constitutionally feasible referendum.

² Greer, *Nationalism and Self-Government*, 2.

advanced systems of protection for the minority languages and cultures in question (Scottish and Catalan).³ From the opposite perspective, “liberal democracies [also] find it difficult to cope with the demands of territorially concentrated national minorities and often provoke resistance and instability.”⁴

I don’t wish to question that nationalism has a determining role in the very existence of the problem. Paraphrasing Benedict Anderson,⁵ the Catalan and the Scottish nations are “imagined” more than enough to account for the existence of Scottish and Catalan nationalism. Taking Montserrat Guibernau’s definition of nation “as a human group conscious of forming a community, sharing a common culture, attached to a clearly demarcated territory, having a common past and a common project for the future, and claiming the right to rule itself,” one can hardly doubt that a Scottish and a Catalan nation exist as much as any other nation.⁶ If we accept the existence of distinct or at least distinguishable national-political communities in Scotland and Catalonia, the surfacing of plans aiming at the expression of this distinctness and the national sovereignty of these communities shouldn’t come as a surprise. That is why treating them primarily as “minority nations” is rather misleading.

It is true that Scottish and Catalan people make up for a numerically inferior part of the population of the UK and Spain than those who are attached to the national identity of the central state.⁷ Even so, if we want to understand why Scotland and Catalonia do not always feel comfortable inside the borders of the UK and Spain, we shouldn’t automatically turn our attention to eventual faults in the

³ Needless to say, cultural aspects in general and the linguistic aspect in particular are very different in these two cases.

⁴ Parekh, “Liberal democracy and national minorities,” 31.

⁵ Anderson, *Imagined Communities*, 6-7.

⁶ Guibernau, *Nations without States*, 14.

⁷ Whether we should call these people Spanish or Castilian and British or English is another question.

applicable instruments of international, European or domestic minority protection.⁸ Instead, we have to have a closer look at the political reality that such legal instruments might not reflect properly. And the political reality in these cases is that there is a Scottish and a Catalan nation, and nations tend to favor being recognized as “simply” nations, as opposed to “minorities” or “minority nations”, expressions which unavoidably imply a hierarchically inferior position to other nations, or at least the “majority nation” of the given state. Aside from the symbolical importance of such hierarchization, in the context of Western liberal democracy it is normatively unacceptable to organize nations and national identities hierarchically, just as it is unacceptable to organize other core aspects of individual identity (e.g. religion) hierarchically. Once there is no point in questioning the existence of a national community, then it should be treated equally to any other nations. In this, nations and nationhood are rather similar to states and statehood.

This is not to suggest that all nations are be *per definitionem* aiming at the establishment of a sovereign state; I don’t think the classic Westphalian understanding of sovereignty should be given too much explanatory value in the 21st century (or even before). Cases abound where national diversity needs to be rekindled with the existence of only one state, although avoiding differentiation between the level of recognition given to the different national components and eventual homogenizing efforts by the state requires moderation and readiness for compromise from the involved political actors.⁹ One of the typical tools to handle the plurinational nature of the state, especially where the different national components are attached to more or less demarcated

⁸ The most important ones among such tools are, on the one hand, legal instruments conceived in the frame of the Council of Europe, such as the Framework Convention for the Protection of National Minorities or the European Charter for Regional or Minority Languages, both of which are ratified by Spain and the UK or, on the other hand, similar guarantees provided by the Law of the European Union to which both Scotland and Catalonia are subjects through the membership of their respective states, specifically the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights to which the EU adhered recently.

⁹ Guibernau, “Secessionism in Catalonia,” 371.

territories, is power sharing between the different levels of the state, i.e. the center and the subunit. Such power sharing solutions are often labelled as federalism. As both Spain and the UK are widely referred to as federal systems, questioning the ability of federations to accommodate multiple national realities or national minorities is an additional feature of the Scottish and Catalan independence debates.

From the point of view of political science, it is both logical and legitimate to talk about federalism “in all “compound” states that consist of two levels of government, each having substantial powers and enjoying true autonomy in relation to the other”, such as the United Kingdom and Spain.¹⁰ However, the distribution of powers between Downing Street and St. Andrew’s House, and between La Moncloa and the Generalitat¹¹ is a result of devolution, the delegation of power from the higher to the lower level, and as such is federal only in terms of some of its objectives, but not in terms of the constitutive processes and the constitutional designs that account for it. In other words, Spain and the UK are to some extent federal systems from a functional point of view, but they are not federations in the strict sense, i.e. from a constitutional-legal perspective. Klaus-Jürgen Nagel points to the uncertainties that this provokes in political science when he enumerates some of the expressions used to better describe “functionally” federal systems: “imperfect federalism, incomplete federalism, federation in the making; “postmodern mode” of federal development, but also unfulfilled federalism.”¹²

¹⁰ Woehrling, “Federalism and the protection of rights and freedoms,” 139.

¹¹ The British Prime Minister’s office and home is at 10, Downing Street (London), Saint Andrew’s House is the headquarters building of the Scottish Government in Edinburgh, the Palacio de la Moncloa is the official residence of the Prime Minister of Spain and the Palau de la Generalitat houses the Catalan executive (Generalitat) in Barcelona.

¹² Nagel, “Espanya, federal?,” 11.

Research question

In order to find a satisfactory answer to the general question of why secessionism prevails in the sub-state national societies of Scotland and Catalonia, and taking into account the observations outlined above, I would like to look at federalism in the UK and Spain and its apparent lack of ability to accommodate the multiple national realities that exist inside a single state. I don't ignore the fact that in both countries, the term "multiple national realities" doesn't only express the dichotomy of one sub-state national identity (Scottish/Catalan) and one national identity ascribed to the central state (British/Spanish), as both countries are arguably built up of a plethora of national identities,¹³ but the primary concern of this work is the place of Scotland and Catalonia in the British and Spanish states. I propose the following question to guide my research:

How does the constitutional design of the United Kingdom and the Kingdom of Spain possibly account for the perpetuation of the independence struggle in Scotland and Catalonia?

With other words, I am interested in finding out why and how have the constitutionally imperfect federalization in the UK and Spain contributed to the perpetuation of secession on the political agenda in Scotland and Catalonia through the optics of a legal analysis. I would like to argue that the current constitutional arrangements could not avoid, or in fact they account for the dissatisfaction of stateless/sub-state nations with the status quo to the extent that independence, i.e. the gaining of a full set of state sovereignty remains a logical option, albeit not yet a fulfilled one.

Constitutional Law

Making a distinction between "true" and "functional" federations is essential in order to better understand the perseverance of secessionist claims inside the current British and Spanish

¹³ English, Welsh and Irish in the case of the UK, Basque, Galician and Andalusian in the Spanish context, just to name the most obvious.

constitutional framework. Constitutional law is an obvious approach for analyzing constitutional designs and completing the traditional understanding of political science when it comes to federalism and its eventual malfunctions explaining the breaking up of federations. Claims for or against secession can be and indeed are framed in many ways, but in societies where the rule of law is a paramount value, we can reasonably expect the most important stakeholders in the debate to formulate their claims for or against secession in a way that provides such claims with legitimacy and legality, thus converting these questions into matters pertaining to the realm of constitutionalism and constitutional law, among others. That is what accounts for the relevance of a legal approach when analyzing scenarios of potential secession and the viability of federalization in these territories. In the cases of Scotland (and the UK) and Catalonia (and Spain), the importance of the legal context is also obvious when it comes to the functioning of the political system, state institutions, economic redistribution between the different levels of government (central and sub-state in our cases) and the claim-making of the stakeholders (the political forces that act in favor of or against secession). This implies that when looking at the “legal framework”, it is not always strictly the letter of the Law, but the institutional (political and economic) structures and legal traditions established on the basis of the applicable legal framework that should be taken into account.

Due to their relevance to state creation, sovereignty and self-determination, there are three layers of the applicable legal framework that has an impact on the legal interpretation of both secession and federalization with regards to the territories that are analyzed here, these are: domestic law, the law of the European Union and international law. While all these layers are relevant in both providing interpretations on the legality of the claim for secession, and influencing the international and national communities (the outside world and the societies directly involved in the secession

debate) in accepting or refusing the secession of a given territory, for the purpose of this thesis I deal with domestic, European and international law insofar as they inform the constitutional settings of the states in question and impact the nature of the federal arrangement and the legal reasons and possibilities for secession. This means I will avoid making a sharp distinction between these layers and regard them as pertaining to constitutional law insofar as they have a say on the constitutional design of the states in question or the eventual breaking up of these constitutional systems.

Using the approach provided by constitutional law also helps us reformulate the core point of reference of these issues: instead of looking at secessionism in Catalonia and Scotland from the perspective of majority-minority relations, it allows us to consider the related problems from the point of view of several equal polities that share a single state. It also offers a toolkit to validate or discard the argument according to which the lack of an adequate (i.e. non-hierarchical) expression of the different national realities in the constitutional design of the state perpetuates the claim for secession. This also implies that the most important assumption of this thesis is that, at least theoretically, a truly federal arrangement can provide for such a non-hierarchical expression of the sovereignty of different political communities inside the same state and rid secessionism of its *raison d'être* to a large extent.

Outline

This work is divided into three major parts. The first one is a brief historical analysis of the constitutional development of Scotland and Catalonia. Special attention will be given to their relations to the neighboring polities with which they eventually came to share a constitutional structure. When looking at the history of Scottish-English/British and Catalan-Castilian/Spanish relations, we are in fact looking at some of the causes of the current problems: in order to

understand the plea for independence, we have to consider the conditions under which Scotland and Catalonia were incorporated and/or integrated into larger territorial units and different, but still non-federal constitutional systems.

The second part is the core of this thesis. It develops the theoretical argument according to which federalization in the UK and Spain is suboptimal, which accounts for the currently problematic relations between the constitutionally unitary central state and the autonomous subunits. I give an overview of what I call the “federal experience” of the two territories, i.e. the most important features of autonomous governance and the development and expansion of devolution. Then I look into the shortcomings of these systems as “federations” and point to the prevalence of the constitutionally a-federal elements in them. This part is completed by a brief analysis of the economic bases of secessionism in Scotland and Catalonia in order to show how not only political grievances but also the sources of economic dissatisfaction are very much dependent on the (a-federal) constitutional design of the state.

The third part concludes the thesis. I establish how the constitutional framework provided by EU Law could be a strong incentive for a constitutional solution inside the existing state (such as a federal redesigning of the constitutional system of the UK and Spain), and then I assess the practical (political) relevance and applicability of the theoretical argument according to which a federal reshaping of the constitutional design of the UK and Spain would act against secessionism in Scotland and Catalonia. I try to see the limits of this approach and evaluate both the possibility and the credibility of a “truly” federal reform in these countries and its alternatives.

