

Scotland and Catalonia: Two Historic Nations Challenge a Three Hundred Year-Old Status Quo

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Abstract

This paper addresses some questions that deserve comments given that they appear in the press on a daily basis. Why and how are Scotland and Catalonia demanding their own individual statehoods? What are the British and Spanish Governments' responses to the demand for a referendum on independence? What is the role of the Constitutional framework in these answers? And that of political will? Are the unionist campaigns the best method of recruitment for pro-independence camps? Do the pro-independence projects paint a too rosy picture? What are the implications in international law, particularly referring to European Union membership?

Keywords: Catalonia Secession, Devolution, European Union membership, Independence, Right to decide, Scotland Secession, Separatism

1. Introduction

Scotland's and Catalonia's pursuit of independent statehood currently occupy newspaper headlines and the political agenda in both United Kingdom and Spain. The purpose of this paper is to summarize and comment on: the causes of the process, its development and some controversial potential outcomes particularly referring to EU membership.

2. Why and how are Scotland and Catalonia demanding their Individual Statehoods?

Scotland's and Catalonia's pursuit of individual statehoods has historic roots. This is not a recent phenomenon as both nations have been considered states at some point in the past and right now, a considerable number of people in both countries seem to want this back.

2.1 Origins of the Union

The unions between Scotland and England, which resulted in the creation of the United Kingdom and Catalonia (Catalan-Aragón Crown) and Castile, which resulted in Spain, present both similarities and differences. In both cases their origins were a personal union, meaning that both kingdoms shared a King or Queen as the head of each State for some time but maintained different government institutions (various parliaments, governments, different legal systems and administration of judicial organizations)¹. The continuity in time of the dynasty at helm resulted in the passage of a personal union to a royal union; but not the disappearance of two different State entities. These arrangements of shared dynasty were threatened at the beginning of the 18th century in both territories by the deaths of childless monarchs. In the case of Scotland and England, the English feared that a different monarch in Scotland may form pacts with other countries, mainly France, in order to attack them and was the reason that triggered the process. On the other hand, Charles II of Habsburg died childless which brought about the "Spanish" Succession War that would align the support of different candidates from Catalonia (Charles Habsburg, Archduke of Austria) and Castile (Felipe Bourbon, grandson of Luis XIV of France).

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The will to defend the institutions of self-government, law and own language, was said to be decisive in not supporting the pretender from the Bourbon dynasty who had practiced a centralizing policy heading to uniformity in France.

The parliaments of England (1706) and Scotland (1707) passed the respective acts of union. It seems that one highly important issue in the Scottish decision was to find a solution to the economic crisis arising from the attempt to establish a colony in the area of the Isthmus of Panama (Caledonia) (1698-1700), known as the "Darien Scheme". The promoting company went into bankruptcy and the nobility and land owners that supported the enterprise were drawn towards the brink of ruin. The English Treasury pledged to a "Bail out". These "Bail outs" offered centuries before the International Monetary Fund was imagined, have always given great leverage. This seems to provide an inkling of a key factor: Union and Secession is about politics not about laws. In any case and whatever the details, it was the parliaments of the two Nations, of the two States, which agreed to the Union.

These were not the circumstances in the case of Catalonia. Philip V's troops triumphed in the War of Succession and it was agreed in 1713 that he would be King. Their victories have been followed by the repeal of self-rule in the conquered kingdoms.ⁱⁱ These circumstances influenced the enduring Catalan resistance after the signing of the Utrecht Treaties (March and April 1713) until the fall of Barcelona on September 11th, 1714.

The fall of Barcelona and the abolition of the "Generalitat", the institution of self-government, would be followed by the suppression of the University of Barcelona. Moreover, the official use of the Castilian language was decreed (known as Spanish nowadays) rather than Catalan. In short, a military defeat is what put an end to the structure of the Catalan State.

2.2. Pro - Independence Movements. What Nurtures them?

It may seem strange to talk about a victory and a defeat that happened more than three hundred years ago, but in fact this is still a subject of conversation to this day. The 2013 Saint George's Day, when people give books and roses to loved ones, the bestselling book in Catalonia, both in Catalan and Spanish was "*Victus Barcelona 1714*", a novel about the War of Succession and the Siege of Barcelona. The Catalan National Day is September 11th. The Battle of Bannockburn, remembered in a Visitor's Centre in the suburbs of the town of Sterling, is a historic fact with significance for many Scots today as well. If the essence of a Nation is that the people have many things in common, but have also forgotten much together (Renan, 1882), here lies a clue as to why many Catalans and Scots, even if they have strong links with other citizens of Spain or UK, feel they belong to different nations. It is undeniable that they have maintained a sense of national identity strong enough to make a significant part of its members today claim the right to be consulted about their collective future.

In Catalonia, the culture, the language and private law have been the pillars on which this sense of national identity that has lasted for centuries has been built. In Scotland and according to the web page of the Scottish government: "Scotland's national and cultural identity is defined by our sense of place, our sense of history and our sense of self. It is defined by what it means to be Scottish and to live in a modern Scotland in a modern world. It is the tie that binds people together (...)"

