THE JUDICIALIZATION OF REGIONAL INTEGRATION

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1. Introductory Remarks.

The Spanish Constitution celebrated its 35th anniversary in late 2013. During all these intervening years, it provided Spain with the necessary stability to transition peacefully from the Franco era dictatorship and become a member in 1986 of the then European Economic Community (now the EU). Although partisan bickering is pretty common between the two major political organizations, the Popular Party (PP) and the Socialists (PSOE), parliamentary monarchy first under King Juan Carlos I and now under King Phillip VI has enabled the country to achieve minimum consensus on democratic governance, dismantling the previous centralist state (García Morales and Arbós Marín, 2010:44) and upholding the rule of law, even in the midst of the severe 2010 economic crisis (Rodríguez Zapatero, 2013).
Political decentralization sketched by the Constitution remained a thorny issue to be refined later on. The first decades of the new cycle were signaled by Basque terrorism spearheaded by ETA, despite the overall success of the constitutional design. Lately, ETA has renounced its violent means and the ECtHR in October 2013 enabled prominent terrorists to be sent home from jail, tossing away the so-called “Parot doctrine” concocted by the Spanish courts. ETA is currently in a cumbersome process of giving up its weaponry.

Now that Basque separatism has ebbed, Catalonia -Spain’s most vibrant economy- threatens with a referendum scheduled for November 9, 2014, based on two questions: a) Is Catalonia a state?; b) Should it be independent?. Catalanian leading political coalition CiU (Convergencia e Unió) and other regional parties such as ERC are aggressively promoting an affirmative answer to both questions placed on the ballot, based on the premise that Catalonia is entitled to ‘decide to decide’ and paving the way for outright independence from Spain (the so-called ‘soberanismo’, meaning the position which defends the ‘sovereign rights of Catalonia’). The Catalanian Executive headed by Artur Mas has conducted a highly visible international campaign (mainly within the EU and even in the U.S.) so as to elicit eventual support from international actors. The Spanish central government in Madrid, in turn, is coordinating policy with the British government of Prime Minister David Cameron so as to handle Catalonia in
sync with the parallel situation of Scotland (scheduled for a similar referendum for September 16, 2014). In sum, the pro-independence forces dislike Catalonia’s current fit (‘encaje’) within Spain; they would gleefully retain EU membership, despite qualms from Brussels.

Spanish major political parties have different stances towards Catalonia. The current PP government flatly denies any right to a regional referendum without approval from the national Parliament (‘Cortes’). The opposing PSOE is keen to a federal constitutional reform, replacing the instability of autonomous communities that exist today.

Regionalism has been a key component of Spanish party politics, as PNV in the Basque country and CiU in Catalonia eloquently show. As Hamann observes (1999:112),

Compounded representation is a crucial concept in understanding the development of patterns of political representation in Spain. The existence of regional administrative and political units, including regional parliaments and executives, provides a strong incentive for regional parties to form and compete in regional elections, as well as in national and European elections, by emphasizing the distinct interests of the voters in that particular region.

Why did this particular conflict begin to flare up again? Catalonia strongly supported the democratic transition from Franco and its final outcome the 1978 Constitution, which was only resisted by Basque nationalists (Peces-Barba Martínez, 1988:252). The ‘territorial model’ adopted by Title VIII was a unitary decentralized hybrid called ‘Estado de las autonomías’ or ‘state of
autonomies'. Authority rests mainly on the central government; however, a significant number of tasks can be performed by CUs (constituent units) autonomously in different degrees. Yet, the judicial decision of June, 2010, invalidating some parts of Catalonia's new sub-national constitution (EAC) fueled the flames of the current conflict. Catalan people saw the ruling as a response to 'a political climate that it is widespread in Spain in which one of the objectives is to put an end to the development of regional autonomy' (Cardús, 2011:26).

2. Historical and sociological context.

Catalonian grievances date back from 1714, when the Spanish Succession War ended and Bourbonic rule suppressed Catalan freedom (‘Decreto de Nueva Planta’). From that moment on, Spain and Catalonia faced diverse development and social trajectories. Catalonia remained an integral part of Spain, but disputes lingered on. Centralism was rampant in the 19th century and in the first seven decades of the 1900s.

Internal migrations fostered the widespread use of the Spanish language in the 1800s. Catalan was mainly confined to rural areas and became a secondary language. Linguistic imperialism took hold: major newspapers in
Catalonia’s capital city of Barcelona (such as ‘La Vanguardia’, for example) were published in Spanish, instead of Catalan.

John E. Joseph (2006: 40) further observes that:

Catalonia was the center of the left-wing movement that briefly established an anarco-syndicalist government in the region in 1936, and it continued to be the center of resistance to the Franco government over the following decades. For Madrid, the suppression of the Catalan language thus had a clear political-symbolic motivation. For Catalans, in turn, the laws forbidding the use of the Catalan language made it the symbol for all their political and cultural aspirations. Retaining their language, using it despite the laws forbidding it, was a political and cultural imperative. Catalan attained its symbolic force from its suppression by the ‘other’ power.