LITERATURE REVIEW

Conceptual Issues

Nation, state, nation-states, sub-state nations and sovereignty

It is a commonplace among scholars of Nationalism Studies that ‘nation’ is a very elusive concept. While there is no need to go through the evolution of this concept for the purposes of this thesis, I judge it adequate to depart from the meaning of ‘nation’ in the context of nation-states and stateless/sub-state nations, specifically those being the subject of this analysis. Benedict Anderson, one of the most significant thinkers in Nationalism Studies, saw nation as “an imagined political community – and imagined as both inherently limited and sovereign”, where the members of the community share a sense of communion and fraternity between each other, despite the lack of direct links between each and every member of the community.¹⁴ This classic definition of ‘nation’ gives us sufficient ground to suppose that all the nations that are subject of this analysis (most importantly the Catalan and the Scottish, but also the Spanish and the British/English) are sufficiently “imagined” to be treated as nations. Nation-states, when appealing to the national sentiment, project identity and attract belonging on the basis of such imagination. Nationalism, according to another classic definition given by Ernest Gellner, is “primarily a political principle that holds that the political and the national unit should be congruent”.¹⁵ Obviously, this congruence cannot be fully achieved in practice; it is certainly not in the cases at hand, if for no other reason than because of the significant overlap between distinct national identities in both the UK and Spain. Gellner’s definition of nationalism coincides with our assertion that striving for such coincidence can be a definitional element of ‘nation’. From the perspective of this research, the

¹⁴ Anderson, *Imagined Communities*, 6-7.

¹⁵ Gellner, *Nations and Nationalism*, 1.

difference in the extent to which British/Spanish and Scottish/Catalan nationalism is congruent with a political unit is a difference in constitutional hierarchy.

The concept of ‘nation-state’ (which for our purposes should be rather called ‘central state’ due to the inconvenience of talking about, say, “multi-national nation-states”) and that of ‘stateless nation’ will be juxtaposed and contrasted throughout this thesis. According to Montserrat Guibernau, ‘nations without states’ are “nations, which in spite of having their territories included within the boundaries of one or more states, by and large do not identify with them. The members of a nation lacking a state of their own regard the state containing them as alien, and maintain a separate sense of national identity.”¹⁶ As such, the most important difference between nation-states and stateless nations is the availability of a complete set of attributes of state sovereignty (at least in theory) or the lack of it. As applicable here, the term “sovereignty” was first coined by Jean Bodin (1530–1596), the French term *souveraineté* denoted the supreme power in a given context; in Bodin’s case the primacy of the Monarch’s authority over that of his feudal lords.¹⁷ The Treaty of Westphalia, concluded in 1648, is usually seen as the forger of union between the modern state and sovereignty. The essence of state sovereignty consists in “internal superiority and the lack of external submission.”¹⁸ In other words, states are sovereign because they have the capacity to maintain internal order, the Weberian monopoly of the legitimate use of physical force included;¹⁹ furthermore, there is no external power that could exercise a similar level of coercion over them.

Nation-states combine national identity with being a sovereign actor of international relations as established in the Westphalian system. In the case of stateless nations, the defining element is not

¹⁶ Guibernau, “Secessionism in Catalonia,” 369.

¹⁷ Bodin, *On sovereignty: four chapters from The six books of the Commonwealth*.

¹⁸ Cravinho, “Visões do Mundo: As Relações Internacionais e o Mundo Contemporâneo”, 63.

¹⁹ Weber, *Wirtschaft und Gesellschaft*, 29.

the existence but the lack of state identity paired up with the existence of a national identity that can be distinguished from the one enshrined in the constitutional system of the state they are part of. For our purposes here, it is important to point out that the creation of nation states eventually implied the merging of ‘nation’ with ‘state sovereignty’; the landmark in this process traditionally being linked to the French Revolution of 1789. The birth of the nation state meant the establishment of the nation as the ultimate holder of sovereignty. Sovereignty belongs to the nation, just as all power stems from the nation.²⁰ This principle has been the basis of political legitimacy in almost every European state since the end of the 18th century. Arguably, this has been a determining *raison d’être* behind internal and international political conflicts ever since: after a “long 19th century” and a short but devastating 20th, marked by conflicts like the Napoleonic wars, the wars for the unification of Italy and Germany, two Balkan wars and, most importantly, two world wars, the principle essentially remains the same. The constitution of the Fifth French Republic, entered into force in 1958 still finds that “national sovereignty shall vest in the nation.”²¹ In the 21st century, sovereignty contests are still contests of national sovereignties. Yet we cannot deny the existence of nations that are not sovereign in this sense of the word, and that is how Benedict Anderson’s classic conceptualization contradicts Gellner’s and also certain political realities expressed through international and constitutional law, and, we should add, even the law of the European Union.

²⁰ See Title III of the 1791 French constitution: “Article 1. - La Souveraineté est une, indivisible, inaliénable et imprescriptible. Elle appartient à la Nation ; aucune section du peuple, ni aucun individu, ne peut s'en attribuer l'exercice. Article 2. - La Nation, de qui seule émanent tous les Pouvoirs, ne peut les exercer que par délégation. [...]” <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1791.5082.html> (March 7, 2016).

²¹ See Title I, Article 3 of the 1958 French constitution: “La souveraineté nationale appartient au peuple [...]. Aucune section du peuple ni aucun individu ne peut s'en attribuer l'exercice.” English translation from here: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleI> (March 7, 2016)

Secession and self-determination

National sovereignty is a key conceptual factor not only when it comes to the establishment of the modern system of states but also when alterations occur inside the system. States can be born and disappear, merge or break up; this we know since the surfacing of the first state-like entities thousands of years ago. One particular form of reorganization inside the state system is secession, “a process whereby part of the territory of an existing state and its people separate from that state, leading to the creation of a new state.”²² Secession is the “most revolutionary and most institutionally conservative of political constructs” as Susanna Mancini rightly points out.²³ It encroaches on state sovereignty regarding the “old” state while at the same time reinforces its importance from the perspective of the “new” state. The “inherent duality” of secession implies that a plethora of justifications can be found for or against it, and while the mainstream interpretations of international law tend to strongly disfavor it, especially when paired up with a restrictive or prohibitive domestic constitutional interpretation (a usual feature of non-federal constitutional systems), this has continuously proved insufficient to prevent a steady growth in the number of states in the last hundred or fifty years. As Mancini remarks in another work of hers, “international law and the international community have never provided coherent guidance for responding to nationalistic minority aspirations or, specifically, to secessionist challenges.”²⁴ The colonial context aside (which clearly doesn’t apply to the cases of Scotland and Catalonia, unless from the perspective of extreme nationalist rhetoric), the only context where a right to secede is seen as legitimate in mainstream legal interpretation is when it is a ‘remedial right’, usually involving serious violation of human rights in a given territory that would decide to secede from

²² Tierney, “Legal Issues Surrounding the Referendum,” 371.

²³ Mancini, “Secession and Self-Determination,” 481.

²⁴ Mancini, “Rethinking the boundaries of democratic secession: Liberalism, nationalism and the right of minorities to self-determination.”

the state it belongs to in order to effectively put an end to such violations. But again, deciding when the level of human rights violations is sufficient to legitimize secession is a complicated task.²⁵

Determining when there is a right to secede is usually paired up with defining the subject(s) of self-determination. Self-determination is, unfortunately, a concept no less complex and contradictory than secession; while it was relatively unproblematic to invoke it in the context of decolonization in the post-World War II part of the 20th century, the concept of self-determination lost its meaning and applicability insofar as “peoples” (the subjects of self-determination) could not be equaled with “colonies” any more. The 1990s brought different challenges that required international law to frame and interpret other possible implications of the right to self-determination. The breaking-up of the Soviet Union and Czechoslovakia and the gradual and bloody dissolution of Yugoslavia begged the question: “what effect would a right to self-determination have outside of the colonial context?” The “two questions that needed to be resolved [were] (a) who has a right to self-determination; and, (b) what does the right entail outside of the decolonization context?”²⁶

Hurst Hannum and Donald L. Horowitz head the list of well-known scholars who pointed out that no satisfactory answer has been found to these questions ever since.²⁷ It is true that while new countries were being born on the ruins of Communism, the answers were not too badly needed. The USSR and Czechoslovakia dissolved as a result of an agreement between the constituting parts divorced, and even in the case of Yugoslavia, the breakup of which was a particularly nasty one, the constituting republics did not only have clearly determined geographical borders, but also some kind of state identity in accordance with the federal constitution.²⁸ However, international law is

²⁵ Seymour, “Secession as a Remedial Right.”

²⁶ Borgen, “From Kosovo to Catalonia,” 1004.

²⁷ Hannum, “The Specter of Secession.”; Horowitz, “The Cracked Foundations of the Right to Secede.”

²⁸ Pavković and Primoratz, *Identity, self-determination, and secession*, 158.

still not provided with answers when it comes to self-determination in the context of potential secession in democracies of the North-Atlantic region, such as Scotland, Catalonia, Québec, the Basque Country and Flanders. In these cases, the right to self-determination has mostly been interpreted as related to the protection of minority rights. “Academic commentators, particularly Europeans, argued that in cases other than decolonization, as long as a State allows a minority group the right to speak its language, practice its culture in a meaningful way, and participate effectively in the political community, then that group is said to have internal self-determination. Secession, or external self-determination, was strongly disfavored. According to this view, a right of self-determination was not a general right of secession.” In line with the Québec Commission, “a group of experts convened by a committee of the National Assembly of Québec to provide advice concerning the legal issues implicated by a hypothetical secession of Québec” from Canada, the best answer that can be given to these questions is that “self-determination is context dependent”.²⁹ This roughly coincides with the conclusion of the Canadian Supreme Court when it issued its famous advisory opinion on the same matter.³⁰

Federalism

The cases of Yugoslavia or Canada are not only relevant to the questions raised in this thesis because they are secession-related, but also because they underline that secession has a significance in federal systems that is qualitatively different from unitary ones. Klaus-Jürgen Nagel, an expert of stateless-nations in general and the Catalan case in particular, takes the example of Spain and underlines that just because a state is functionally federal, i.e. power-sharing and a delimitation of competences is a core feature of several sectoral policies, it is not necessarily a federation.³¹

²⁹ Borgen, “From Kosovo to Catalonia,” 1005.

³⁰ Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

³¹ Nagel, “Espanya, federal?”

Federation in the legal sense, and it is very important from the perspective of this research, is built up from federated entities, originally (at least on the level of legal fiction) possessing the same level of sovereignty, and voluntarily deciding to pool it to a federal level of governance. Normatively, this also implies the possibility to opt out of the federation under certain circumstances. From a legal point of view, devolution can be seen as the exact opposite of federalism, which makes it quite understandable that the constitutional systems of unitary states cannot show the same flexibility in recognizing sub-state nations' rights to constitutional recognition as nations.³² Such conclusion cannot be avoided either when combining the optics of domestic, EU and international "constitutional" law.³³ In extremis, such lack of flexibility can result in a "constitutional crisis" requiring a legal approach that is outright revolutionary.³⁴

Scotland and Catalonia

Historical aspect of the evolution of the Scottish and Catalan polities

While the historical dimension of my thesis focuses mostly on the evolutions of the last couple of decades, a better understanding of Catalan and Scottish aspirations for a fuller recognition of their sovereignty and constitutional specificities as nations implies studying the constitutional history of these territories, especially with regards to their relations to neighboring polities, "Castile" and "England" above all. Montserrat Guibernau is doubtlessly one of the most recognized expert of Catalan nationalism worldwide; we can rely on her when she guides us through the evolution of Catalonia as a territorially distinct polity from the Frankish times through the dynastic unions with

³² Tajadura Tejada, "El pronunciamiento del Tribunal Constitucional sobre el Preámbulo del Estatuto de Autonomía de Cataluña: Nación, realidad nacional y derechos históricos."; Carrillo, "La sentencia del Tribunal Constitucional español sobre el Estatuto de Autonomía de Cataluña."

