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Catalonia's recent strive for independence: a legal approach

> The Parliament of Catalonia solemnly declares that Catalonia is part of a national reality different from the rest of the State.
> Respecting the current institutional framework [...] does not imply a renouncement of the right to self-determination by the Catalan people.
> Catalan Parliament, 12th of December 1989

Introduction: the Spanish "open method of decentralization"

During the last century Spanish politics have been characterized by recurring conflicts between the central institutions and the main peripheral nationalisms, especially in Catalonia and in the Basque Country, but also in Galicia.

During the Second Spanish Republic (1931-1939), these three areas approved their statutes of autonomy: the constitution adopted in 1931, in fact, established a division of Spain's territory into autonomous communities; but this was put into effect only in the three aforementioned regions. The process was halted when the Civil War broke out, five years later, and the centralized character of the regime under General Franco strongly endorsed the idea of a unitary state. Franco tried to stifle separatism and repress the identity of the periphery, beginning with language allegiance.

After Franco's death in 1975 and during the transition to democracy, one of the most arduous questions to deal with was the territorial organization of the state, because of the claims of peripheral nationalisms. During the constituent phase, the government precipitated the restoration of the so called *Generalitat de Catalunya* (the main institution of the self-government) and gave it some devolved powers. At the same time, it permitted the formation of provisional legislatures to constitute "pre-autonomies": while the constitution was being drafted, this system was used as a bridge by regions that later pursued policies of outright autonomy.

In any case, the starting point for every study on the current Catalan (legal and political) situation must be the constitutional framework that defines the territorial form of the state.

When it came into force in 1978 the majority of regions did not exist. For this reason the norms of the constitution's third chapter basically decree how a decentralized organization could be established, without determining any specific structure. In other words, the constitution adopted a flexible model and the consequences of this

choice could have been very different[1]: for example, it was theoretically possible that no communities would be created or that only parts of the country would form autonomous regions.[2]

The basic principle that defines the "open method" is mentioned in Article 143.1 and it is called *principio dispositivo* (that in any case must be considered along with the unitary form of the state and the principle of solidarity). This means that, according to the right to autonomy established in Article 2,[3] some kinds of provinces (i.e. bordering provinces with common historic, cultural and economic characteristics, islands and provinces with historic regional status) were given the opportunity to accede to self-government and build autonomous communities. Besides, Article 143 determines that local authorities are free to decide *if* and *when* to exercise their right to autonomy.

The constitution aimed to offer the tools to create autonomous communities without predetermining them itself. It established two tracks towards autonomy: the "slow" or "normal" one, through which the territories would assume some legislative powers, being compelled to wait at least five years to increase them (Article 143). The "fast" or "special" one was more difficult to pursue and entailed the potential achievement of all legislative competences (Article 151). The latter process had been implicitly intended for the historical regions, since the second interim provision established that those territories that already had a statute and a pre-autonomous regime could obtain directly the higher level of autonomy: that's exactly what Catalonia did.[4] The Basque Country and Galicia also used the "fast" track, and so did Andalusia.

There are some provisions dedicated to specific cases where the state could intervene: if national interest was at stake, the parliament could pass an organic act (*ley orgánica*[5]) in order to permit the creation of a community when its territory is not wider than a province, to permit the adoption of a statute by areas that are not part of the provincial settlement, or to substitute the initiative of some local bodies if necessary (Article 144). In addition to these exceptions, the first interim provision maintained the special financial regime for the Basque-speaking provinces (now the Basque Country and Navarra)[6]; the

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[1] See P. Cruz Villalón: La estructura del Estado o la curiosidad del jurista persa. In *Revista de la Facultad de Derecho de la Universidad Complutense*, n. 4, 1981.

[2] The actual situation in 1978 explains the formulation of Art. 137: «The state is organized territorially into municipalities, provinces and *autonomous communities that may be constituted*. All these bodies shall enjoy self-government for the management of their respective interests».

[3] Art. 2: "The constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognizes and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all".

[4] "The territories which in the past have, by plebiscite, approved draft statutes of autonomy and which at the time of the promulgation of this constitution, have provisional autonomous regimes, may proceed immediately in the manner provided in clause 2 of Article 148, when agreement to do so is reached by an absolute majority of their pre-autonomous higher corporate bodies, and the government is duly informed. The draft statutes shall be drawn up in accordance with the provisions of Article 151, clause 2, when so requested by the pre-autonomous corporate body".