The unifying policy pushed by many governments both in Spain and UK during three centuries has combined both repression and incentives. Charles III, the same king who removed Catalan from primary and secondary education (1768) opened trade links between the American Colonies and Catalonia ten years later (1778). The more democratic nature of British governments during this period chose to inflict less repression than in Spain, but it did so all the same. The Dress Act (1746) that until its repeal in 1782 made wearing the Highland dress including tartan or a kilt illegal in Scotland still remains in our memory. The shared history in both cases, with light and shadow, mistake and achievement, has been mostly built - especially in Spain - not around the belief that there are two nations which add value to the resulting union but one that has shown its superiority and becomes stronger when it includes people, ideas and territory from the other one.

Surveys on the level of support to the creation of a State of their own suggest that it has existed for years in both territories. However, more recently between 2006-2011 in Catalonia and during the last election for the Scottish parliament in 2011, there seem to have been enough followers to question the status quo. So, why now and not before? This is the question that immediately arises. Both territories have recovered some structures of self-government and political autonomy; most relatively recently (Catalonia, 1979ⁱⁱⁱ and Scotland, 1998^{iv}). Is devolution the trigger for independence?

In Spain, the complex situation in the transition to democracy following the death of General Franco after 36 years of dictatorship alongside an army uncomfortable with a multinational state, was settled with a Constitution (1978) based on the indissoluble unity of the Spanish Nation, the common and indivisible country of all Spaniards that guarantees the right to autonomy for the nationalities and regions of which it is composed (arts. 1.2 and 2 Spanish Constitution).

To consolidate Spanish democracy Catalans accepted to enshrine the term “nationality” instead of “Nation” in the constitution, thinking that in practice they would be exactly the same. However, they have not been the same in practice at all. This term “nationality” has not been developed as substantially different to “regions” and the State legislation has mostly acted under the unifying impulse of the seventeen autonomous communities. The level playing field of competences has gone down or up depending on whether the Spanish Government held an absolute majority or not in the Spanish Parliament.

The most sensitive aspects for the feeling of national identity, such as language, education or territorial organization, have been open to the Central Government intervention in nationalities and regions alike. An attempt to rewrite the relationship, by making explicit what for the Catalan autonomist positions was implicit in the constitutional pact, took place through a new Statute of Autonomy (2006). This attempt ended with a sound disclaimer by the Constitutional Court^v(STC 31/2010). Evidently, there are always complaints when a court upholds the adverse point of view but this was a key moment. Many people changed their mood from pro-autonomy to pro-independence.

In addition to that, an unbalanced financial flow in terms of fiscal transfers from the territory and the services received (GDP ranging from 4.8% to 8.5% depending on the calculation system) creates a sense of fiscal grievance (Castells, 2013). This perception, coupled with the demagogic statements relating to a supposed lack of solidarity from Catalans by some political leaders of both major parties in the Spanish Parliament (Popular and Socialist) and amplified by certain media, have added insult to injury.

The year 2012 saw an attempt to settle this situation through a "fiscal pact" limiting the amount of the fiscal deficit. This proposal enjoyed broad social support across the political spectrum and civil society in Catalonia. In brief it meant that a Catalan tax agency collects taxes and that it is the regional government who, after that, will transfer a quota to central Government to meet central government's expenditures (Defence, Foreign Affairs and other services) together with a territorial solidarity share. Both figures would be bilaterally agreed for a period of five years. This proposal was not accepted by the Spanish Prime Minister, stating that there would not be a sufficient majority in Parliament to back it.

Finally, the conclusion for many Catalans, fair or not, is that they have a State working against their interests that restrains their chances of cultural and economic development, along with its associated affective rupture from the rest of the Spanish State. If we focus on Scotland, serious disagreements with many policies driven from UK parliament since Margaret Thatcher's premiership can be seen, particularly in the industrial and welfare parameters. Undoubtedly, the devolution process has allowed the Scottish to see the advantages of self-government but also its flaws. Possibly the welfare policies developed by Edinburgh's Government in harsh contrast with drastic spending cuts driven by the coalition in Westminster are fresh in many citizens' minds. In this sense, watching the different composition of central parliaments (Westminster and Madrid) and the territories (Edinburgh and Barcelona), illustrates the distance that separates the political aspirations of most of the citizens (voters) of Catalonia and Scotland and the rest of Spain and the whole of the United Kingdom^{vi}.

At the end of the day, many people do not feel comfortable with today's situation in Scotland and Catalonia. In Catalonia, there seems to be a correlation between more centralized policies driven by Spanish governments and more pro-independence supporters. In Scotland, it appears that the equivalent is cuts in public services approved in Westminster and more citizens in favour of independence. So, it not seems to be the devolution process the trigger for the pro-independence movements. The first impression is that the pro-independence camp in Scotland is looking for improvement whilst in Catalonia the focus is not to make the situation any worse.