³³ Rupíérez Alamillo, "La nueva reivindicación de la secesión de Cataluña en el contexto normativo de la Constitución española de 1978 y el Tratado de Lisboa."; Connolly, "Independence in Europe: Secession, Sovereignty and the European Union."; Borgen, "From Kosovo to Catalonia: Separatism and Integration in Europe."

³⁴ de Smith, S. A. "Constitutional Lawyers in Revolutionary Situations."

Aragón and later Castile, the era of Bourbon absolutism and centralization until Franco's ultra-national (anti-Catalan) regime and beyond.³⁵ The history of the independent Scottish Kingdom, the co-ruling of England and Scotland and the Act of Union and the creation of Great Britain has also inspired many historians of renown, like John Duncan Mackie or Thomas Martin Devine.³⁶

Devolution

The analysis of the latest stage of the constitutional genesis of the UK and Spain is the very central element of this thesis. In the case of Spain and Catalonia, the starting point of this period can be set to 1978 when the democratic Spanish constitution that is still in force today was adopted after the death of the General Franco and the concept of the *Estado de Autonomías* was made a cornerstone of the new system. In the UK, finding such a clear point of departure is somewhat more problematic; demands for greater autonomy unfolded gradually after World War II in Scotland, but considering the paramount impact that Margaret Thatcher's governance of the UK had on these demands, the end of the 1970s provides us with a convenient temporal parallel with the Spanish case. From this time until recently, "the demise of sub-state nationalism ha[d] been predicted by Marxists, modernists and globalization theorists;"³⁷ and the view that "substate nationalists do not seek independent statehood [as an alternative to the existing legal framework] to maintain political representation and institutions that guarantee the continued representation of the community" had been widespread in the academic community.³⁸ For this thesis, it is very important to see how the concepts of devolution and autonomy were conceptualized and implemented in this period; this should help to pinpoint the deficiencies that failed to undermine potential secession claims in

³⁵ Guibernau, "Prospects for an Independent Catalonia," and "Secessionism in Catalonia."

³⁶ Mackie, *A History of Scotland*; Devine, *The Scottish Nation: 1700-2000*.

³⁷ Jeram, "Sub-state Nationalism and Immigration," 225.

³⁸ Csergo and Goldgeier, "Nationalist Strategies and European Integration," 25.

Scotland and Catalonia. As for the latter, contradicting the general expectations, an eventual declaration of independence could have very well been what British historian and political scientist Hugh Seton-Watson had in mind when, shortly before the end of the Franco regime, he speculated about Catalans having “some unpleasant surprises in store for the Castilians.”³⁹

Felipe Vasconcelos Romão gives a detailed account on the evolution of post-Franco Spanish political system with a special focus on the accommodation of peripheral nationalisms (Catalan, Basque) in the constitutional system of democratic Spain. It analyzes the synergies between the *café para todos* model and nationalist demands in Catalonia and the Basque Country, thus contributing to a better understanding of the phenomenon of sub-state nationalism in the Spanish context and the appreciation of the impact certain constitutional arrangements have had on the appeasement and revival of these nationalisms in the framework of the State of Autonomies.⁴⁰ Jaime Lluçh chisels this narration with the comparison of “the process that led to the founding of the ADQ (autonomism) in Quebec [with] the process that culminated in the transformation and de facto re-founding of ERC (independentism) in Catalonia during the period 1976–2005,” thus explaining how nationalist parties are consolidated in democratic parliamentary contexts such as those in Canada and Spain.⁴¹ Recent elections (2010, 2012 and 2015) in Catalonia and the “quasi-plebiscite” on independence (2014) should also be kept in mind, as they have been very important to demonstrate the Catalanian electorate’s ambiguous relation to the existing constitutional arrangements.⁴²

³⁹ Seton-Watson, “Unsatisfied Nationalisms,” 6.

⁴⁰ Vasconcelos Romão, “A transformação dos mecanismos de materialização política das identidades nacionais: o Estado autonômico espanhol e a emergência das autonomias-nação basca e catalã.”

⁴¹ Lluçh, “How nationalism evolves: explaining the establishment of new varieties of nationalism within the national movements of Quebec and Catalonia (1976–2005).”

⁴² Martí, “The 2012 Catalan Election: The First Step towards Independence?”

Scotland's experience with devolution on the one hand and the 2007, 2011 and 2016 election, as well as the 2014 independence referendum on the other offer an obvious comparison to the Catalanian scenario.⁴³ The Scottish referendum is of course interesting in itself; having a closer look at it provides us with insight into the constitutional and political mechanisms that made a compromise between Westminster and Holyrood, and consequently a constitutionally legitimate referendum possible.⁴⁴ For the overall analysis of the Scottish case, the related policies and initiatives of the Westminster government is crucial. "The victory of Margaret Thatcher and the British Conservatives in 1979 in the UK, following the failure of the referenda on devolution, seemed to put an end to a period which had been characterized by peripheral nationalist claims."⁴⁵ The progressive strengthening of Scottish identity and nationalist revival during the Thatcher era and the questioning of the viability of the Union with the other parts of the UK is essential to be traced from the Thatcher government through Tony Blair and Gordon Brown until David Cameron, with special regards to the heavy loss of Tory popularity and the subsequent rivalry between Labour and the SNP in Scotland.⁴⁶

Secessionism and the European Union

Apart from the experience sub-state nations have had regarding devolution, the other factor that I argue was crucial in keeping the strive for independence under control for quite a while is European integration, more specifically regionalism in the EU, the idea of a "Europe of the regions", where sub-state territorial entities (not exclusively those endowed with a national character) would enjoy

⁴³ Breda, "La devolution de Escocia y el referéndum de 2014: ¿Cuáles son las repercusiones potenciales en España?"; Nagy, "A katalán válsztások eredménye."

⁴⁴ Camp-Pietrain, "Le référendum d'autodétermination en Écosse;" Tierney, "Legal Issues Surrounding the Referendum."

⁴⁵ Leydier, "Les années Thatcher en Écosse : L'union remise en question."

⁴⁶ Dixon, Keith. "Le retour du chardon : nationalisme et dévolution en Écosse (1967-1999)." *Études anglaises* 59, no. 4 (2006): 441-452.; Dixon, Keith. "Le pari risqué des nationalistes écossais : L'indépendance ou rien ?" *Politique étrangère* no. 4 (Winter 2013): 51-61.

access to opportunity structures in Europe and could consequently represent their own interests vis-à-vis Europe or even the Member State they belong to in a more autonomous way.⁴⁷ As Michael Keating argued, “Europe in particular provide[d] a new context for national minorities and the management of nationality issues” through the undermining of state sovereignty, resulting in “renewed minority nationalisms” in Spain and the UK (among others) “seeking to use the new global order and, in particular, continental regimes like the European Union (...) as a framework for new forms of autonomy”.⁴⁸ This points to how European integration did not only have a potential to subdue the claims of regional nationalisms encroaching on the sovereignty of their Member States, but also reinforce them. Nagel conceptualized this duality through contrasting two types of strategies, one based on the concept of ‘Europe of the Regions’, the other on ‘Independence in Europe’. In this analytical framework, the Scottish and Catalan choices of strategy might not have been identical, which is certainly a relevant aspect to study.⁴⁹ Arguably, though, the ‘Independence in Europe’ option became a particularly salient one after the ‘Europe of the Regions’ had reached its limitations regarding the opportunities it could provide for stateless nations in the EU, despite the otherwise not too favorable interpretations of EU regarding membership and secession.⁵⁰

Economic nationalism

The roots of Scottish and Catalan secessionism are often found to be economic in nature. While I don’t intend to write a thesis on the political economy of secession, I do see redistributive

⁴⁷ On opportunity structures in the EU, see: Princen and Kerremans. “Opportunity Structures in the EU,” and Bourne, “Europeanization and Secession.”

⁴⁸ Keating, “The minority nations of Spain and European integration.”

⁴⁹ Nagel, “Transcending the National / Asserting the National: How Stateless Nations like Scotland, Wales and Catalonia React to European Integration?”; Nagel, “A unificación europea. ¿Unha nova escena posible para os nacionalismos non estatais?”

⁵⁰ Hepburn, Eve. “The Rise and Fall of a ‘Europe of the Regions’.”

arrangements between regions as the economic and financial expression of constitutional planning. When Scotland or Catalonia is dissatisfied with fiscal transfers, taxation, redistribution or the control of national resources, it is yet another example of a “systemic failure” of unitary states vis-à-vis sub-state national aspirations. That is why I consider it important to have a closer look at the potential or actual sources of economic discontent in the two regions. Luckily, academic material abounds both regarding the causes of regional economic nationalism and the eventual implications of a followed-through secessionist agenda.⁵¹

⁵¹ Bell, “Scotland and Small Country Independence: The Assessment”; Adam, Johnson and Roantree, “Taxing an Independent Scotland”; Armstrong and Ebell, “Assets and Liabilities and Scottish Independence”; Comerford and Eiser, “Constitutional Change and Inequality in Scotland”; Hughes, “The Energy Sector in Scotland’s Future”; Young, “Transition Costs in Secessions, with a Brief Application to Scotland”; Castells, “Catalonia and Spain at the crossroads: financial and economic aspects”; Boylan, “In pursuit of independence: the political economy of Catalonia's secessionist movement.”

PART ONE: HISTORICAL DEVELOPMENT

Regarding both Scotland and Catalonia, references are often made, and not exclusively by pro-independence and/or nationalist politicians, to historical experiences of statehood that these territories have had. While I don't think the validity of such observations conditions in any way a right to independence or the expectation of remaining part of the existing state structures, these assertions are certainly not without foundation. Scotland and Catalonia had existed as distinct territorial, social and political entities long before the early 18th century, when they were integrated into the constitutional framework of the states they currently make a part of. Evidently, there are important differences between the Kingdom of Scotland and the Principality of Catalonia in the Middle Ages on the one hand, and present-day Scotland and Catalonia on the other, but it is relatively easy to establish a legal-constitutional continuity between the polities of the past and those of the present in these territories.

With some dramatic exaggeration, we could say “the division between England and Scotland has existed since 122 AD, when the Roman Emperor Hadrian constructed a wall across northern England to repel Scottish barbarians.”⁵² It is certainly true that Hadrian's wall, roughly following the current border between England and Scotland, was a divisive line between the southern, relatively Romanized part of Britannia and the northern territories that eventually fall out of Rome's reach, but without historical romanticism we cannot speak of an English and a Scottish polity at this time. For a long time after the wall was built, Britons, Picts, Angles, Gaels and Vikings fought each for the dominance of the territory of present-day Scotland. The 10th century brought about important steps toward the formation of a single realm in Scotland: “after the victory at

⁵² Patrick, “The Zeitgeist for Secession,” 200.