[5] According to Article 81, this is a special law that requires the absolute majority of the members of the Congress of Deputies (the lower chamber) to be passed, amended or repealed.

[6] The system consists in the fact that these communities establish and collect almost all taxes and then transfer to the Spanish state a share for common functions.

fifth established that Ceuta and Melilla would be autonomous cities after the approval of their assemblies and the national parliament.

After the constitution entered into force, the first phase in the development of the territorial organization began, i.e. the establishment of the autonomous entities. Two regional statutes were enacted in 1979 (the Basque and the Catalan), and then, in 1981, the Galician and the Andalusian. The same year the main parties agreed on the so-called "autonomic pacts", in order to integrate the fragmentary constitutional regulation. First of all, they prevented other areas (apart from the three historical regions and Andalusia) from taking the fast track; secondly, they extended to all types of communities the parliamentary form of government (that the constitution accorded only to the fast track ones); finally, they outlined the territorial map of Spain. By 1983, all autonomous communities were supposed to have approved their statutes, and so they did.

The second phase consisted in the stabilization of institutions. The system began to settle, in spite of the national government's reticence to transfer some powers. At the end of the eighties the "slow" communities claimed the same level of autonomy as the fast ones, since the five-year period established in the constitution (Article 148.2) had already passed.

The solution of this conflict was a new "autonomic pact" (1992) through which the government accepted the transfer to the regional entities more than thirty legislative powers, among them education (while the health system was regionalized a decade later, in 2002). The goal of this pact was to equalize the legal functions of both "rapid" and "slow" communities through the reform of their statutes. Still, the debate went on for several years (some problems had remained unresolved, starting with finances[7]).

The third phase, in my opinion, has just been completed.[8] It represented the desire to differentiate between autonomous communities concerning individual rights. The first strong aspirations for autonomy were summarized in the so-called "Plan Ibarretxe" (named after the then president of the Basque Country): it was an amendment to the statute proposed by the Basque Country regional government in 2003, passed by the regional parliament in 2004, and rejected by the national parliament in 2005.

The central element of the plan was the right to self-determination for the Basque people, defined as a specific European population with a unique identity. Consequently, it was presented almost as an agreement between two sovereign states. The main parties at the national level (the Socialists – PSOE – and the People's Party – PP), criticized the proposal arguing that it was in reality a secessionist project that endorsed the claims of

[7] The specific (organic) law about the funding system of the Autonomous Communities was passed in 1980 (n. 8) and has been amended several times since then. See for example M. Medina Guerrero: *La incidencia del sistema de financiación en el ejercicio de las competencias de las Comunidades Autónomas*, Madrid: CEC, 1992; J. Pérez Royo: *El nuevo modelo de financiación autonómica. Análisis exclusivamente constitucional*, Madrid: McGraw-Hill, 1997; J. García Morillo, P. Pérez Tremps, J. Zornoza Pérez (eds.): *Constitución y financiación autonómica*, Valencia: Tirant lo Blanch, 1998; F. Pau i Valls (ed.): *La financiación autonómica*, Madrid: Tecnos, 2010.

[8] About the three phases of the Spanish territorial system, see S. Ragone, "«Sustainable differentiation»: the 21st century challenge to decentralization (a comparative study of Italy and Spain, with special attention to constitutional case law)", in A. López Basaguren, L. Escajedo (eds.): *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, Springer, 2013, forthcoming.

radical terrorists (ETA), and that it was totally unilateral, since there had been no previous dialogue with non-nationalist parties in the Basque Country.

Furthermore, PP, the governing party in Spain, took legal action against the plan filing an appeal of unconstitutionality to the Constitutional Court, which was not admitted.[9] On the one hand, PP argued that the proposal had legal effects and that the Basque executive was trying to introduce a constitutional amendment and not a reform to the statute; on the other hand, PP also asserted that some changes could be done only through a constitutional amendment. The concrete objects of the appeal were two supposed "resolutions" of regional institutions: the proposal approved by the Basque Country government and the decision of the regional parliament speaker's office to submit the proposal to the assembly. The main point of the constitutional court's argument was exactly the lack of any binding value of these documents, since they were parts of the particular legislative process necessary to enact a reform of the statute.[10]

After this first effort failed, legal and political debate focused on the reform of the Catalan statute.