Catalonia’s relationship with the centralist Franco government (1936-1975) was confrontational. Boix (2011: 22) adds that:

Our current problem...started in the 1950s, when large-scale Spanish immigration doubled Catalonia’s population. It was a time when all the practical mechanisms for promoting functional assimilation were outlawed by the Franco government. From the start, the regime was brutal in its repression of the Catalan language. In the 50s and 60s, the situation was made even worse by radio and television, which were exclusively in Spanish and were absolutely Spanish in content and ideology.

Catalonia endorsed the new constitutional framework set up in 1978, after Franco had died in 1975. But the most recent focal point of discussion involved a judicial decision. The Spanish Constitutional Court in 2010 struck down as unconstitutional certain key provisions of the Estatut d’Estatut d’Catalunya
(Catalonia’s *de facto* sub-national constitution\(^1\)). This step was seen by many in Catalonia as another evidence of the supremacist stance of the Spanish state over historic regions and rights.


The autonomous state is a rather vague idea. It was purportedly devised as a work in progress, an initially open-ended model prone to subsequent fine-tuning and keen to flexible solutions (Díaz Ricci, 2009:87; Villaverde Menéndez, 2012:76). Some authors even labeled it as a ‘never-ending federal state’ (Blanco Valdés, 2001:163), to emphasize that it involves a process rather than a finished product. To compound the problem, Article 2 of the Spanish Constitution contains two joint principles which could eventually collide: indivisible unity of the State and autonomy rights of regions and ‘nationalities’\(^2\).

A constitutional issue develops when individual and social rights are recognized both at the national and sub-national levels, and courts at both levels of government face similar problems. In federal states, this is called ‘jurisdictional redundancy’ (Cover, 1981:639).

Famous scholar Daniel Elazar (1987:30) pondered that:

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\(^1\) Ironically, each autonomous community has its Statute, but it is actually enacted by the national Cortes in Madrid as an organic law, a hard proposition for a federal state to swallow.

\(^2\) The first principle is relevant as far as constitutional amendments are concerned, since they require a nation-wide will to reform the Constitution (Sánchez Agesta, 1980:344).
Redundancy was considered to be one of the unattractive aspects of federalism, something to be tolerated because of federalism's political virtues but minimized whenever possible. This view became especially prevalent after the rise of the modern science of public administration, which is built on hierarchical principles and the notion that the larger the institution or organization, the more efficient it will be.

Spain's Estatutos de Autonomía, like American state constitutions (Gardner, 2007), often duplicate rights recognized at the center (Aparicio, 2008). And the Spanish Constitutional Court had a relevant role in defining the terms of autonomy since its very inception (some even spoke about a 'judicial autonomous state', Fernández Ferreres, 2005:17), as the Catalanian Supreme Court also had on a lesser degree (see below). However, the Constitutional Court issued two very important judgments, the first concerning the Valencia Statute³ and the second one, most importantly, about the Catalanian Statute (EAC)⁴.

4. A most important judicial decision (STC 31/10).

Judgment 31/2010 proved to be pivotal in the conflict between Spain and Catalonia. 99 legislators from the-then disgruntled opposition conservative

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⁴ STC 31/2010.
party PP (now in government)\(^5\) challenged the 2006 reforms to the EAC as unconstitutional\(^6\). The Constitutional Court partially agreed, holding that fourteen clauses were inconsistent with the Spanish Constitution. Simultaneously, in a long and complex ruling spanning more than 800 print pages (López Aguilar, 2011: 224), it also validated many other clauses. The whole reform process of autonomy statutes was halted. Colino and Olmeda (2012:192) contend that:

\[\text{Due to a protracted process of reform and to the final intervention of the Constitutional Court with a landmark ruling on the Statute of Catalonia, this round of reforms has raised many questions about the real reform capacity of the system, on its capacity to achieve integration, accommodation, and adaptation to changing social circumstances and therefore legitimacy and stability without formal constitutional reform.}\]

Firstly, the Court held that the EAC Preamble, replete with references to Catalan nationhood, had no legal effect whatsoever. It also struck down article 6, section 1, which mandated for preferential use of Catalan in public administration, public mass media and education. ‘Preferential’ was deviant from a bilingual policy of equal footing between Spanish and Catalan. Other strucken provisions involved Catalan powers vis-à-vis the central

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\(^5\) The PP had been excluded from the reform deal which was struck between the three-party sub-national Catalanian government and the PSOE-led Administration in Madrid.

\(^6\) These amendments were the first to be made to the 1979 Catalanian Statute. Its text mushroomed from 57 articles to 223 articles, becoming in effect a fully-fledged sub-national Constitution (Castella Andreu, 2010:6).
government in Madrid, which the Constitutional Court is entitled to referee (Biglino Campos, 2007:154).

Are the national and linguistic aspects intertwined? Undoubtedly, yes. Major (2013:86) stresses that:

Catalans are no different from any other society in the world in that their culture has a particular language as its proper vehicle. And, no differently from every other society in the world, they see in their language a central element of their national character.