Carham over the Northumbrians in 1018, the Scottish kingdom reached its present boundaries by the incorporation of Lothian, the northern part of Northumbria.”⁵³ Even so, by the time William the Conqueror arrived in 1066 to unify the territories south of the wall into a medieval Anglo-Norman kingdom that became England, the influence of the King of Scotland was still limited with regards to great areas of the realm. The Western Isles, for example, were only taken from Norwegian (Norse) control in the second half of the 13th century; “Orkney and Shetland were governed by Norse law down to 1468.”⁵⁴ In any case, the following centuries were marked by Scotland’s turning into a medieval polity, where the level of centralization was arguably lower than in England, but a political unit able to match its southern neighbor’s power came into existence. Wars were frequent between English monarchs trying to make the Scots King their vassal, and a Scottish monarchy coveting the lands of Northern England. Periods of warfare were altered with periods of armistice, marriages between the English and the Scottish royal families and even early plans for a dynastic union between the two countries.⁵⁵ While such plans were not carried out at this stage, the marriage of Margaret, daughter of Henry VII of England, to James IV of Scotland later proved to be of utter importance from this aspect.⁵⁶

As for Catalonia, it was perceived as a distinct territorial entity at least as early as after Charlemagne’s armies had taken Barcelona in 801 and pushed back the Muslim expansion towards the central and southern regions of the Iberian Peninsula. The feudal entities of the *Marca Hispanica*, the buffer zone between the Frankish Empire and the Muslim territories, were united under the counts of Barcelona, themselves vassals of the Frankish king until the very end of the 10th century. After the Frankish Empire failed to provide military help to Count Borell II against

⁵³ Walker, *The Scottish Legal System*, 113.

⁵⁴ *Ibid.*, 114.

⁵⁵ Houston and Knox (eds), *The New Penguin History of Scotland*, 165-172.

⁵⁶ Ashton and Finch, *Constitutional Law in Scotland*, 1.

the Muslim troops ravaging Barcelona in 985, he refused to renew his oath of allegiance to the Frankish king, although *de jure* it was only in the Treaty of Corbeil in 1258 that Louis IX of France renounced feudal overlordship over the Marca Hispanica.⁵⁷ Prior to that, the County of Barcelona entered in a dynastic union with Aragón in 1137, becoming part of a realm that is usually referred to as the Crown of Aragón. In spite of the union, the Crown of Aragón was built up by separate political entities with different laws and customs, and this was further recognized and granted in the *Usatges* of 1150. The Catalan estates elected Berenguer de Cruïlles, the first president of the Generalitat, which is today the Government of the Autonomous Community of Catalonia, in 1359.⁵⁸ In 1412, following the Compromise of Casp, Ferdinand of Antequera was elected to the vacant throne of Aragón; that was when the rule of the Castilian Tráстамara dynasty began.⁵⁹

It was Ferdinand's grandson, Ferdinand II of Aragón, whose marriage with Isabel of Castile in 1469 is usually regarded as the event that directly led to the dynastic unification of Spain and the joint rule of the Catholic Monarchs (*Reyes Católicos*) from 1479. Since then, the continental territory of present day Spain was under the rule of the same monarch, but no significant institutional or legal changes occurred as far as the status of the Crown of Aragón and its components are concerned. Their neatly different legal identities were reflected in how it was in the name of only Castile that Columbus took possession of what he thought to be the Indies. The gradual conquest of the New World was highly lucrative for the Kingdom of Castile: the wealth of the new acquisitions, mostly in the form of silver and gold, poured to (and was wasted by) the Castilian treasury. The newly gained financial power and the parallel loss in importance of the

⁵⁷ Kalmár, "Habsburg Károly főherceg," 15-17.

⁵⁸ See "La Diputació del General (segles XIV-XVII)," http://web.gencat.cat/ca/generalitat/historia/historia_1/#bloc1, visited May 31, 2016.

⁵⁹ Guibernau, "Prospects for an Independent Catalonia," 9.

Mediterranean commercial empire of Aragón resulted in a significant shift of power between the two components of the Catholic monarchy.

On the (not yet) British Isles, a similar dynastic union between Scotland and England had to wait for more than a century after Isabel and Ferdinand's wedding. Elisabeth I (1588-1603), the "virgin queen", is often seen as a wise monarch who brought prosperity and peace to an England devastated by the religious enmities that surfaced after her father Henry VIII denied allegiance to Rome and established the Church of England and continued during the short but bloody reign of Queen Mary (1553-58), a fervent persecutor of Protestantism and as such a very fitting wife for Philip II, the Catholic Monarchs' great-grandson and Charles I successor on the Spanish throne.⁶⁰ But Queen Elisabeth was, if not necessarily virgin, certainly childless and thus became the last Tudor monarch of England. The solution to the problem of her succession was found in the dynastic union with Scotland: its king James VI was crowned King of England as James I in 1603.

The Union of the Crowns did not bring about fundamental constitutional changes aside from the sharing of the same monarch between Scotland and England. Scotland retained its Parliament and structures of government. Scotland's Privy Council served as an executive body through which the King of Scotland could govern the country. However, the King was no more physically present in the country (he moved to England), which called for trouble, especially as James VI/I converted to Anglicanism. Eventually, it was not so much the enmities between Scotland and England, but between the King and the English Parliament that caused the real trouble: James' successor,

⁶⁰ The heir to the throne of Castile after the death of Isabel the Catholic was her and Ferdinand's daughter, Joanna or, as she is widely known due to her insanity, Joanna the Mad. Joanna's Husband was Philip ("Philippe le Beau"), Duke of Burgundy, son of the Holy Roman Emperor Maximilian I of Habsburg, and as such heir to the Habsburg realms. Joanna and Philip's son was Charles I, king of Spain from 1514 and Holy Roman Emperor from 1519, as Charles V ("Charles Quint"). This is how the Habsburgs inherited the Kingdoms of Spain and, united the Austrian and the Spanish realms under their scepter until Charles V's resignation as King of Spain (1556).

Charles I failed in his attempt to reassert his power in a way most Western-European absolutist monarchs were doing at the time and lost the civil war against the parliamentary forces, which led to his beheading in 1649 and to Oliver Cromwell's rule as the Lord Protector of the Commonwealth of England, Scotland and Ireland.⁶¹ In 1660, the Monarchy was restored and Charles's son could effectively start ruling the two kingdoms as Charles II. Religious differences resurfaced between the two parts of the realm, and while the 1666 Pentland Uprising led to a more tolerant religious regime, Charles' brother and successor James VII/II could not escape suspicions that he wanted to restore Catholicism and was ousted from the Isles in 1688. The English Parliament invited his daughter Mary and her husband William of Orange to the throne. In 1689, the Petition of Rights was passed by the same body to reinforce its own power and consequently curtail that of the king in the new constitutional environment of the "Glorious Revolution".⁶²

On the Iberian Peninsula, the increased power of Castile was not used to suppress Aragón until the last century of Habsburg rule in Spain.⁶³ Philip IV (1621-1665) appointed the Duke of Olivares his first minister in 1621. The Duke's mission was to build a centralized absolutist state, and the existence of legal and cultural pluralism as incarnated by the special statuses of the territories belonging to the Crown of Aragón didn't fit that conception. Tensions arose as Olivares were trying to curb the privileges of the Catalan political elite; at the same time, the burden of Spain's involvement in the Thirty Years War was more and more perceived as damaging Catalonia more than Castile. The enmity culminated in the Catalan revolt of 1640 ('Reapers' War', *Guerra dels Segadors*), "treated by scholars of Catalan history as one of the first nationalist revolutions in

⁶¹ It is worth noting that the Cromwellian period was the first time in history when Scotland and England (and Ireland) ceased to have their distinct legislation, government and judiciary.

⁶² Ashton and Finch, *Constitutional Law in Scotland*, 1-2.

⁶³ See footnote 60.

Europe.”⁶⁴ The subsequent turbulence in the region contributed greatly to the outcome of the Franco-Spanish war that went on beyond the Treaties of Westphalia. Philip IV was forced to sign the Treaty of the Pyrenees in 1659 and cede territories to France.

The War of Succession that followed the extinction of the Spanish branch of the Habsburgs proved disastrous to Catalonia and its traditional privileges, as it supported the Archduke Charles from the Austrian branch of the Habsburg dynasty against the Bourbon claimant.⁶⁵ In the end, it was the latter, the grandson of Louis XIV of France, who became king of Spain as Philip V. His rival dropped out of the competition when he was elected Holy Roman Emperor in 1711; the great powers gave assent to his claim in the Treaty of Utrecht in 1713. Catalonia took more time to bend its knees before the new master: Barcelona capitulated to King Philip on September 11, 1714 after a siege of more than a year. The consequences were grave: in the *Decreto de Nueva Planta del Principado de Cataluña*, the last one in the series of many similar decrees issued for the administration of other provinces of the Hispanic Monarchy, the King outlawed separate Catalan political institutions in an attempt to create a centralized Spanish monarchy (following his grandfather’s ideal) and banned the use of Catalan language for the benefit of Castilian (Spanish), “although the majority of the population could not understand it.”⁶⁶

The War of Spanish Succession had its impact on far-away Scotland as well. England initially took the Archduke Charles’ side in the conflict and joined the Grand Alliance against France and the Bourbons. King William and his government wanted to avoid any sort of political turbulences that might undermine the war efforts against Louis XIV, especially as the latter endorsed the ousted

⁶⁴ Guibernau, “Prospects for an Independent Catalonia,” 10.

⁶⁵ O’Reilly, “Lost Chances of the House of Habsburg,” 54-56.

⁶⁶ Guibernau, “Secessionism in Catalonia,” 373.

James II's successor as a pretender to the Scottish and English thrones. While the plans for the restoration of the Stuart dynasty eventually came to naught, the Jacobite threat was taken seriously at the time, as the political system of the "Glorious Revolution" was still in its phase of consolidation. The 1703 session of the Scottish Parliament demonstrated that Scotland cannot always be governed in accordance with English design despite the dynastic union. The assembly voted into law several bills that were hostile to Queen Anne, William's successor, and her representatives in Scotland: it reclaimed the right to decide on the person of the childless Queen's successor and threatened with excluding anyone from the inheritance of the Crown of Scotland who is also King of England unless Scotland can trade freely with the English colonies. The Scottish Parliament also maintained the prerogative to declare war, which technically meant an autonomous Scottish foreign policy. Eventually, despite a previous lack of interest to deepen the union of the two countries from both sides, the Crown decided to push for a new constitutional design that would allow for a more efficient governance of Scotland. The Alien Act of 1705, which threatened to treat Scots as foreign nationals in commercial relations and consequently to imperil Scottish exportation to England, forced Scotland to sit down to the negotiating table and contribute to the work of the Anglo-Scottish Parliamentary Commission, created in 1706. Despite the Anglophobia and popular resentment that the Alien Act caused in Scotland and the initial resistance of the Scottish Church (the Kirk), the Commission's work bore its fruit: the Act of Union between England and Scotland was passed on January 16, 1707, when "the [Scottish] parliament voted itself out of existence".⁶⁷ The Scottish Privy Council was abolished in 1708.⁶⁸

⁶⁷ Devine, *The Scottish Nation*, 12.

⁶⁸ Ibid. 3-16.

While the Act of Union of 1707, which is still one of the most important constitutional documents of the United Kingdom, meant a final transfer of legislative authority to Westminster, Scotland's incorporation into Great Britain was rather different from that of Catalonia into the Spanish Monarchy. Through the Act of Union, the English and Scottish parliaments, fiscal matters and public law systems were integrated, but this was sanctioned by the Scottish Parliament itself, even if not without certain pressures from England. Moreover, Scotland retained its own private law system, the Kirk obtained legal guarantees against an eventual incorporation into the Church of England and Scots could freely trade with England and its colonies. This is not to say that Anglo-Scottish cohabitation worked completely smoothly from day one of the creation of Great Britain: in 1713, a bill proposing the dissolution of the Union was only defeated by four votes in the House of Lords.⁶⁹ The Jacobite uprising of 1715 and the troubles caused by unpopular new taxes (especially the malt tax) are also good examples to the difficulties of this "marriage of convenience" between North and South. But all in all, Scotland kept a "remarkable degree of legal, religious and administrative autonomy and continuity" after the Union.⁷⁰ Moreover, it could hugely profit from the opportunities the common market with England and its colonies provided for its linen, cattle and tobacco exports. Scottish nobility, merchants, sailors and soldiers were no more excluded from taking part in overseas "business", as it is attested by the "infiltration" of Scots into the East India Company and the military. "In the nineteenth century, [...] Scotland played a significant role in the emergence of imperial Britain."⁷¹ All in all, Scottish identity was not crushed like Catalan was intended to by the centralized Bourbon monarchy.⁷²

⁶⁹ Ashton and Finch, *Constitutional Law in Scotland*, 5-6.