The first attempt: the reform of the Catalan statute passed in 2006 and the attitude of the constitutional court.

The reform of the Catalan statute contained a very wide range of autonomist demands and was adopted without previous consultation with the central government, comparable to the "autonomic pacts" mentioned before. This situation stirred deep tensions and various institutions filed actions against the statute in the Spanish Constitutional Court: the People's Party, the national ombudsman and some other autonomous communities.

The main points in the appeals were the norms about fundamental rights and general principles.[11] Previously, when judging the statute of the Valencian Community,[12] also enacted in 2006, the constitutional court dedicated some lines to certain theoretical questions, particularly the principle of decentralization and autonomy, interpreted as a right to self-government.

The profundity and complexity of the appeal against the Catalan statute were actually more dramatic[13] and the decision was issued four years later, in 2010: the most known and

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[9] See decision n. 135/2004 ("auto") of the Spanish Constitutional Court.

[10] See J. Pérez Francesch: *La impugnación de disposiciones y resoluciones autonómicas sin rango de ley*, Working Paper n. 263, Institut de Ciències Polítiques i Socials, 2007 and the literature quoted in the paper.

[11] The regional statutes of the eighties did not contain many norms like these, but some questions had been judged by the constitutional court before (see decisions n. 25/1981 and n. 208/1999).

[12] See decision n. 247/2007. Concerning this judgment, for example, I could mention the essays by M.A. Cabellos Espiérrez: La relación derechos-Estado autonómico en la sentencia sobre el Estatuto valenciano. In *Revista d'estudis autonòmics i federals*, n. 7, 2008. 106 ff.; J. Tajadura Tejada: El Tribunal Constitucional y las reformas estatutarias: a propósito de la STC 247/2007 sobre el Estatuto de autonomía de la comunidad Valenciana. In F.J. García Roca, E. Albertí Rovira (eds.): *Treinta años de Constitución*, Valencia: Tirant Lo Blanch, 2010. 225. ff.

[13] See J.J. Solozábal Echevarría: El estatuto de Cataluña ante el Tribunal Constitucional. In *Teoría y realidad constitucional*, n. 24, 2009. 173. ff.; J. Tornos Mas: El estatuto de autonomía de Cataluña, y el Estado autonómico, tras la sentencia

important judgment was n. 31/2010 (about the complaints filed by the PP[14]), but there were also other judgments later on. Through this statement the court had the opportunity to reshape the state of autonomies, reflecting on three decades of practice.

Instead of declaring the unconstitutionality of all the norms appealed (only some of them were abolished), the constitutional court issued an interpretative decision through which it diluted the innovative elements of the statute.[15]

It is an extremely long decision; I will therefore focus on those aspects that, in the intention of the regional legislator, were meant to be symbols of the identity of the autonomous community.

Firstly, the idea of a Catalan "people" was defined as the collectivity formed by all Spaniards who live in Catalonia. Secondly, the allusions to the Catalan "nation" were construed in the following way: every community can conceive of itself as a specific group ideologically, historically or culturally, but the only sovereign country in the constitutional framework is Spain (indissolubly united, according to Article 2).

The court had a stronger attitude about the question of language. The statute promoted the preferential use of Catalan in public administration and means of communication, among other contexts. The court considered that these norms contravened the so-called "co-official regime" and distinguished between the duty to speak Castilian Spanish and the obligation/possibility to speak Catalan to interact with public authorities. According to the court, it is not possible to impose any one of the two co-official languages.

Regarding the historical perspective adopted in the statute to emulate the special regime mentioned above and given to the Basque-speaking regions, the court affirmed that the situation is different and it is not possible to use such an historical basis as the foundation of Catalan autonomy. At the same time, the court affirmed that the exclusive legislative powers of the autonomous community as well as those shared with the centre must be exercised within the limits of the law and especially the corresponding constitutional principles.

Finally, the rules regarding rights and principles were defined as limitations for the regional legislature within its devolved powers but not as fundamental rights, because statutes are not allowed to create new ones (according to Article 81, their implementation must be done with organic acts). Anyway, autonomous communities can only regulate

del Tribunal Constitucional 31/2010. In *El Cronista del Estado Social y Democrático de Derecho*, n. 15, 2010. 18. ff.