Along with the internal causes, there are international ones too. Changes in the world map after the fall of Berlin wall and the success of the European Union despite its problems, have help to spread a feeling that economic activity and security are guaranteed through supranational organizations as EU, even the recent crisis in the Ukraine and the annexation of Crimea to Russia has prompted a trend to rethink it, at least in part.

In any case and whatever the reasons, Scottish and Catalan parliaments aim to hold a referendum about the state structures.

3) What are the British and Spanish Governments' Responses to the Demand for a Referendum on Independence?

In the Government's answer, four aspects can be distinguished: Constitutional and legal; economic; sentimental and international, with particular attention to the relationship with the EU. British and Scottish governments have agreed for the referendum to be held on September 18th 2014 with the question: "Should Scotland be an independent country?". The Catalan Government has set November 9th 2014 as the day to ask two questions: "Do you want Catalonia to become a state?" and if your answer is yes, "Do you want it to become an independent state?" Nevertheless, the Spanish government claims that the Spanish constitution does not permit the referendum to take place.

The difference between the British and Spanish response in the constitutional and legal field is enormous. The British Government accepts the legitimacy of the consultation and a possible independence-friendly result. It is up to the Scots, which means British voters registered in Scotland, to decide (Rachman, 2014). According to the Edinburgh agreement (2012), both governments agreed 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; deliver a fair test and decisive expression of the views of people in Scotland and a result that everyone will respect.* The UK government has delegated the Scottish one to organize the referendum in the agreed terms.

The influence of the Canadian Clarity Act (2000) is evident. This Act obliges Canada to negotiate with Quebec over the terms of a possible separation only following a referendum that proposes a stark choice between either full separation or continued inclusion in the Canadian state.

The Spanish Government, on the other hand, maintains that the consultation promoted by the Catalan Parliament violates the Constitution as "*National sovereignty is vested in the Spanish people, from who emanate the powers of the State*"(art. 1 CE.) Ultimately, the right of the Catalans to decide is denied. The Catalan Government (Institut d'Estudis Autònoms, 2013) has objected to defend its constitutionality that this is a non-binding consultation; but the Spanish Government has answered that it is nonsense to ask citizens about hypotheses or guesses instead of concrete proposals in accordance with the procedures established for Constitutional reform.

4. What is the Role of the Constitutional Framework in these Answers? And that of Political will?

The British approach is consistent with the democratic principle and with the principle of parliament sovereignty. Perhaps a written constitution in UK (written like that which an independent Scotland hopes to gain) would make things more difficult. This, at least, is the point of view expressed by the Spanish government when it refers to specifics of the British constitutional system to deny, comparatively, the right of Catalans to be consulted alone.

In Spain, prominent lawyers mostly opposed to secession have expressed the possibility of a consultation about a non-binding outcome on the link with Spain, confined to the voters of Catalonia, as a previous step to promote a constitutional reform (De Carreras, 2014). The common ground for this opinions is that although Catalans cannot by themselves decide on their independence, "It is difficult but not giving them the moral right to be consulted on questions which so deeply affect them and consequently if they express through their legitimate representatives their desire to be consulted, our leaders should endeavour to legally manage this moral right by any of the roads our positive law offers "(Rubio Llorente, 2013) (translated by the author^{vii}).The law of Referendum methods (2/1980 Act) gives the Spanish Government the last word to call them, that could use this empowerment to know the degree that Catalans support independence. To satisfy those that consider the law has not forecasted a referendum like that, this outcome could be achieved by modifying the law of Referendum methods to include a referendum on such subjects and regulated by the Spanish Government.

The Spanish government considers that the reference to "all citizens" of article 92 of the Spanish Constitution when it refers to referendums, demands to be interpreted as all "Spanish"citizens. Even this interpretation is highly debatable; this difficulty could be overcome by modifying this constitutional precept by a vote of three fifths of both houses of Parliament. Ultimately, "the consultation can have a possible legal (and constitutional) framework, but this should be performed previously through its reform. Here it may be possible to reform the constitution, but doing so or not will not depend on laws, but the political willingness to carry it out."(Tornos, 2014, p.50).

Among those that propose the consultation in Catalonia, there are different goals (a new relationship within Spain, Federalism, Confederation, Independence, etc.). Also, they forecast different effects, binding or not binding, to the consultation. Those opposed to the consultation claim that even a non-binding consultation legally speaking, would be binding in political terms. In their reasoning, the conclusion would be the same, a part (Catalan citizens) would be deciding about the National Sovereignty (that belongs to all Spaniards). But conversely it could also be argued that it would not have to be like this necessarily if clear legal outcomes were agreed (% participation, % Yes vote, next steps if both previous criteria are fulfilled or not).