⁷⁰ Devine, *The Scottish Nation*, 24.

⁷¹ Flamini, "Scotland's Independence Bid," 61-62.

⁷² Devine, *The Scottish Nation*, 16-30.

Catalonia did not have a chance to regain its confidence until industrialization made it the most developed region of Spain during the 19th century; a position it still claims to hold. Economic modernization provided the necessary background for the rethinking of Catalonia's place in a retrograde, underdeveloped, conservative state to which it was subordinated. Political thinking and Catalan identity went through a real renaissance (*Renaixença*), which “prompted demands for Catalan autonomy, first in the form of regionalism and later in calls for a federal state.”⁷³ This is when Catalan nationalism in the contemporary sense of this term was born; even at its birth it was a multifaceted phenomenon, it appeared in various forms at roughly the same time. One of the main developments of the era was the appearance (though not considerable popularity) of the idea of an independent Catalonia: ERC, which is still one of the most consequentially secessionist parties, gained perceivable electoral support at the beginning of the 20th century.

One of the most important elements of Scotland's political renaissance in the 19th century consisted in the radical increase in the number of the electorate after the Scottish Reform Act of 1832 gave men over 21 years of age the right to vote. The Scottish electoral reform, more radical than the contemporary English one, provided for an articulation of the need for better representation in Westminster.⁷⁴ In 1885, a Scottish Office was created under the leadership of the Secretary for Scotland, who was given a seat in the British Cabinet in 1892, and the rank of Secretary of State in 1926. The competences of the Scottish Office “gradually increased over the years so that the Secretary of State for Scotland had responsibility for a wide range of matters including agriculture, fisheries, the arts, education, environmental matters, fire and police services, health services, local authorities, prisons, roads, social work, sport, tourism and planning.” This didn't mean a change in

⁷³ Guibernau, “Secessionism in Catalonia,” 373.

⁷⁴ Houston and Knox (eds), *The New Penguin History of Scotland*, 278.

the constitutional design of the United Kingdom, but the establishment of the Scottish Office seems to have been a precursor of devolution.⁷⁵

In the wake of the national renaissance, Catalonia regained, for the first time since the Nueva Planta Decrees, “a certain degree of autonomy under the administrative government of the *Mancomunitat* (1913-1923).”⁷⁶ This experience came to an end after General Miguel Primo de Ribera’s coup in 1923, but during the Second Republic in the 1930s, Catalonia’s distinct identity was again taken into account, as the republican government granted it a Statute of Autonomy and with it a specific political and institutional structure when it called the Generalitat back to life. This rediscovery of enhanced interior freedom couldn’t last long, as the general Francisco Franco abolished the Generalitat in a decree on April 5, 1938, shortly before the final end of the Spanish Civil War (1936-1939). The authoritarian regime Franco introduced was as repressive towards Catalans as Philip V’s measures were in and after 1714. The philosophy behind Franco’s dictatorship had several common features with Olivares’ and Philip V’s ideal of the absolute monarchy. As for Catalonia, it claimed to be different, specific and autonomous from any other parts of the realm, and as such it meant a threat to absolute centralization, uniformity and subordination to one single (Madrid) government of one single (Spanish) nation. It was an enemy of Franco’s ‘counterrevolution’ and consequently, it was to be repressed and regulated. During Franco’s rule that lasted until the Caudillo’s death in 1975, Catalonia couldn’t have its own political and cultural institutions.

In the early 18th century, Scotland and Catalonia were both merged into a shared constitutional system with a neighboring polity that was from many respect more powerful, populous and

⁷⁵ Ashton and Finch, *Constitutional Law in Scotland*, 6-7.

⁷⁶ Guibernau, *ibid.* and “Secessionism in Catalonia,” 373.

territorially extended than them. While that is an important common point, as these mergers largely, if indirectly, have determined the constitutional design of Spain and the UK ever since, we should observe the important differences between the nature of this mergers. In the case of Catalonia, the promulgation of the Decrees of Nueva Planta meant the total destruction of the constitutional framework that differentiated Catalonia (and Aragón, Valencia, Mallorca, etc.) from Castile. The birth of the unified Spanish monarchy meant more the expansion of Castile and the abolition of the Crown of Aragón than an at least formally equal unification of the legislative and executive structures that occurred between Scotland and England in 1707.

This difference between the creation of Great Britain and the unified Spanish monarchy still has its impact on the constitutional design of the UK and Spain, and the political visions behind it. The 1707 Act of Union did not create a federal state “under which governmental responsibilities would be formally divided between London and Edinburgh, but it created instead the conditions under which London-based institutions could govern across the expanded territory.”⁷⁷ The absence of the federal ideal is not very surprising as there were no federal examples to follow at the time: the United States of America only came into existence some seven decades later, and during the first period of the shaping of American federalism, Britain wouldn’t have necessarily been thrilled to copy one of its former colonies. But the creation of the British unitary state kept the subtleties of the common law system intact, and, apart from the fact that Scotland retained a significant part of its distinct legal system, the flexibility this assured is arguably accountable for the relative ease with which a constitutional solution was found for the holding of an independence referendum.

The Nueva Planta Decrees, on the other hand, put into practice the Bourbon dream of a constitutionally indivisible, centralized monarchy, which of course hasn’t remained intact until

⁷⁷ Himsworth and O’Neill, *Scotland’s Constitution*, 43.

today, but Catalonia has had several very bad experiences with the idea of unitary Spain, more recently during the almost four decades of Franquismo that had an enduring impact on Spain's development, and Catalonia's in it. One example of that is how the current constitutional design of Spain, now a pluralist democracy, still reflects the inflexibility that it cemented regarding the denial of any constitutional units that are not based on the sovereignty of the Spanish state or the Spanish nation.

PART TWO: DEVOLUTION AND STATE OF AUTONOMIES

The “Federal” Experience

What I call the federal experience in Spain and the UK started, at least for the purposes of this work, in 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. It should be noted, though, that this approximate temporal coincidence doesn’t indicate much similarity between the underlying reasons that accounted for the redesigning of the institutional structures of political power in the two countries.

In Spain, the death of General Francisco Franco, *caudillo*⁷⁸ since the fall of the Second Republic and the end of the Spanish civil war (1936-39), 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 executive) 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.⁷⁹ 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. The Generalitat led by Josep Tarradellas was recognised 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.⁸⁰

⁷⁸ Franco’s title as Spain’s dictator was *caudillo*, “leader”, “Führer”.

⁷⁹ Guibernau, “Prospects for an Independent Catalonia,” 10-11.

⁸⁰ Vasconcelos Romão, “A transformação dos mecanismos,” 72.

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 3/1979*, 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 Catalonia’s collective identity and the inalienability of its self-governance.⁸¹ The Statute had to be and was in compliance 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 measures a federation. However, during the following decades the new constitutional framework of Catalan autonomy and was widely accepted by Catalan politicians and citizens, expressing a “balanced dual identity (i.e. “equally Spanish and Catalan”).”⁸²

In Scotland, the need 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 1707,⁸³ and which was reinforced due to the shared suffering and efforts of the war against the Axis powers.⁸⁴ 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

⁸¹ Vasconcelos Romão, “A transformação dos mecanismos,” 73

⁸² Serrano, “Just a Matter of Identity?,” 527.

⁸³ Munro, “Scottish Devolution,” 136-140.

⁸⁴ Dixon, “Le retour du chardon,” 443; “Le pari risqué des nationalistes écossais,” 53.

and “helped to reinforce the commitment of Scots to the Union.”⁸⁵ 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. In retrospect, 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 Constitution⁸⁶ 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.”⁸⁷

The Commission’s report was published in 1973. Its most important and eventually 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 to account.⁸⁸ In line with the Commission’s observations, the Labour government 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.⁸⁹ Both Acts were required to be approved by a referendum where not only a simple majority of the voters, but at least 40% of those entitled to

⁸⁵ McEwen, “State Welfare Nationalism,” 67.

⁸⁶ Usually referred to as the Kilbrandon Commission, after Lord Kilbrandon who became chair of the Commission in 1972, after the death of Lord Crowther.

⁸⁷ Himsworth and O’Neill, “Scotland’s Constitution,” 52.

⁸⁸ Ibid.

⁸⁹ Dixon, “Le retour du chardon,” 446.

vote 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.⁹⁰ 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 Scotland Act was passed in the Westminster Parliament in 1998 and came to effect gradually until April 1, 2000.⁹¹ 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 the promulgation of *Ley*

⁹⁰ McEwen, "State Welfare Nationalism," 69-70; Leydier, "Les années Thatcher en Écosse," 1045.

⁹¹ Himsworth and O'Neill, "Scotland's Constitution," 53-54.

Orgànica 4/1979 on September 18, 1979, it was subsequently submitted to a referendum in Catalonia where more than 88% of the participants voted in favor of it.⁹² It was published in the *Diari Oficial de la Generalitat de Catalunya* (the Community's official journal) and entered into force on December 31 of the same year. The *Estatut d'Autonomia de Catalunya* had to be and was in compliance with the Spanish Constitution, subordinated to it in the legal hierarchy, but 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.⁹³ (Emphases 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 (Catalan) people.⁹⁴ While Catalan is established as the language of Catalonia, co-official status and equality for Castilian and special protection for Aranese is also established.⁹⁵ The flag of Catalonia is also described in the Estatut.⁹⁶ The exclusive competences of the Generalitat, ceded by the Spanish

⁹² The participation rate was slightly below 60%. For more details, see: http://governacio.gencat.cat/ca/pgov_ambits_d_actuacio/pgov_eleccions/pgov_dades_electorals/resultats-2/?a=a&id_eleccions=R19791&id_territori=CA09, visited May 31, 2016.

⁹³ Preamble EAC (Statute of Autonomy of Catalonia) 1979.

⁹⁴ Art.1 EAC 1979.

⁹⁵ Art.3 EAC 1979.

⁹⁶ Art.4 EAC 1979.

State are enlisted in 34 points, englobing a wide range of affairs from health care through education to the protection of cultural heritage.⁹⁷ In other fields, the Generalitat has complementary or executive competence.⁹⁸

While one can argue that by the end of the 20th 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, from education through development policies to social issues, 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 CiU and Jordi Pujol. A new Statute of Autonomy was approved in the Parliament of Catalonia, sent to the Spanish Cortes to be significantly diluted and 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, which declared several core features of the Estatut unconstitutional or void of judicial value after a 4-year-long deliberation in 2010, causing serious outrage in Catalonia.

As for Scotland, where the SNP won the elections for the first time and thus was able to form a minority government in 2007, a Commission on Scottish Devolution⁹⁹ 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

⁹⁷ Art.9 EAC 1979.

⁹⁸ Arts 10-11 EAC 1979.