[14] See the dossier edited by C. Viver Pi-Sunyer, A. Bayona Rocamora, J. Galofré i Crespi: Informe sobre la STC que resuelve el recurso de inconstitucionalidad presentado por 50 diputados y senadores del Partido popular contra el Estatuto de Autonomía de Cataluña. In www10.gencat.cat and the specific study of R. Tur Ausina, E. Álvarez Conde: *Las Consecuencias Jurídicas de la Sentencia 31/2010, de 28 de junio del Tribunal Constitucional sobre el Estatuto de Cataluña. La Sentencia de la Perfecta Libertad*, Cizur Menor, Aranzadi, 2010. See also J.M. Castellà Andreu: La sentencia del Tribunal Constitucional 31/2010, sobre el estatuto de autonomía de Cataluña y su significado para el futuro del Estado autonómico, http://www.funciva.org.

[15] Among the arguments to criticize this choice is the interesting point made by R.L. Blanco Valdés: El estatuto catalán y la sentencia de nunca acabar. In *Claves de razón práctica*, n. 205, 2010. 4. ff. The author highlights the consequences on those subjects who have to enforce the re-interpreted norms.

rights as long as they affect a regional competence and do not infringe upon constitutional and international legal sources.[16]

In conclusion, the biggest part of the regulation is still formally in force, although it has been totally distorted.

The reaction to the decision was a major demonstration in Barcelona on the 10th of July, using slogans like "we are a nation" (*Som una Nació*) and "we decide" (*Nosaltres decidim*). In the regional elections held in November, the nationalist party called Convergence and Union (*Convergència i Unió* – CiU)[17] got 62 of the 135 seats and its candidate, Artur Mas, became the president of the community.

The second attempt: elections and a new path towards self-determination

The spark for the second attempt was another pro-independence demonstration that took place in Barcelona on the 11th of September 2012 (the so called *diada*, national day of Catalonia), a continuation of similar protests over the course of the preceding months. The streets of the city center were blocked for hours and the slogan of the protestors was clear: "Catalonia, new State of Europe" (*Catalunya, nou Estat d'Europa*).

This event was part of a political campaign to increase "awareness" about the financial situation of the autonomous community. CiU unsuccessfully tried to obtain from the national government a fiscal regime similar to the one conceded by the Basque-speaking region (the so-called *concierto económico* has been in force there since the 19th century and enjoys specific recognition in the constitution).

The 2012 *diada* protest actually determined the course of the political agenda of the government and opened a new debate on the possibility for independence. The president of Catalonia thought that it was the right moment to propose a separatist plan, but he needed a larger majority in the regional parliament (as mentioned, CiU held only 62 out of 135 seats). A few days later he called snap elections for 25th November.

CiU aspired to a solid – or rather, absolute – majority in parliament so that it would be able to launch the (hypothetical) independence process.

However, the electoral results were different from the party's expectations: CiU "fell" down to 50 deputies. The Socialists (*Partit dels Socialistes de Catalunya* – PSC –, the regional section of the Spanish Socialist Party) also lost votes, going down to 20 from its previous 28 seats. On the contrary, the Republican Left of Catalonia (*Esquerra republicana de Catalunya* – ERC) more than doubled its seats, from 10 to 21. The People's Party maintained its strength and Citizens of Catalonia (*Ciutatans de Catalunya*) grew from 3 to 9 while the United Left Initiative (*Iniciativa Esquerra Unida*) also increased its seats from 10 to 13.

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[16] See M.A. Aparicio, J.M. Castellà Andreu, E. Expósito (eds.): *Derechos y principios rectores en los Estatutos de autonomía*, Barcelona: Atelier, 2008.

[17] It is actually a regional coalition formed by two main parties: the Democratic Convergence of Catalonia (CDC) and the Democratic Union of Catalonia (UDC).

The only option to go on with the independence project was to form a coalition government and the only possible alliance for CiU was with the Republican Left, because of the common nationalist approach.

The regional parliamentary term had a very striking start: during the first session, it approved a "sovereignty declaration"[18]: it affirmed that Catalonia is a sovereign subject from a legal and political point of view and established the beginning of a process through which the Catalans would be allowed to choose their future as a people.