In 1998, the Canadian Supreme Court issued an advisory opinion at the request of the Canadian government, about whether Quebec possessed a unilateral right to secede under domestic or international law. This opinion that is cited by camps both in favour of and against independence to back their positions – a circumstance, by the way, quite frequent in lawyers' activities- concluded that Canadian domestic law does not back unilateral secession. However, on the basis of the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities, concludes that the Constitution is not a straitjacket and that “a clear majority vote in Quebec on a clear question in favor of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize”(Canadian Supreme Court, 1998, &150).The Spanish Constitutional Court has ruled in a quite similar way on March 2014. After ruling that the Catalan people are not a sovereign subject, in an appeal for a political solution to the conflict, the judges wrote that “the constitution does not resolve and cannot resolve all the problems that arise within the constitutional order, especially when they derive from the will of one part of the state to change its legal status” (STC 42/2014, FJ 4.b).The Court added that it was up to public powers to resolve such conflicts, through dialogue and cooperation. This outcome could be achieved by modifying the legal and constitutional framework. Once again this is a question of political willingness.

5. Are the Unionist Campaigns the Best Method of Recruitment for Pro-Independence Camps?

We will deal with the economic aspects opposed by governments and their allies to the demands of independence, the strategy used and finally the sentimental vector or those statements that touch feelings more than material interests. The implications of international relations towards independence will be considered below.

5.1 Economy

Both Governments (UK and Spanish) have chartered “scare force one” (Roberston, 2014) in an attempt to gain the citizens' will to vote against the Independence. The world of large companies has recently entered the debate and their position is mostly opposing or cautious.

The UK Government, Conservatives and Liberal parties that back them as well as Labour in opposition collectively rule out sharing the Pound with an independent Scotland (Balls, E, 2014). The Governor of the Bank of England, (Carney, 2014) said that to participate in monetary policy, an independent Scotland should set out a common fiscal policy. The Unionist camp insists that this is contradictory to the proposal for independence. On the other hand, the euro crisis, which is partly attributed to sharing currency without sharing taxation or the commitment to transfer resources to the States in crisis to ensure their solvency, has been used to argue the inconvenience for the UK to share the pound with Scotland.

The huge amount of the investments needed to get the North Sea crude oil reserves to the surface has been invoked by Government and BP's Chief executive Bob Dudley to minimize the expectations of income from this resource for the future independent Scottish budget (Kavanagh & Chazzan, 2014).Similarly, UK's top retailers have spoken out against Scottish independence (Groom, 2014). They have voiced concerns about a rise in costs in the supply chain and that new employment and pension laws would create extra administration, which could lead to higher costs for consumers.

The Spanish Government has also warned of the economic damage that would be incurred by an independent Catalonia. So, with a predicted reduction of 20% in GDP (García Margallo, 2014), the foreign affairs minister bases their claims on the almost inevitable exit from both the EU and the euro. Adversely, the Catalonia Economists Association (Col·legid'Economistes de Catalunya, 2014) has reasoned the economic viability of a Catalan State even if an exit from the European Union would have a very negative impact.

5.2. Strategies

The UK practices politics. The country which invented rules even for boxing, the Marquess of Queensberry's rules, also applies them to this contentious issue. Once the terms of the referendum between the UK Prime Minister and Scotland's First Minister have been agreed, they will both try to win voters for their respective positions: No and Yes. Governments publish reports on their websites and look for partners in the civil society. The Scotland analysis presented to the Parliament is based (HM Government, 2013, p.5) on the fact that "the UK Government believes that the partnership can and should continue into the future". Even so, "the UK Government recognizes that Scotland has the right to leave the UK if a majority of people vote for it in the referendum in 2014". "The choice rests with the people in Scotland". It is the first of a series of papers to keep people in Scotland properly informed and to base their decision on.

The paper analyzes Scotland's constitution today, based on Devolution, as a process that evolves with social needs and offers people in Scotland "political decision-making on key issues closer to the people affected by it and to be part of a global player". The report highlights that some assumptions in the Independence field, such as keeping the Pound and the Bank of England or a waterfall of black gold are less than certain. The impact in international relations, particularly putting in doubt the automatic or even easy access to EU, NATO, IMF, membership is, probably, where the ink used is blacker. So, in points 3.22 to 3.24, it demonstrates that UK has been involved in up to 14,000 treaties, bilateral and multilateral, from television program exchange, air services agreements that allow airlines to operate routes, to police and security services or to avoid double taxation and that a new independent Scottish state "would have to go through a process of becoming a party to (or confirming its participation in...)". This very cloudy horizon is dotted with some small rays of sunshine that stresses its credibility. In this way when at point 3.27 it says "For example, once it has become a member of the UN, an independent Scottish state could, should it wish to do, seek to become a party to whichever of the 500 plus treaties deposited with the Secretary General to the UN in which it was eligible to participate. This process should be relatively straightforward for an independent Scottish state".

In Spain, the official reports against the process are filtered to newspapers or are sent to foreign embassies but they are not available to the public. A think-tank close to the ruling popular Party, has published a report about Questions and Answers on the secession of Catalonia (FAES, 2014). Even for those that disagree with some of its statements, it is helpful that it has been created and published.

Last but not least, the Spanish Prime Minister, after stating that the query is illegal and unconstitutional, deduced that in this respect it has nothing to deal with the Catalan Government. This position seems an example of anti-politics that at this moment encourages the pro-independence camp. More and more people have become angry in front of what they consider to be a contempt attitude to their opinion, expressed in overcrowded demonstrations. If November 9th arrives without any agreement about what to do or without any clear direction to follow, citizens may think that in response to their politicians' lack of decision making, they will have to take the lead. Clearly, however, this is not the most convenient way to solve problems in a democratic system, based on the representation principle.