⁹⁹ The Calman Commission.

with 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.¹⁰⁰ Aside from this, Scotland gained increased powers to borrow,¹⁰¹ and other legislative and executive competences were also expanded.¹⁰²

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 references to the constitution.

Devolution and State of Autonomies vs "True" Federalism

In any case, we can establish 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

¹⁰⁰ See Part 3, Sections 28-31, SA (Scotland Act) 2012.

¹⁰¹ Part 3, Section 32, SA 2012.

¹⁰² Part 1 and 2 (Sections 1-22), SA 2012.

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 “true” federations. In order to do so, 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, such as in the case of Scotland and Catalonia, the institutional setting undoubtedly resembles to 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 “true” 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. “True” 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 “historic rights”.¹⁰³ Eventually, the Spanish Constitutional Court rejected, or rather “castrated” the reformed Statute after four years of deliberation and after it had

¹⁰³ See the Preamble of the Statute of Autonomy of 2006, and Tajadura Tejada, “El pronunciamiento del Tribunal Constitucional sobre el Preámbulo del Estatuto de Autonomía de Cataluña”, 430.

been approved by the Catalan Parliament, both houses of the Spanish Cortes and also a referendum in Catalonia.¹⁰⁴ This has been one of the most spectacular manifestation 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.”¹⁰⁵ 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.

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

¹⁰⁴ Carrillo, “La sentencia del Tribunal Constitucional español,” 365.

¹⁰⁵ Tierney, “Federalism in a Unitary State,” 238.

Catalonia wants to acquire certain competences, London or Madrid have to be lobbied for a start of negotiations, and eventually their approval is also necessary. The Spanish Constitution is a good example to 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*, Victor Ferreres Comella points to several aspects in which Spain's constitutional design "deviates from standard cases of federalism." 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 Supreme Court still has the tools to judge whether it conforms to the Constitution. Fiascos similar to the ominous 2010 decision of the Supreme 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.¹⁰⁶

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 of the 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. When they try to circumvent the central state and follow a kind of foreign policy on their own, it's usually met with strong disapproval from the part of the central authorities. 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.

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. But again, the legal fiction behind is 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 that they can be exercised instead and in the name of the national community that defines the contours of the subunit. 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. Especially when Catalonia *per se* does not have

¹⁰⁶ Ferreres Comella, *The Constitution of Spain*, 47-48.

any influence on the composition of said court¹⁰⁷ 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.”¹⁰⁸ 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 the Spanish Constitutional Court and similar high instances. 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 is allowed to 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 basically cannot decide from one day to the other within the limit of their own competences 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

¹⁰⁷ Nagel, “Espanya, federal?” 19.

¹⁰⁸ Ferreres Comella, *The Constitution of Spain*, 48.

as it was expressed in the Latin word *foederati*, describing the allies and, at least in principle, not the servants of the Roman Empire.

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.¹⁰⁹ 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.¹¹⁰ The UK's constitutional system is much more subtle and less explicit, so one can expect that once powers are devolved, no common law 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 court to do so.

Constitutional Design and Economic Nationalism

The strive for independence in Scotland and Catalonia is often regarded as a question of economics or of economic nationalism. This is why 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. On the other hand, economic relations

¹⁰⁹ Art.161(2) CE (Spanish Constitution) 1978.

¹¹⁰ Art.155(1),(2) CE 1978. See also http://ccaa.elpais.com/ccaa/2015/07/21/catalunya/1437508061_800916.html, visited April 30, 2016.

between the center and the subunit are very much dependent on the constitutional design, which points to the limits of economic concessions in order to curb secessionism without a true federal reconfiguration of the constitutional settings.

In both Scotland and Catalonia, the struggle for independence is a struggle for full sovereignty, also in economic terms, including economic policies and planning, fiscal and monetary policies, welfare regulation, etc. The argument that only independent statehood could provide Scotland and Catalonia, the Scottish and the Catalan nation with full sovereignty over economic assets and policies is recurrent. But what would such sovereignty imply?

First of all, both Scotland and Catalonia would be detached from the redistributive mechanisms of their respective central states. This is important for Scottish and Catalan nationalism for rather 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.”¹¹¹ From this aspect, independence would mean that Catalonia wouldn’t have to transfer money to the central budget, the revenues of which are redistributed according to policy objectives that aim at the benefit of the whole of Spain and the Spanish nation, and not just Catalonia. This might mean saving some 14 billion euros per annum, as Catalonia transfers that amount to the Spanish budget every year.¹¹²

¹¹¹ Castells, “Catalonia and Spain at the crossroads,” 284.

¹¹² Nagy, “A katalán választások eredménye,” 5.

Having full autonomy over spending locally raised revenues is an important claim in Scotland, but with a very different edge to it. Scotland, unlike Catalonia, normally receives more from the central budget than its contribution to it. This is explained by the lower level of prosperity compared to the rest of the UK, especially England. 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).”¹¹³ 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.”¹¹⁴ The most important natural resource in this respect would be North Sea oil and gas, most of which could end up under Scottish sovereignty in the event of eventual 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.”¹¹⁵ In itself, 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.

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 taxes paid in Catalonia should be spent on the pensions, hospitals, unemployment benefits, etc. of Catalans. In Scotland, a

¹¹³ Tierney, “Federalism in a Unitary State,” 249.

¹¹⁴ Domjan and Stone, “A comparative study of resource nationalism,” 39.

¹¹⁵ Hughes, “The Energy Sector in Scotland’s Future,” 376.

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, a government policy “having a direct impact on the welfare of citizens by providing them with services and income” in Marshall’s classic definition,¹¹⁶ gained an important symbolic value in Scotland especially during Margaret Thatcher’s premiership (1979-1990), 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.”¹¹⁷ 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, independence would bring full (formal) sovereignty over fiscal and natural resources for Scotland and Catalonia. This sounds a rather solid argument for independence, as long as we suppose that economic, fiscal and welfare policies completely or partially under the control of Madrid or London only took revenues from Scotland and Catalonia, and didn’t channel them back in some form. This is not the case, though. I previously hinted at the importance of subsidies for a relatively underdeveloped Scotland inside the UK. Catalonia was never really relatively underdeveloped inside Spain, but constant claims that it is the most prosperous autonomous community should be taken with caution. It is certainly true that “while Catalan citizens make a tax contribution per capita to the funding of total autonomous governments that is 20 per cent above the average, the resources per capita available for the Catalan government are around the average,” and Catalonia only “ranked third out of 15 autonomous communities in terms of tax contribution

¹¹⁶ Marshall, *Social Policy*, 1.

¹¹⁷ McEwen, “State Welfare Nationalism,” 74.

per capita (i.e. before equalization) [and only] ninth in terms of autonomous resources per capita (i.e. after equalization).” The latter again indicates more giving than getting and seems to prove that central redistributive mechanisms do take some wealth away from the Autonomous Community. Nevertheless, there are autonomous communities where this gap could be wider (Madrid, Balearic Islands).¹¹⁸

Sovereignty manifested in independent statehood would also entail specific costs such as the maintenance of an army, a diplomatic apparatus, border control, etc. Regaining control over important natural resources also comes at a price. In the most striking case of relevance, Scottish oil reserves, Scotland would 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.¹¹⁹

This leads us to another key aspect of secession, its “friendliness”. Both Scotland and Catalonia would be rather small, open economies; as such, their membership in the European Union and continued incorporation into the single market would be vital. As I present it with more detail in a later chapter of this thesis, according to the current mainstream interpretation of EU Law, neither would automatically become an EU Member State just because they would have been part of one previously.¹²⁰ Application for membership thus seems unavoidable, and one of the most important criteria of becoming an EU Member State is that all of the Member States already in the “club” endorse it. This is far from evident, especially in the case of Spain. Catalonia could also find itself

¹¹⁸ Castells, “Catalonia and Spain at the crossroads,” 284-285.

¹¹⁹ See Hughes, “The Energy Sector in Scotland’s Future.”

¹²⁰ See Weiler, “Catalonian Independence and the European Union,” and the next part of the thesis.

out of the Eurozone, and Scotland would not be given the right to become part of a monetary union with the remainder of the UK.¹²¹ As such, the terms of separation would heavily determine transition costs, such as “transaction costs, fiscal costs, and the effects of uncertainty.”¹²²

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 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 aspects?

The explanation redirects 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 neither the UK nor Spain. In Britain, the Westminster

¹²¹ See House of Commons, Scottish Affairs Committee, *The Referendum on Separation for Scotland: no doubt—no currency union*.

¹²² Young “Transition Costs in Secessions,” 395.

Parliament's sovereignty is undividable; in Spain, national sovereignty stems from the indissoluble unity of the Spanish nation.¹²³ Consequently, the Scottish Parliament cannot legally express Scottish national sovereignty; the functioning of Catalanian 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 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."¹²⁴ 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 next part of this work I try to find some elements of the answer to this question.

¹²³ See Art.2 CE 1978.

¹²⁴ Bell, "Scotland and Small Country Independence," 194.

PART THREE: POLITICAL APPLICABILITY

In this last, concluding part of the thesis I look at the viability of the federal option in Spain and the United Kingdom. I start by looking into how EU Law, a determinant feature of the constitutional design of both the UK and Spain, might present an incentive for the abandonment of secession as an objective in Scotland and Catalonia. There is no place for a detailed demonstration, but I don't hesitate to assert that both Scotland and Catalonia would want to remain part of the European Union, independent states or not. This is important, as the present-day mainstream interpretation of EU Law points to the lack of tenability of the argument that when seceding from a Member State, the newly independent state would automatically remain part of the EU. The strong political and economic need to remain in the EU could thus be an incentive in Scotland and Catalonia for trying to find a solution to the dissatisfaction of the current constitutional design internally, i.e. not through secession. In the second half of Part Three, I briefly evaluate the actual chances for a federal redesigning of the constitutional structures in British/Scottish and Spanish/Catalan politics. I also assess the potentials in the current, devolved unitary system to durably accommodate Scotland and Catalonia inside Britain and Spain. I intend to point to some differences between the two systems that might lead to different scenarios in the quest for independence.

The Law of the European Union: A Push for Cooperation?

One crucial aspect of Scottish and Catalan independence is whether these territories would or could be a Member State of the European Union, and if so, under what conditions. Scotland and Catalonia have been covered by territorial effect of EC and EU law since the coming into force of the UK's and Spain's Treaty of Accession to the European Communities in 1973 and 1986 respectively.

Scotland and Catalonia's population are EU citizens insofar as they have British or Spanish citizenship (or the citizenship of any other Member State). So while Scotland and Catalonia are not under EU law by their own right, EU law has been applied in these regions for more than enough time to complicate the dilemma that Member States, EU institutions and Scotland and Catalonia would have to face in the event of successful secession. While such an event would have direct implications for EU Law, there are no provisions in the primary law of the European Union that would specifically address the scenario of the secession of part of a Member State.¹²⁵

One of the basic principles enshrined in the Treaty on the European Union (TEU) is the respect of the fundamental political and constitutional structures of the Member States, including "ensuring the territorial integrity of the State."¹²⁶ This provision is evidently the manifestation of one of the most basic interests of the High Contracting Parties (the Member States); it serves as an interpretative framework for any scenario in EU law that has an impact on a Member State's territorial integrity, such as Catalan and Scottish secession. That certainly has to be kept in mind when analyzing the relevant stipulations of EU Law, most importantly provisions on becoming and ceasing to be a Member State.