The first argument used in the preamble was the historical one, in light of the traditional self-governing institutions of Catalonia. But at the same time the declaration mentioned the experiences of the 20th century (especially the Second Republic) and of course the constitutional state of autonomies initiated in 1978. As expected, the declaration highlighted the importance of the statute reform and of the subsequent constitutional court judgment, defining it "a radical negation of the democratic development of the collective will of the Catalans within the Spanish State [...] and the cause of a regression in self-government". Following that, the text cited demonstrations of 2010 and 2012 and the electoral results of the previous November as evidence of the will of the region to determine its own future.

The points of the declaration itself include sovereignty, democratic legitimacy, transparency, dialogue, social cohesion, Europeanism, legality, preeminence of the parliament, and participation, all in view of the collective exercise of the right to self-determination. The most important principles to analyze are probably the fourth and the seventh one, since the pro-independence parties agreed on the idea of negotiating autonomy with Spain's central government, Europe and the wider international community, while also committing to use all legal instruments available.

The national government's reaction came within the span of a few weeks. It considered the opportunity of an appeal of unconstitutionality and it obtained, by the end of February, the positive advice of both the State Lawyers (*Abogacía del Estado*) and the Council of State (*Consejo de Estado*). In particular, the latter delivered an advisory opinion

[18] It was passed on January 23rd, 2013 by a large majority: 85 in favor, 41 against and 2 abstentions. It is worth mentioning that this is not the first declaration on self-determination approved by Catalan institutions: the regional parliament passed six documents with a clearly similar subject, but this is the first time that there is a clear reference to the sovereignty of the people. One such declaration, as cited before, was passed in 1989; another was voted on August 27th, 1991, in which the representatives invoked self-determination as a fundamental value for the new "Europe of peoples"; yet another was passed on the October 1st, 1998. After several consultations organized in Catalan municipalities in 2009 and 2010, the Parliament approved a document to endorse these initiatives by promoting a real exercise of the right to decide on the March 3rd, 2010. Finally, between 2011 and 2012, the regional parliament passed a series of different declarations: on March 10th, 2011 it also defined itself as the institution that represents the sovereignty of Catalans and committed to support consultations about independence; two weeks later, it encouraged the government to use all the legal instruments possible in order to promote self-determination; on September 27th, 2012 it reiterated the obligation for the regional government to organize such a consultation. Anyway, this is the first time that the political intention of achieving independence seems to be authentic: it is confirmed by the fact that, only a few months ago, one of the most known experts on national claims, M. Keating, affirmed that «Convergència i Unió in Catalonia has never come out for secession, although it has been careful not to rule it out as a future possibility». See M. Keating: Rethinking Sovereignty. Independence-lite, devolution-max and national accommodation. In *Revista d'Estudis Autonòmics i Federals*, n. 16, 2012. 10.

against the declaration of another sovereign subject within Spain's territory, arguing that it would infringe the rule on "national sovereignty vested in the Spanish people, from whom powers emanate" (Article 1.2), the principle of unity of the state (Article 2) and the binding value of the constitution both for citizens and public authorities (Article 9.1). On the 8th of March the appeal was submitted.

Conclusion: how can domestic and comparative law be applied to Catalonia's demands for independence?

If we adopt a strictly constitutional perspective, the objectives of the actual Catalan government are clearly illegal. The only way to include in the legal system a process like the one undertaken would be a constitutional amendment according to Articles 166 and following. Furthermore, in consideration of the part of the constitution that would be modified, the procedure of a *total* reform would be necessary.[19]

Despite this, the current challenge to the legal order must be confronted by the political and legal establishment in some manner. Offering my own thoughts on this exact question, I will first propose a comparison with the "Plan Ibarretxe" decision of the Spanish Constitutional Court, and then make a wider comparison to the two cases that are typically used as examples: Scotland and Quebec.[20]

On the one hand, the Basque precedent could be considered quite alarming for the destiny of the Catalan initiative. That act had supported the idea of Basque sovereignty and the right of the autonomous region to decide its status and its relation with the state. In general terms, the contents of the Catalan declaration are similar, but from a legal point of view there is a paramount difference.

In fact, Article 161.2 of the constitution allows the government to appeal every source of law or resolution that may infringe a constitutional rule. The reasoning of the decision issued in 2004 was that the act appealed could not be considered as a resolution with legal effects, being a part of the longer procedure necessary to pass a reform. It was just the beginning of a series of steps that would end up with a final "appealable" act depending on its contents. On the contrary, the Catalan Sovereignty Declaration is a resolution itself with a specific significance: the end of the story *could* be different.