If we reviewed the twelve Marquess of Queensberry's rules only two would apply to the UK debate, numbers 1 and 12: 1. *To be a fair stand-up boxing match in a 24-foot ring, or as near that size as practicable.* 12. *The contest in all other respects to be governed by (...)* these could be translated as 1: the use of Governments (British and Scottish) web pages and Crown Print and 12: the Edinburgh Agreement.

As we have seen, everybody forgets rule 6, *No seconds or any other person to be allowed in the ring during the rounds.* (...) However, it is much more so in Spain where the only rule for Spanish Government is that the match is illegal.

5.3. Sentimental

With the noticeable exception of Prime Minister Mr. Cameron on 7th February in The Olympic Park in East London who said "*We want you to stay*", there have been very few references in the official British and Spanish responses to what a loss may constitute for the remaining states of these countries. To be fair, in the HM Government report there are some statements about the importance of Scotland for the UK. Even so, if we put aside the elapsed time in forming part of the same State, it is hard to find statements empathetic enough to seem to understand the sense of grievance perceived by those who choose to leave.

Some opinions exude a tone of lecturing about what is appropriate or not for the 'other', forgetting that in general, people do not like to receive lessons (Stephens, 2014). On other occasions, the statements are so blatant that they show in words like those I borrow from a Spanish journalist (Zarzalejos, 2014), "a rough handling of persuasive communication techniques ", as when the Spanish Foreign Minister, says that Catalonia will wander through space for centuries outside the European Union. On the same way, Mr. Rajoy, the Spanish Prime Minister compares an Independent Catalonia to Robinson Crusoe's Island^{viii}. Arrogant or contemptible approaches do not seem to be the best way to convince people that they are wrong. It is certainly more effective and therefore more intelligent to speak like the British PM (Cameron,2014): "We would be deeply diminished without Scotland (...)Our human connections –our friendships, relationships, business partnerships- they are underpinned because we are all in the same United Kingdom, and that is the number 1 reason why we are stronger together(...)"

6. Do the Pro-Independence Projects Paint a too Rosy Picture?

In my opinion, yes they do. The White paper, Scotland's future (Scottish Government, 2013) sets out the gains of independence for Scotland –whichever party is in government-.

After outlining the advantages of home rule as closely as possible to the citizens governed, the white paper stresses Scotland's strengths and the many positive outcomes that now locked inside, can be unleashed in the future. There have been some doses of wishful thinking and the controversial approach to some issues where a negotiation is needed with other subjects has not been considered. Instead of dealing with the problems head-on, they have been merely put off saying: "This change in the political and governmental arrangements for Scotland will not affect the many other ties that bind Scotland to the other nations of the UK. We will continue to be linked to other nations of the UK by five continuing unions: the EU; an ongoing Union of Crowns; a Sterling Area; and as members of the NATO defence union (...)".(Scottish Government, 2013) Without denying the right of Scotland to EU membership as it will be developed in the next chapter, it must be realised that the rest of UK (minus Scotland) will have a decisive voice about forming a "Sterling Zone", the current "Travel Area", etc... The same could be said about remaining a NATO member and other members' point of view if, as promised in the "White paper", the nuclear deterrent on board the Trident submarines has to leave the Clyde.

The profound disagreement that the Scottish Government (and I imagine its voters) has with some policies that Westminster has proposed , for instance taxation, welfare benefits or the Royal Mail privatization is crystal clear by reading the paper. The quest for Independence is a bid for changing specific policies, in some cases quite radically. These changes – from the White paper's point of view- will always be for the better. The reason is the trust in the fact that the best guarantee for good governance is the proximity between the government and citizens. In Catalonia, things are not so clear. As the focus is based on the mere possibility to hold a referendum, firmly rejected by the Spanish Government, there is not an officially conducted debate about what can improve with Independence if it is obtained. Certainly, the majority of the people that are proud of Catalan culture and those elements, previously cited, that conform to a National identity, think that things cannot get worse. The recentralization policies, uniformity measures and the financial hardship suffered by the Catalan government, for this view, form a perfect storm that if devolution tools are emptied of effective content, it seems that only Independence can sweep them away.

In this sense, as mentioned before, it must be pointed out that the Scottish bid is attempting to change things for the better. The Catalan one, however, it seems is only aiming to avoid further disaster. In addition, it is also clear that the political and social forces that back the pro- independence field in Catalonia are so different from each other that it is difficult to say what the agenda may be for the day after. But there are an increasing number of people, not engaged in politics until now, that as a grass-root movement, see independence as an opportunity for social justice. An idyllic future has been envisaged by those in the Catalan pro-independence camp who contemplate a smaller, smarter, fairer country within the EU and an active member of the international community.