According to Article 49 TEU, "any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." On the basis of that, Scotland and Catalonia could certainly reapply for membership in case no other solution is found to the dilemma; Catalonia, as an Autonomous Community of Spain, and Scotland, as a territory of the United Kingdom, have already been part of the EU and as such they have,

¹²⁵ Neither is there any provisions on secession in the secondary law of the EU, but questions of membership hardly pertain to secondary law.

¹²⁶ Art.4(2) TEU (Treaty on the European Union)

supposedly, already respected the values of Article 2, and in fact the whole of the *acquis communautaire*. However, “the conditions of admission [...] shall be the subject of an agreement between the Member States and the applicant State [and] this agreement shall be submitted for ratification by all the contracting States.” This means that all the Member States must be in favor of the enlargement, and that might be a rather problematic condition. Primarily because the Member States that would suffer the loss of part of their territories would have to agree to the accession of their then former regions, but it is also far from evident that other Member States, judging such a precedent undesirable, would be in favor of Catalonia’s and/or Scotland’s reincorporation. It can be recalled how the EU could not, in its entirety, recognize the independence of Kosovo, a country with far less relevance to the Member States’ political concerns. Five Member States, Spain among them, has not yet recognized Kosovo as an independent state in part due to their fears of fomenting unilateral declarations of independence in their own territories. Catalonia’s admission as a Member State would greatly, if not exclusively, depend on the way it will have seceded from Spain; a negotiated solution and Spain’s recognition of Catalan statehood seem to be as required as unlikely. We could suppose that the rest of the UK’s approach would be more friendly towards Scotland’s EU membership, as London didn’t only recognize Kosovo, but the Scottish independence referendum was carried out on the basis of an agreement between the UK and the Scottish governments. Still, the rest of the UK would be in a more advantageous position if it came to negotiations on the terms of supporting Scottish EU membership.

There are certain conclusions that can be drawn from Article 50 of the TEU, regulating the withdrawal of a Member State from the European Union; a provision that did not exist before the modifications that the Treaty of Lisbon brought to the TEU. “The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that,

two years after the notification [...]”¹²⁷ The TEU foresees that EU law cannot just cease to exist in a territory where it have been *en vigueur* before, and as such some kind of an agreement or provisory regulations might need to be elaborated. It is of course only indirectly related to Scotland and Catalonia’s hypothetical secession, as they are not Member States, and consequently it cannot withdraw from the EU as a Member State.¹²⁸ Sir David Edward, who was the British judge of the European Court of First Instance and later of the Court of Justice of the EC/EU from 1989 to 2004, suggests nevertheless that the spirit and the general scheme of the Treaties might provide for the application of Art.50 in the hypothetical case of Scottish (and Catalan) independence, whereby “good faith, sincere cooperation and solidarity [...] would require [all Member States and EU institutions] to enter into negotiations to determine the future relationship within the EU” of the seceded territories.¹²⁹

If for some reason the Court of Justice of the European Union (CJEU) were required to give a verdict relative to the consequences of Catalonia’s secession in EU law, it would probably find a way, as on many previous occasions, to give a judgment of precedential value despite the lack of specific dispositions in the Treaties, and as such reinforce one of the core aspect of its jurisprudence according to which the EU is a *sui generis* legal order that autonomously confers rights and obligations not only to its Member States (like international organizations) but also to its citizens.¹³⁰

On the one hand, the CJEU might look for the help of international law to complete the lacunae of EU Law. On the other hand, it could look for precedents in EU Law when the territorial scope of

¹²⁷ Art.50(3) TEU

¹²⁸ Tierney, “Legal Issues Surrounding the Referendum,” 386.

¹²⁹ Edward, “Scotland and the European Union,” point 19.

¹³⁰ Tierney, “Legal Issues Surrounding the Referendum,” 383. This autonomy of EU Law was cemented by the Court of Justice through its doctrine of the principle of direct effect (*Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, February 5, 1963) and of the principle of the supremacy of EU Law (*Flaminio Costa v. E.N.E.L.*, Case 6/64, July 15, 1964).

EU (or EC) Law was extended to or withdrawn from territories. Such precedents are not abundant in number. In the case of Germany's reunification in 1990, "community law automatically applied upon entry into force of the Unification Treaty," as a result of a political agreement between the Member States.¹³¹ While this is a precedent for an automatic extension of EU law as a result of a political solution, the unification of Germany was the exact opposite of secession. "The territory of Algeria, as part of France, was subject to the Treaty of Rome. When it became independent in 1962, however, it ceased to be so, while France continued as a member state of the EEC."¹³² Similarly, when Greenland "seceded" from the European Economic Community in 1985, "the Treaty ceased to apply to the territory of Greenland."¹³³ In the first case, Algeria ceased to be part of a Member State; in the latter case, Greenland withdrew only from the EEC, and not from the Member State (Denmark) it was part of. Both of these precedents reinforce the expectation that EU Law would cease to apply to Catalonia in the event of a secession, and the new state would need to apply for membership.¹³⁴

The few remarks of top-ranking EU officials further strengthen this approach. Joaquín Almunia, Vice-President of the European Commission at the time, made it clear days after widespread pro- and anti-independence manifestations in Catalonia in 2013, that in case the Autonomous Community secedes from Spain, it leaves the EU as well, because as a sovereign, independent country it would need to apply for membership on its own.¹³⁵ This statement followed a clear EU stance, as Commission President José Manuel Barroso had set out a very similar observation on an independent Scotland: "If part of the territory of a Member State would cease to be part of that

¹³¹ Jacqué, "German Unification and the European Community," 11.

¹³² Tierney, "Legal Issues Surrounding the Referendum," 382.

¹³³ Jacqué, "German Unification and the European Community," 5.

¹³⁴ Carreras Serra, "Unión Europea y secesión," 277-278.

¹³⁵ <http://online.wsj.com/news/articles/SB10001424127887323527004579079031402636014>. (January 4, 2015).

state because it were to become a new independent state, the Treaties would no longer apply to that territory.”¹³⁶ This statement was almost identical to the wording used in 2004 by Barroso’s predecessor, Romano Prodi.¹³⁷ Other prominent EU officials, such as Viviane Reading, Vice President of the European Commission (2010-2014), Martin Schulz, President of the European Parliament (since 2012) and even Herman van Rompuy, President of the European Council (2009-2014) made similar remarks on the matter.¹³⁸

Independence Referenda and the Federal Idea in Britain and Spain

Assuming that neither Scotland, nor Catalonia would want to find itself out of the EU, the uncertainties regarding their EU membership after secession is certainly an important incentive for trying to find a solution inside the Member State they belong to. It is also logical to assume that there has been an important desire for a change in the constitutional design in both Scotland and Catalonia that has prevailed even after the establishment of their autonomous governments. In Scotland, opinion polls showed a remarkable majority in favor of devolution before the reestablishment of the Scottish Parliament, and more devolution has remained a very important constitutional preference even after the 1998 Scotland Act. In Catalonia, the reform of the Statute of Autonomy was seen as a necessary step to further increase the recognition of Catalonia as a nation before 2006.¹³⁹ These preferences have been accompanied by demands for outright independence, first as an option that were outside the mainstream of politics, later, in the wake of both increasing devolution (Scotland) and the lack of it (Catalonia), as a constitutional preference that is not shared by an absolute majority of the population, but definitely strong enough to become

¹³⁶ Barroso, *Letter to Lord Tugendhat*, December 10, 2012.

¹³⁷ Carreras Serra, “Unión europea y secesión,” 280.

¹³⁸ Vaubel, “Secession in the European Union,” 295.

¹³⁹ Martí, “National Identity and Constitutional Change,” 18-25.; Serrano, “Just a Matter of Identity?,” 525-529.

an important source of division in these societies, often neighboring a 50% share in opinion polls. The recent independence referendum in Scotland and the quasi-referendum and subsequent plebiscitary elections in Catalonia showed clearly the allure of the independence option.

It was first Scottish people above the age of 16 that were called to have their say on independence on September 18, 2014. There was a single question on the ballot paper: “Should Scotland be an independent country?” Should there have been a majority for “Yes”, Scotland would have already become an independent country, as secession was proposed to happen by March 24, 2016. Eventually, with a very high turnout rate (84.6%), the “No” option won with more than 2 million votes (55.3%) for Scotland remaining part of the UK. There is, however, two important observations to make concerning this referendum. One is that more than 1.6 million Scots (44.7%) voted for independence, which is remarkable both in the context of a total population of around 5.3 million, and of the only 400,000-votes difference between “Yes” and “No”.¹⁴⁰ The other is that an agreement between the UK and a Scottish governments (“The Edinburg Agreement”) was the basis of the constitutionality of the referendum, which is “in itself remarkable [as it means that] the UK government has entered consensually [...] into a process which could lead to the break-up of the state, a level of acquiescence which is itself unprecedented in the EU context.”¹⁴¹

In Catalonia, the *nou ena* (9N) quasi-referendum was held on November 9, 2014. 2,305,290 people with residence in Catalonia and above the age of 16 participated in the event and an additional 26,103 cast their votes between November 10 and 25, thus expressing their opinion on the

¹⁴⁰ For the official results, see <http://scotlandreferendum.info/>, visited May 27, 2016.

¹⁴¹ Tierney, “Legal Issues Surrounding the Referendum,” 360.

statehood and independence of Catalonia.¹⁴² On the bi- and trilingual ballot papers,¹⁴³ two questions were asked: “Do you want Catalonia to become a state?” and “If so, do you want it to become an independent state?” 80.87% of the respondents supported both statehood and independence, and an additional 10.07% endorsed statehood for Catalonia without independence, whatever that might mean. Although we don’t have official turnout rates due to uncertainty about the actual number of the electorate, it is more or less safe to assume that it was between 35-45% (37% according to *The Economist*).¹⁴⁴ While the turnout did not give this initiative an unquestionable legitimacy, and while this “referendum” was not more than a methodologically questionable opinion poll on a huge sample, it is a fact that 1,861,753 Catalans out of a total population of 7.4-7.5 million went to the polling stations and explicitly said that Catalonia should be an independent state.¹⁴⁵

The 9N “referendum”, contrarily to the Scottish one, could not be binding in legal terms. It was not even officially called a referendum: Artur Mas, at the time president of the Generalitat, and his allies originally referred to it as a “popular consultation on the political future of Catalonia” (*consulta popular no referendària sobre el futur polític de Catalunya*). It was not only considered illegal by the Spanish Government, but the Constitutional Court delivered a judgment on the unconstitutionality of the *consulta*. No political solution was found to the situation: instead of the usual “legal disciplining”, Prime Minister Rajoy and the People’s Party did not even try to beat the

¹⁴² See <http://www.participa2014.cat/>, visited May 27, 2016.

¹⁴³ All ballot papers were at least bilingual (Catalan and Castilian Spanish), but in Aranese territories, a trilingual version (completed by Aranese) was available. See http://www.participa2014.cat/pdf/P1_tr_descarregable.pdf, visited June 1, 2016.

¹⁴⁴ <http://www.economist.com/news/leaders/21632478-madrid-government-should-let-catalans-have-vote-and-then-defeat-separatists>, visited May 15, 2016.
<http://www.economist.com/news/europe/21632479-catalan-vote-november-9th-will-do-little-resolve-future-either-region-or>, visited May 15, 2016.