I must dedicate some words to the choice of the specific instrument of the referendum, because there is another "Basque precedent" that can be used in this case. The regional parliament passed a law in 2008 to call a consultative referendum about the possibility

[19] Article 168 establishes the procedure for this kind of amendment: if a total revision of the constitution is proposed, or a partial revision affecting the Preliminary Title, Chapter Two, Section 1 of Title I, or Title II, the amendment must be approved by a two-thirds majority of the members of each house, and parliament must be immediately dissolved. The new parliament must ratify the decision and proceed to examine the new constitutional text, which must be approved again with the same majority. Afterwards, it will be submitted to ratification by national referendum.

[20] See the recent essay by J.M. Castellà Andreu: Democracia, reforma constitucional y referéndum de autodeterminación en Cataluña. In E. Álvarez Conde, E. Souto Galván (eds.): *El Estado Autonómico en la perspectiva del 2020*, Madrid: IDP, 2013. 184 ff.

of initiating a negotiation process to achieve "peace and political normalization".[21] The Spanish Constitutional Court in its decision n. 103/2008 established that the absence of any binding effects of the referendum was completely irrelevant and that calling such a referendum infringed on the exclusive competence of the state to do so (see Article 149.1). Furthermore, the court added that referendums are instruments aimed at exercising the right to political participation in exceptional circumstances and cannot be misused to inquire into the opinion of a specific group about any topic.

The question itself was defined by the court as a challenge to the basis of the constitution, since it implied the reconsideration of identity and unity of the only sovereign collectivity (the Spanish people) or at least a change in the balance that the state can establish with the autonomous communities. This topic can be voted on exclusively in the context of a constitutional amendment referendum.

Regarding the cases of Scotland and Quebec, both regions have already held referendums to decide about their status within the state and so they are always mentioned as examples in discussions of claims for independence or extra autonomy.

In Scotland, the first referendum held in 1979 failed while in the second one, held in 1997, the majority voted in favor of the creation of a regional parliament. Throughout this period, Catalan autonomy was clearly higher than the devolved system adopted in the United Kingdom, and I would add that the current situation reflects the same balance. In spite of this, the political situation is now the opposite: Catalonia would like to imitate Scotland by pushing for more autonomy or independence via referendum.

The commitment to support the referendum was one of the main points in the campaign of the Scottish National Party for the 2011 regional parliamentary election when this party gained absolute majority for the first time. The turning point was the agreement between the regional and the central government about the calling of a "single-question" referendum in 2014 ("Should Scotland be an independent Country?"), possibly on the 18th of September.[22] The agreement, signed in October 2012, established that the referendum should "have a clear legal base", "be legislated for by the Scottish parliament", "be conducted so as to command the confidence of parliaments, government and people" and "deliver a fair test and decisive expression of the views of people in Scotland and a result that everyone will respect". The first step was supposed to be an order under section 30 of the Scotland Act 1998 voted by the Privy Council (it was agreed in February 2013). Afterwards, the Scottish government should introduce a bill to the regional parliament about the referendum; this bill must receive royal assent after being passed. As the agreements point out, this procedure pursues the "highest standards

[21] N. 9/2008: "Ley de convocatoria y regulación de una consulta popular al objeto de recabar la opinión ciudadana en la Comunidad Autónoma del País Vasco sobre la apertura de un proceso de negociación para alcanzar la paz y la normalización política". It consisted of one article and called a referendum on the following two questions: "Would you support a process bringing a negotiated end to the conflict if ETA unequivocally demonstrates its willingness to put an end to violence once and for all?" and "Would you agree if all Basque parties, without exception, initiated a negotiation process with the aim of reaching a democratic agreement on the right of the Basque people to decide and if this agreement were to be put to referendum before the end of 2010?"

[22] The date is quite symbolic. Seven hundred years before, in 1314, thanks to the battle of Bannockburn, Scotland obtained its independence and maintained it during several centuries.

of fairness, transparency and propriety, informed by consultation and independent expert advice".

There are at least three key elements in the Scottish case that could be very useful for the Catalan initiative: first of all, an agreement with the state; secondly, a clear question on the ballot; and thirdly the choice of not mentioning the European Union in the referendum question.