It is also true too that only now, as the process advances, the difficulties and challenges to overcome before achieving this position have arisen and that has started an assessment, albeit not yet a dialogue about it. Tradeoffs, losses and gains are, more and more, being considered. Nevertheless, if it is not possible to change the not absurd view that the perfect storm is heading for Catalonia in the form of Spanish Parliament and Government decisions, probably a lot of people will take a position by thinking about their children or the mid- term implications, more than the short term damages involved.

Added to that, as people do not like to be lectured to or threatened, a gut reaction could be triggered. A more cautious reaction is not the most likely result when people are angry.

7. What are the International Law Implications, Particularly about EU Membership?

This is the most contentious issue between those that argue about the consequences of secession. Let us start paying attention to its legal dimension remembering that “acts of secession are evaluated under domestic law, while international law is only concerned with regulating secession’s the consequences” (Connolly, 2013, p.67).

7.1 Secession under International Law

Secession is clearly not favoured in either international or domestic law. It should not be forgotten that international law is, generally speaking, a set of rules made by and for states, and states have been reluctant to enshrine a right that would justify their own demise.

The International Court of Justice has upheld that the right to external self-determination in the colonial context has become customary international law^x. On the other hand, “the most common argument in favor of a right to external self-determination outside of the colonial context is that international law should condone “remedial secession” as a last resort where a group within the territory of an existing state is denied basic democratic freedoms and is subjected to severe human rights abuses”(Connolly,2013,p.72).

Happily, this is not the case for either Scotland or Catalonia. Looking at a compass to find a way out of this labyrinth, someone quoted the treaty (Vienna Convention on the Law of treaties, 1978) on state succession with respect to treaties on art. 34.(1) It states :“*Any treaty in force at the date of the succession of states in respect of the entire territory of the predecessor state continues in force in respect of each successor state so formed* ”. It would be a nice and smooth remedy, but it cannot be applied in these cases as both countries are not party to the convention and Croatia, the Czech Republic, Estonia, Slovakia, Slovenia are the only EU members who have ratified this. In addition, article 4 (a) makes the priority between the different legal sources clear by pointing out that an international organization’s rules on membership take priority over the general rule set out on article 34. (1). So, if secession does take place, the consequences about international organization membership will be defined by their own treaties or by “ad hoc” solutions implemented through their decision making processes. Once at this point, politics will be more important than rules, even though decisions will be formally justified on those legal bases.

7.2. The EU Membership of the New States

The UK prime minister has promised an in/out referendum by the end of 2017 if his party wins an outright majority at the next general election. This fact introduces a parameter in the Scottish debate that is not present in the Catalan one. However, the continued EU membership of the seceding territories is an extremely contentious issue in both cases, between those in favour and against the secession. While the former minimize the difficulties, the latter tend to exaggerate them.

If the secession takes place, the size and population of the remaining parent state will very probably prompt it to be considered the parent state’s rightful successor according to International Law. This conclusion has significant importance (Crawford &Boyle, 2013), because by applying international law, the remaining parent state will retain its membership of international organizations as well as EU.

If a lawyer is questioned, there are four possible, but quite different scenarios for the new independent states: Negotiation from out the EU (Art. 49 TEU); Search to join the “European Fair Trade Association” EFTA and negotiate the access to the common market with the EU through European Economic Area (EEA) membership; Passive membership, until the completion of the application process, accompanied with a “fast track” application procedure; Enlargement from within (Art. 48 TEU).

7.2.1. Negotiation from out the EU (Art. 49 TEU)

Art.49 TEU makes it clear that a State cannot accede to the EU without the consent of each existing Member State. Each existing member of the club must agree to the admission of any new member, even in the opinion of many, (Happold, 2012; Crawford & Boyle, 2013; De Areilza, 2014), if an aspirant Member State comes from within. This position has been reiterated by European Commission representatives. Nevertheless, there is not a specific provision in the TEU about membership from a new State whose parent State is an EU member.

7.2.2. Seek to join the “European Fair Trade Association” (EFTA) and negotiate access to the Common Market with the EU through European Economic Area (EEA) Membership

Faced with the opposition of some member states, Scotland and Catalonia may be able to access the common market indirectly by trying to join EFTA previously and, having achieved that, negotiating membership of the EEA. This agreement provides for the inclusion of EU legislation covering the free movement of goods, services, persons and capital throughout the 31 EEA States (28 EU members plus 3 EFTA members, Norway, Iceland and Liechtenstein. Switzerland, who is an EFTA member, is not part of EEA but it has a bilateral agreement with EU). In addition, the Agreement covers cooperation in other important policies, such as research and development, education, social policy, the environment, consumer protection, tourism and culture.

This kind of partial passive membership that guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA is not exactly the same as EU membership, not only because the EU policies that do not cover it^x but also because, (DalleMulle, 2013): the new states wouldn't intervene in the EU decision making process.