¹⁴⁵ http://web.gencat.cat/ca/actualitat/detall/20141110_participacio-resultats, visited May 15, 2016.

nationalists on their own turf and find a way to support some kind of a consulta and win it against CiU, ERC and the other “Catalanists”. Artur Mas, in an attempt to show that he is being forced by the Constitutional Court and Madrid and at the same time keep his promise of the self-determination referendum, suspended the preparations for the consulta, and launched a new initiative, which was de facto the same thing, except that it was renamed to “citizens’ participative process” (*procés de participació ciutadana*). The message was that the Generalitat is abiding the law, even though Madrid is perverting the same law in order to bridle Catalonia.

As no legal solution was found to the organization of a binding referendum on independence and/or statehood, Artur Mas and his allies came up with the idea of a plebiscitary referendum. This was indeed a solution with a solid legal basis: as President of the Generalitat, he used his power to dissolve the Catalan Parliament on August 3, 2015 and call for early elections for September 27 of the same year. The pro-independence formations called for all parties to be absolutely clear about their stance on independence, and, accordingly, the core message of their campaign was that a vote for them meant a vote for independence. Artur Mas’ center-right CDC and Oriol Junqueras’ left-wing republican ERC made a formal electoral coalition under the name of “Junts pel Sí” (Together for Yes, i.e. to independence). This also meant that the CiU coalition, composed of CDC and the Christian Democrat UDC, broke up in the process, the latter not being in favor of an eventual unilateral declaration of independence. Just like in Scotland, there was a record turnout: more than 77% of the electorate took part in the elections to the Parliament of Catalonia. In the end, the Junts pel Sí coalition celebrated victory: they obtained 62 out of the 135 mandates and, together with the 10 seats of the pro-independence Anarchist-Marxist-nationalist formation CUP, there seemed to be a parliamentary majority in favor of independence. Behind this not so impressive majority, however, there were only approximately 48% of the votes cast, due to the rules of parliamentary

mathematics. While this is a questionable basis for the legitimacy of the independence project, it shows that in Catalonia, similarly to Scotland, millions of people would want independence. In any case, even before the formal agreement on the continuation of the independence process was reached between Junts pel Sí and the CUP, the new legislature passed a resolution on the first anniversary of the 9N referendum in which it declared the start of a Constituent Process with the aim of creating an independent Catalan republic.¹⁴⁶

The referenda and elections related to the question of independence in Scotland and Catalonia definitely underline the relevance of independence as a constitutional preference for Scots and Catalans. Also, more relevantly to this work, it points to a very important aspect of the federal idea in these territories: its low profile. Not counterintuitively, the battle in these plebiscites was fought between “staying” and “leaving”, and a lot less between the different options for “staying”. In the campaign preceding the September 27 snap elections in Catalonia, the Socialists expressed their support for a constitutional reform that could include a federal reorganization of the state, an idea that already appeared during Prime Minister Zapatero’s time in office (2004-2011). However, it is far from evident whether the federal option would be endorsed by the whole of the Socialist Party (PSOE) or only its Catalan branch (PSC). Federalism was just one of the objectives the Socialists wanted to achieve through a constitutional reform, but Pedro Sánchez, Secretary-General of the PSOE included the federal reorganization of the state as part of the a remedy to “recompose consensus” that have been broken due to the ideological and legal warfare between the PP and Catalan pro-independence forces.¹⁴⁷ The results of the national (Spanish) elections in December 2015 made it very unlikely that a constitutional reform process would be attempted any time soon,

¹⁴⁶ *Resolució 1/XI del Parlament de Catalunya*, November 9, 2015.

<http://www.parlament.cat/document/bopc/153123.pdf>, visited May 27, 2016.

¹⁴⁷ http://politica.elpais.com/politica/2015/07/08/actualidad/1436350562_370300.html (August 20, 2015).

especially as Sánchez, as candidate of his party for Prime Minister of Spain, failed to form government, and consequently there will be new elections in Spain in June 2016.

There were a few other suggestions in the campaign that seemed to contain federal elements. One of these wouldn't even have required a constitutional reform, at least according to the leader of UDC, Josep Antoni Duran i Lleida. UDC parted ways with CDC because Duran's party did not support Mas' decisive turn toward secessionism and his compromises with the republican left. After CiU became history, Duran said to be in favor of adding a special disposition to the Constitution that would recognize the "specificity of Catalonia's identity" without the need for the complete reform of the Constitution.¹⁴⁸ Apart from the fact that it is very unclear how such a disposition can be added to the constitution without a thorough reform thereof, UDC, running on its own after such a long time didn't even make it to the Parliament of Catalonia. A similar line tended to appear in the campaign of the electoral alliance *Catalunya – Sí que es pot* ("Catalonia – Yes, it's possible") composed of the Catalan branch of Podemos/Podem and regional left-wing parties such as ICV (Iniciativa per Catalunya Verds) and EUiA (Esquerra Unida i Alternativa). Representatives of the latter two made references to the "elaboration of a constitution that leads to the establishment of a Catalan republic," through which Catalonia will be able to exercise its sovereign rights; it is less than clear if the "Catalan republic" is envisaged as part of a reformed Spain or as an independent country.¹⁴⁹ Nevertheless, both UDC's and the left-wing coalition's vague suggestions seemed to point to a more loose, confederal type of constitutional design that very clearly recognizes Catalonia's specificities and distinctness. This quest for the recognition of Catalonia on a footing that is different than that of the other Autonomous Communities is a key

¹⁴⁸ http://www.ara.cat/eleccions27s/UNIO-JOSEP_ANTI_DURAN_I_LLEIDA-MADRID-REFORMA_CONSTITUCIONAL-CATALUNYA-ELECCIONS-27-S_0_1414658700.html, visited May 15, 2016.

¹⁴⁹ http://www.eldiario.es/catalunya/politica/Catalunya-Podemos-ICV-EUiA-defendera-Republica_0_409459481.html, visited May 15, 2016.

factor behind not only the shy federal/confederal ideas, but the most important pro-independence coalition, CDC and ERC's approach, as well. An eventual compromise with the Madrid government will be extremely difficult at this point where the leadership of the Generalitat with its new President Carles Puigdemont, Artur Mas' CDC and Oriol Junqueras' ERC don't only want more competences for Catalonia, but they want Catalonia to exercise these competences on a different, special legal and political basis than any other autonomous or federal unit inside Spain.

This is also what makes the Scottish situation very different from Catalonia. There we find even less talk of a specifically federal solution: while the plea for a federal Britain tends to keep surfacing in the academic realm and in the British media, no major Scottish or British political party deemed it important enough to endorse it. A possible exception is the Liberal Democrat Party, a political formation that is itself constituted in a federal manner, which affirms in both in its Federal and Scottish (Party) Constitutions "the values of federalism and integration" in the European Community. While this might show for the presence of some kind of a "federal idea" inside the party, we can hardly consider it as a definite plea for the federalization of Britain. Also, the Liberal Democrat Party is the smallest group in the Scottish Parliament with 5 MSPs; just to compare, the SNP has 63, and even the Conservatives (Scottish Conservative & Unionist Party) have 31 mandates out of 129 after the 2016 Scottish elections.

Is Scotland, a strive for federalization also couldn't have surfaced as a tool for the recognition of the Scottish nation. Unlike in Catalonia, there is no constitutional or significant political denial of the national reality of Scotland. The Scots entered into the Union in 1707 as a nation, and while the meaning of this concept surely has changed a lot in the past 300 years, they still make part of a constitutionally unitary British state as a nation. From the point of view of federalism, this is an apparent contradiction, but it can be explained through both the differences in the British and the

Spanish constitutional design, namely the lesser amount of rigidity of the first, and also through the historical experiences of Scotland and Catalonia inside Britain and Spain. We find no adequate parallels neither to Bourbon absolutism, nor to the Franco dictatorship in Scotland/Britain, certainly not after the Treaty of Union. Scottish national identity has not ever been threatened by the central state, at least not in a constitutionally or legally expressed manner; this also stands, with restrictions, to the constitutional identity of Scotland. Arguably, there is no need for a formal separation of powers and very explicit constitutional guarantees that a federal constitutional arrangement could offer, if the existing constitutional design can be subtly accommodated with the changing expectations of the political environment. Perhaps that is why devolution and more devolution remain the most viable constitutional preference both in Scotland and for Westminster. Before I make my own concluding remarks at the end of this thesis, it seems opportune to close this part with Stephan Tierney's observation: "What the UK experience has illustrated is that theorists of federalism may need to re-think the assumption that federalism is the only vehicle by which territorial diversity might be constitutionally managed. At the same time, the lack of federal elements in the UK model, particularly in terms of representation at the centre, suggests that there are structural elements of a federal model which, if missing in a unitary or quasi-federal settlement, may in the long term prove to be dangerous."¹⁵⁰

¹⁵⁰ Tierney, "Federalism in a Unitary State," 251.

CONCLUDING REMARKS

At the end of this work, I myself have to agree that “true” constitutional federalism is not the only way through which territorial diversity can be managed. Looking at the Scottish experience, the constitutional design of the United Kingdom has been for decades, if not for centuries, able to provide both national recognition and autonomous governance to territorial units inside the British state to the extent that they expressed a desire for such assets. In recent times, the devolution method was the most important tool for this, and it seems devolution has not yet reached its final limits. The relative ease with which a constitutionally adequate solution was found to permit for the organization of a referendum on Scottish independence itself shows a significant degree of federalism. However, the UK’s constitutional design is a rather unique, almost *sui generis* one, we find nothing like it in Europe, certainly not in Spain.

In Spain, historical experiences combined with a constitution that has been traditionally interpreted in a centralist, rather than a federal fashion¹⁵¹ led to the ultimate loss of credibility for any federal solution, at least for the moment. Since the 19th century, or perhaps even from the 18th, Spain has been “a bad copy of France” insofar as its rulers could never really give up on the ultimate aim of national homogenization despite the consequent failures of such projects. It is as if in Spain, political powers operating on the level of the central state, but also often on the level of the Autonomous Communities, would be reluctant to admit that it is the Constitution that should serve the well-being of everyone inside the political framework provided by the state, and not the other way around.

¹⁵¹ Guibernau, “Secessionism in Catalonia,” 377-378.

The overall conclusion that should be drawn from this thesis is that while a proper federal redesigning of the British and Spanish constitutions seem to be an adequate tool for handling the plurinational nature of the UK and Spain in a manner that counteracts secessionist tendencies in Scotland and Catalonia, there is a plethora of political conditions that can provide for compromises made in good faith between the central states and the stateless national territories concerned. Such conditions are lacking in both Scotland and Catalonia, albeit for different reasons. In Scotland, devolution has not reached its ultimate limitations, neither does it have to resolve the symbolic issue of Scotland's recognition as a nation. In Catalonia, where federalist projects have surfaced from time to time as an alternative to the inadequateness of the current constitutional design, the credibility of such projects has evaporated, and even the minimal level of trust between the most important actors is missing, which in part accounts for the popularity of the independence option.

The role of the EU in the secession debates of its Member States would require another thesis. Itself a federation in the making, neither its legal system, nor its institutional structures have been able to tackle the related questions in a truly autonomous way. It is a pity if we consider how Scotland and Catalonia are often "better Europeans" than their member states, especially the United Kingdom. The obvious probability that an eventual Brexit would bring about a new independence referendum in Scotland makes it necessary that the EU find its own voice, distinguishable from its Member States, on constitutional issues that concern European citizens in EU territories, such as the independence debates in Scotland and Catalonia.

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