EAC Preamble references to nationhood ('Catalonia is a nation’, ‘national reality of Catalonia’) are deliciously vague and not prone to a straightforward constitutional interpretation. It is not easy to tell, for example, whether they fall inside or out of the Article 2 perimeter. Several times the Catalan Legislature (‘Parlament’) had issued unilateral nationhood declarations (1989, ‘Catalonia is a differentiated national reality which does not resign its right to self-determination’; 1998, ‘It confirms the right of the Catalan people to freely choose its future’), but the nationalist references were now enshrined in the EAC and could possibly collide with the Spanish Constitution.

Judicially, the Catalan Executive argued in briefs that the Constitutional Court had given no legal effects to preambles in prior decisions⁷, so the nationhood mentions were mere political statements with no binding character. The Court, however, disagreed: it held that Preambles had no

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⁷ STC 36/81 at paras.2 and 7.
dispositive effects as legal norms regularly do, but that they still represent useful yardsticks for constitutional interpretation (Solózabal Echavarría, 2011:216), according to its own criteria espoused in STC 36/81. Consequently, Preambles were not entirely ‘off-limits’ to some kind of judicial screening.

The Constitutional Court was bent on defusing EAC’s own imprint as a whole sub-national Constitution. Many Constitutions worldwide have preambles and they serve as helpful tools to sharpen constitutional identity. The Court wanted to send a clear message to Barcelona, in the sense that nationhood was ambiguous and that it did not entertain the idea that a distinct citizenship (i.e., a political concept) could be derived from a cultural or social reality. Technically, it did not strike down the Preamble as unconstitutional, but it gave it no effect as far as nationhood was concerned. Undoubtedly, it was a big blow to Catalan identity politics. Salvador Cardús sums it up (2013:98):

> Awareness of the complete failure of the [reform] project, which began in 2006, was widespread by 2010. The Catalanian people leapfrogged the political class by demanding a new sovereigntist political framework. The final denouement arrived with the demonstration in September 11, 2012, the day that Catalonia celebrates its National Day.

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8 With the exception of the Netherlands, Austria, Uruguay and Chile Constitutions, among other countries, which do not include Preambles.
Former Catalan President Jordi Pujol has termed the ruling as ‘harmful’ and ‘morally damaging’ (2011:59).

5. Language and regional politics in court.

One of the most delicate areas of identity politics is language. Language permeates everyday life and almost every identity politics situation (Canada, Belgium) has had linguistic implications as a substantial part of the equation. STC 31/10 also meddled in language politics as part of the regional question. Its criticism of Catalan identity politics did not stop at nationhood or national reality. One of the most visible consequences of national and regional affirmation is language, and it has a reverse effect on national politics: a common language (English in Canada) is heightened and the minority/majority language (French in Québec) seems to suffer. The same happens with Spanish and Catalan, even though Spanish is also the first language in Catalonia (a rough 51-36 % ratio currently exists). The 2006 EAC had provided for a language policy bent on a preferential treatment of Catalan so as to bolster national identity. It was not a new stand: previous sub-national legislation on language use had a manifest pro-Catalan bias.
Recently, Catalonia’s top Court has ruled in favor of a 25% use of Spanish in five schools as ‘lengua vehicular’ (*lingua franca*). Many object to a fixed percentage determined by courts.

Catalonia has pursued a policy of linguistic immersion, where Catalan is prevalent and Spanish remains a secondary option, having to make room for other languages such as English. Controversies abound, since business and commerce with the rest of the country is obviously conducted in Spanish and internationally in English. Increasing globalization has compounded the linguistic issue:

In our globalizing world, the distinction associated with geography, including statehood and language differences, are fading as English becomes ubiquitous and even nation states that have not restructured officially are dealing with non-national normative claims, entailing legal changes of a non-national nature.\(^9\)

STC 31/10 objects to Article 6.1 of EAC which gives preference to Catalan. The Court states that preference is not just an empirical observation such as ‘linguistic normalcy’. If Spanish and Catalan are on an equal footing ‘official language’, it would seem contradictory to upgrade one of them to a preferential status. In that case, the ‘equilibrium’ among the two official languages would be affected.


Catalans are eager to continue as U.E. members, despite qualms from the European Commission. Some contend that Catalonia joined the U.E. as a part of Spain; should it leave the Spanish state, Catalonia would have to reapply for membership, to be approved by the 28 Member States. Probably, this thorny issue will end up at the ECJ sitting in Luxembourg, which would imply a new round of judicialization of regional politics.
BIBLIOGRAPHY

-Aparicio, Miguel (Editor) (2008), Derechos y Princípios Rectores en los Estatutos de Autonomía, Barcelona, Atelier.

-Biglino Campos, Paloma (2007), Federalismo de integración y de devoluci ón: el debate sobre la competencia, Madrid, Centro de Estudios Políticos y Constitucionales.


- Rodríguez Zapatero, José Luis (2013), *El Dilema (600 días de vértigo)*, Barcelona, Planeta.


- Villaverde Menéndez, Ignacio (2012), *La igualdad en la diversidad (Forma de Estado y derechos fundamentales)*, Madrid, Centro de Estudios Políticos y Constitucionales.