7.2.3. Passive Membership, Until the Completion of the Application Process, Accompanied by a “Fast Track” Application Procedure

The UK government's position about a Scottish state EU membership asserts (HM Government, 2013) in point XXIII in the Executive summary and § 3.10- “Rather than being purely a matter of law, the mechanism for an independent Scottish state to become a member of the EU would depend on the outcome of negotiations and on the attitude of other EU institutions and Member States. It is likely to be a process requiring unanimity across all Member States of the EU. Since an independent Scotland would be a new state there is a strong case that it would have to go through some form of accession process to become a member of the EU(...)”. This assertion claims that the way to become member does not imply being previously expelled from it and necessary to follow the steps in ex- Art. 49 TEU which was commented on as case 1.

It seems reasonable, considering the EU's purposes and strategic goals defined in their treaties, to allow some kind of passive membership to the new states. This means the continuing application of EU law and policies with access to the common market, at least in the same way that EFTA members through EEA, without having vote in the decision making process until the accession negotiations conclude. The same strategic reasons justify, in this view, to frame an accelerated and simplified process to negotiate the full membership.

7.2.4. Enlargement from within or Internal Enlargement (Art. 48 TEU)

This case that seems to be the most favourable to continuing membership, even it does not necessarily mean automatic membership as a negotiation process would be necessary in any circumstance, has been reasoned in a note (Avery, 2012) published in the UK Parliament website. Publishing it is a sign of the rooted democratic beliefs in the UK parliamentary tradition and, let us say, of political intelligence and is perhaps the best way to strengthen one's own arguments by not being afraid to show the opposite view.

The opinion emphasizes that the decision on how to proceed would be political, not a legal exercise, although the lawyers will be consulted, and “taken by the EU's political leaders (elected representatives meeting in the European Council, the Council of Ministers and the European Parliament) in the light of the practical options available and the national and European interests involved”.

Considering the Scottish people's acquired rights as European citizens and the absence of a historical precedent, the note envisages a road to membership with negotiations in the period between the referendum and the date of independence. The process would require an intergovernmental conference to amend treaties but without a detailed scrutiny of the EU's *acquis* as Scotland has applied the EU's policies and legislation for 40 years. The changes required in the EU treaties should be those related to governance issues, votes in the Council, number of MP's in the European Parliament, both for Scotland and the remaining UK. In order to implement secondary legislation (directives, decisions) and putting aside technical adaptations, it seems that the most controversial issue could be the continuity of the “opt-outs” obtained by UK.

7.3. Has any sense to expel Scottish or Catalans citizens from the EU?

Real life is full of hardships. So we cannot dismiss the worst case scenario which is the first one: being expelled from EU for either Scotland or Catalonia or both. However, it doesn't seem would be a fair outcome, even knowing that fairness is not the most common coin in international relations.

Does it make any sense, considering the reasons for building the EU: stability and peace in Europe through the development of a common market, to expel those states and their citizens from its core that fulfil the economic and political requirements known as the Copenhagen criteria? In other words, having a democratic, free market government together with the corresponding freedoms and institutions, and respect for the rule of law and who have previously adopted the existing body of EU law.

In the end, the reasons why expelling those citizens, who (as UK citizens and Spanish citizens) have been European citizens since the years 1973 and 1986 respectively, could be ill will from either former parent states or from others worried about secessionist movements from within or even more shortsightedly, to obtain some compensations in other fields (opt outs, budget,...). It is possible to understand the reason, however it is difficult to read the preamble of the Treaty on European Union and feel comfortable with a decision of this kind.

8. Conclusions: Politics is the way to tackle Political Issues

The demand to be consulted about a possible future own statehood from a territory and their people is primarily a political issue, not a legal one. So, the way to deal with it is by politics and a sensible use of the legal framework and its tools.

The difference between the British and Spanish response in the constitutional – legal field is obvious. The UK government accepts the legitimacy of the consultation and a possible independence-friendly result. The Spanish government, on the other hand, maintains that the inquiry promoted by the Catalan parliament violates the constitution even if its result is not binding.

The British approach is consistent with the democratic principle and with the principle of parliament sovereignty. In Spain there are legal difficulties with the consultation, even if its results are not binding and there exist doubts about its constitutionality. Admittedly, although the Catalans' have a moral right to be consulted, what is missing are the juridical mechanisms to make it possible. May be this would need a change in the legal and eventually in the constitutional framework. In any case, not doing anything other than rejecting the consultation as illegal is attracting new backers for the pro-independence camp.

Even in the worst case scenario for the UK government, which means a pro-independence friendly result, there are better forecasts to heal wounds and arguments and to build up a reasonably satisfactory future relationship between both camps in a process of dialogue. In contrast, one possible scenario envisaged by the Spanish government, which means no consultation held and backed up by the unilateral enforcement of government or judicial resolutions, will produce deep social wounds and resentment.

By accepting the right to give an opinion, it is necessary to nurture this with sufficient and balanced information. In this sense, fear tactics in the unionist camp or the too rosy pictures in the pro-independence one, do not help to achieve a goal of a well-informed public opinion. The first strategy could lead to a visceral reaction against it whilst the second one makes a crucial mistake to disguise difficulties ahead.