In the case of Canada, the necessity of a clear setting was the basis of the *Clarity Act* passed by the Canadian Parliament in 2000. This legislative act was the result of a process started with a reference judgment of the Canadian Supreme Court issued in 1998,[23] in the context of a strong independence movement in Quebec and a secessionist referendum held three years before. The Supreme Court's judgment was an opinion in response to a request submitted by the national government about the potential legality of Quebec's secession from Canada. First of all, the court established that the Canadian Constitution would not permit unilateral secession. Nevertheless, if a referendum was held and if the secessionist proposal won, the government should negotiate to state the conditions under which Quebec could achieve independence. The court endorsed a negotiated process in light of international law and did not adopt an extensive interpretation of self-determination. In other words, the consequence of a referendum in favor of independence with a huge majority would not be immediate secession, but rather an exhortation to enter negotiations towards this goal.

The national parliament would play an important role before and after the referendum, being given the opportunity to evaluate the question before submitting it to the vote and then to decide if the majority achieved was sufficiently high. Should the referendum come out in favor of secession, the national parliament would also be responsible for drafting the constitutional amendment outlining the terms of the secession and its legal consequences.

The need to take the path of agreement with the state is again the core of the process and shows that unilateral decisions would not be effective. It is superfluous to say that a supposed unilateral secession by Catalonia would be illegal and only a handful of governments, at best, would recognize the new state created. Finally, the experiences of Scotland and Quebec mentioned above underline the fact that negotiation with the central government is the only possible path to independence and that, in order for this to succeed, it must be undertaken within the existing rules of the legal system.

The latest resolution of the Catalan Parliament adopted only a few days ago (on March 13th) seems to prove exactly this point. The proposal originated from the PSC[24] and was voted by an impressive majority of 104 representatives. The short final text urges the regional government to initiate a dialogue with the Spanish executive in order to make possible a referendum about Catalonia's future.

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[23] See Reference re Secession of Quebec, [1998] 2 S.C.R. 217. *http://scc-csc.lexum.com/decisia-scc-csc/scc-csc/scc-csc/en/item/1643/index.do*

[24] This party is in favor of a federal reform and did not endorse the sovereignty declaration.

In spite of the elements mentioned, it is also crucial to outline that there are at least two basic differences, between the Scottish and the Canadian cases and the Spanish legal structure, that make it difficult to export the solutions adopted there: on the one hand, the absence of a constitution *stricto sensu* and on the other hand the federal (and not regional or autonomic) structure of the state.[25]

That's why those paths towards autonomy can't be simply copied or invoked as models in themselves. It is be necessary to select the potential instruments within the legal system.

Theoretically, there are only a handful of means that can be applied to achieve a popular decision about Catalonia's separation from Spain, and, if a strict interpretation of the constitutional case law mentioned before is adopted, there is only one. Firstly, in my opinion the Catalan law n. 4/2010 on referendums could not be used properly for a vote on independence, because the text of the law explicitly limits the issues about which referendums can be called to those that fall under the autonomous community's powers. A literal exegesis and a combined interpretation with the constitutional framework are incompatible with this hypothesis. Secondly, it is unlikely that the national parliament would approve an amendment to the organic law about referendums, n. 2/1980, to establish a new kind of referendum open only to a portion of the Spanish electorate (in this case, Catalan residents). Thirdly, it not so implausible that the Catalan Parliament would pass a law to create a new form of popular vote different from a referendum: a specific Committee began to work on this project a few days ago, but its legality and effectiveness could be questioned. In the end, the only clear option seems to be a constitutional amendment. In the already mentioned decision n. 103/2008 the Spanish Constitutional Court affirmed that it is possible to change every part of the constitution through a total reform, as long as the procedure is followed correctly.

The Catalan Parliament has the authority to propose a draft for a constitutional amendment. Paradoxically therefore, constitutional reform seems to be the only effective way of realizing Catalan independence and it is the only method that has not been tried. Of course, the success of a proposal to modify Articles 1 and 2 of the Spanish Constitution among others (that must be approved by the central institutions and a national referendum) is quite doubtful.

[25] Some interesting hints can be found in J.F. López Aguilar: Canadá y España: una comparación desde el federalismo contractual. In *Autonomies*, n. 25, 1999. 7 y ss.