It seems that a smarter way to confront the pro-independence challenge by the pro-unionist camp would be to be emphatic and try to understand and solve their grievances and not to adopt a tone of lecturing about what is appropriate or not for the “other side”. As the process advances, a more balanced approach has emerged in the pro-independence campaigns, but none the less as an answer to the challenges and hardships announced and amplified by the unionist camp. In any case, even successful independence will produce losses and gains that have to be weighed up by the citizens in advance to decide if the trade-offs deserve the effort.

Once considered the demand to have a saying about the political future of both, Scotland and Catalonia, we have to confront their international implications and, particularly, why the EU membership is a so controversial issue. An international community governed by the rule of law, with well-functioning international cooperation platforms in the economy, particularly trade, and security, drastically reduces the state's size importance. Once these platforms have been pooled, the state's own scope of sovereignty is highly diminished.

International organizations such as the EU provide the environment in which citizens' activities can thrive, whatever the size of their member state. If the unionist camp in UK think that the risk of losing EU membership could swing the balance in their favour, this shows the size of EU's importance over the states. Being a member state of EU, therefore, seems to imply a higher priority than any other condition. When the Spanish government points out that a Catalan state would be immediately out of the EU and Euro frameworks, it is heading in the same direction. For this reason, to belong to the EU is an extremely contentious issue between both camps.

This being said however, it seems that the unionist camps have nothing or very few offers of their own other than facilitating different club memberships. At this point the apparently contradictory stance of promoting, simultaneously, the state's integration at EU level and achieving own statehood, can be better understood.

There is unanimity that the denominated remedial secession is not applicable either to Scotland or Catalonia. If the secession takes place, the size and population of the remaining of the parent state will very probably prompt it to be considered the later rightful successor and will keep their memberships of international organizations even the EU. In this case, for the new independent states are four possible scenarios about EU membership:

Negotiation from without the EU (art.49 TEU); Keep passive membership until completing the application process, that can go accompanied with a "fast track" application procedure; Seek to join the EFTA and negotiate with the EU access to the common market through the EEA membership; Enlargement from within (art. 48 TEU). The decision about which scenario to follow is and will be a political one adopted by EU political leaders and could be, as governments of UK and Spain and the European commission have said, to leave the new states outside EU; but it is truly difficult to see the sense of such a measure considering EU treaties goals and in its own existence.

Notes

ⁱ England –Scotland, 1603, when King James VI of Scotland inherited the English throne from his cousin, Queen Elizabeth I; Castilia-Catalonia, Isabel and Fernando, 1479

ⁱⁱ New Plant decrees of 29 June 1707 that repealed the charters of Valencia and Aragon.

ⁱⁱⁱ The Statute of Autonomy of Catalonia (LO4/1979) is an Act of the Spanish Parliament. It is the Act which develops the autonomy for Catalonia which the Constitution of 1978 lets and sets the "Generalitat of Catalunya" which had been provisionally devolved in 1977 and previously in 1932-1939 during the 2nd Republic. The Generalitat was the name of the Government of Catalonia until the "New Plant Decrees". The Act was amended by LO6/2006, partially declared unconstitutional by Constitutional Court Sentence 31/2010

^{iv} The Scotland Act 1998 (1998 c. 46) is an Act of the Parliament of the United Kingdom. It is the Act which established the devolved Scottish Parliament. The Act was amended by Scottish Parliament (Constituencies) Act 2004, Constitutional Reform Act 2005 and Scotland Act 2012.

^v In the STC 31/2010, June 28th, on the Statute of Autonomy approved by the Catalan and Spanish Parliaments and by referendum of Catalan citizens, the Court states that references to Catalonia as a "Nation" and to "the national reality of Catalonia" in the preamble have no legal effect. From 116 articles that were questioned by the Popular Party parliamentary group, the Court declares that 14 are unconstitutional and 27 are not if and when they are interpreted under the terms established in the sentence. The open political pressures on the Court and the infighting in it during the four years between the action was brought and the decision was taken didn't help to the authority of the ruling.

^{vi} In UK general election, 2010, the conservative party was –between those which won seats- the most voted in UK (36,1%), and the less in Scotland (16,7%). In the Scottish Parliament election, 2011, the conservative was the third force (13,9%), after SNP (45,9%) and Labour (31,7%).

In Spanish general election, 2011, the Popular party was the most voted in Spain (44,62%) and the third in Catalonia (20,71%), after CIU –Center Right Catalan Nationalist- (29,35%) and Socialist (26,63%). In the Catalan Parliament election, 2012, was the fourth (12,97%), after CIU (30,70%), Socialist (14,43%) and ERC-Cat Sí -Center Left Catalan Nationalist- (13,70%).

^{vii} Also are translated by the author those from García Margallo, Spanish Constitutional Court, Tornos, Zarzalejos.

^{viii} DSCD 192, p. 15.

^{ix} For instance in the case East Timor (Portugal v Australia), Judgment, 1995 I.C.J. 103, at & 31, the Court takes note that for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

^x The EEA Agreement does not cover: Common Agriculture and Fisheries Policies; Customs Union; Common Trade Policy; Common Foreign and Security Policy; Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); Monetary Union (EMU).

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