



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Alternative pathways to an independence referendum – some reflections based on the experience of Catalonia

Citation for published version:

Casanas Adam, E 2021, 'Alternative pathways to an independence referendum – some reflections based on the experience of Catalonia', *Edinburgh Law Review*, vol. 25, no. 1, pp. 125-130.
<https://doi.org/10.3366/elr.2021.0680>

Digital Object Identifier (DOI):

[10.3366/elr.2021.0680](https://doi.org/10.3366/elr.2021.0680)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Edinburgh Law Review

Publisher Rights Statement:

This article has been accepted for publication by Edinburgh University Press in the Edinburgh Law Review, and can be accessed at <https://www.eupublishing.com/doi/full/10.3366/elr.2021.0680>.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Alternative Pathways to an Independence Referendum – Some Reflections Based on the Experience of Catalonia.

Elisenda Casanas Adam*¹

A. INTRODUCTION

Despite the current focus on the responses to the Covid pandemic and the constitutional developments surrounding the Brexit process, the issue of Scottish independence remains very much at the forefront of the Scottish political and constitutional debate. As is well known, the Scottish Parliament has enacted the Referendums (Scotland) Act 2020, which sets out the legal framework for a second independence referendum to take place, and the First Minister, Nicola Sturgeon, has promised an Independence Referendum Bill before end of Parliamentary session.² The UK Government's refusal to grant a s30 order transferring the competence to the Scottish Parliament to legislate for the referendum, thus putting its legality beyond doubt, has also led to proposals for alternative avenues to enable the vote to be held.³ In a sign that these may be gaining further significance, a motion has been submitted for debate at the SNP's forthcoming conference which calls on the Scottish Government to establish the legal competence of the Scottish Parliament holding the referendum without the approval of the UK Parliament, and if this is not established, then it states that the election of a pro-independence majority of seats in the 2021 Scottish elections shall be considered a mandate to commence independence negotiations with the UK Government.⁴ It is also worth noting that there is already a case regarding the need for a s 30 order pending before the courts.⁵

These recent proposals present many similarities with the process that led to Catalonia's controversial referendum in 2017. This piece will therefore provide some reflections on the use of alternative pathways to hold an independence referendum based on the recent experience of Catalonia.

B. ALTERNATIVE PATHWAYS TO AN INDEPENDENCE REFERENDUM AND THE ROLE OF THE COURTS

The search for alternative legal avenues to hold an independence referendum without the agreement of the central authorities inevitably leads to legalisation of the conflict, and as a consequence, to the involvement of the courts. In the case of Scotland, the proposals and

¹ Lecturer in Public Law and Human Rights and Associate Director of the Centre for Constitutional Law at Edinburgh Law School.

² "Plans for independence vote to be published in draft bill", BBC News, available at <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-53987594>.

³ "Scottish independence: SNP needs a plan B if Boris Johnson refuses permission for indyref2 – Kenny MacAskill", The Scotsman, available at <https://www.scotsman.com/news/opinion/columnists/scottish-independence-snp-needs-plan-b-if-boris-johnson-refuses-permission-indyref2-kenny-macaskill-2900851>.

⁴ K Nutt, "SNP conference motion on Plan B for Scottish independence has wording agreed", The National, available at <https://www.thenational.scot/news/18750092.snp-conference-motion-plan-b-scottish-independence-wording-agreed/>.

⁵ *Keatings v Advocate General for Scotland* 2020 CSOH 75.

initiatives in this sense have so far been pre-emptive; in the case of Catalonia, the challenges came from the central authorities.⁶ There is of course, on the one hand, a benefit in securing clarity and legal certainty regarding the constitutional provisions regulating the competence of the Scottish Parliament to legislate for an independence referendum. The Edinburgh Agreement in 2014 left this question unresolved, and many scholars have highlighted that the answer is unclear.⁷ From the perspective of the Scottish Government, a decision in their favour would also mean that they would be able to hold the referendum without the need to wait for the agreement from the UK authorities. However, if this were the case, it may be that the court's decision would simply push the conflict further down the line, as the UK Government may not necessarily accept the outcome of a unilateral referendum or feel bound to implement it in the case of a vote in favour of independence. Furthermore, an initial court decision in this sense could also potentially lead to further legal challenges to the specific referendum Bill / Act and related measures, to further delimit the exact scope and limits of the competence of the Scottish Parliament in this context. In the case of Catalonia, the Catalan authorities' attempts to hold the referendum led to 32 challenges before the Spanish Constitutional Court, resulting in a significant legalisation of the debate which overshadowed the issue of independence and affected the perception of legitimacy of the process.⁸

On the other hand, the Supreme Court may decide that the Scottish Parliament does not have the competence to hold a referendum on independence or that this has to be held via an agreement between both levels of government; This may then weaken the Scottish Government's negotiating position with Whitehall. More generally, there are significant risks resulting from the judicialization of a conflict over the holding of a sub-state independence referendum, as the case of Catalonia highlights again. Such cases pose a significant challenge for the courts as they bring to the fore different competing understandings of the nature of the state and of constitutional framework, which are common in many multinational states such as the UK and Spain. It is therefore very difficult for courts to reach a balanced decision that engages with and responds to the positions of both sides. The Spanish Constitutional Court's decisions on Catalonia have been met with accusations of politicization and of endorsing the position of the central authorities, and have further escalated the conflict.⁹ As a result, it is no longer perceived as a legitimate independent arbiter between both levels of government in Catalonia, and therefore can no longer effectively carry out that function.¹⁰

⁶ E Casanas Adam, "The Constitutional Court of Spain: From system balancer to polarizing centralist" in N Aroney and J Kinkaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (2017), 367-403.

⁷ See, for example, S Tierney, "A second Scottish independence referendum without a s. 30 Order? A legal question that demands a political answer", Centre on Constitutional Change Blog, available at <https://www.centreonconstitutionalchange.ac.uk/opinions/second-scottish-independence-referendum-without-s30-order-legal-question-demands-political>; and A McHarg, "Indyre2: Who Decides?", Scottish Constitutional Futures Forum Blog, available at <https://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/10276/Aileen-McHarg-Indyre2-Who-Decides.aspx>.

⁸ J Miguel Barcena, "The Catalan Process before the Spanish Constitutional Court" (in Spanish) (2018) *Revista Española de Derecho Constitucional*, 133-136.

⁹ Casanas Adam, 'The Constitutional Court'.

¹⁰ Ibid.

The UK Supreme Court has so far largely avoided being drawn into conflicts regarding the functioning of the devolution settlements. However, in the *Miller* case its decision on the potential judicial enforcement of the Sewel Convention was strongly criticised from the perspective of its approach to the territorial constitution.¹¹ A decision on the competence of the Scottish Parliament to legislate for an independence referendum would pose a notable challenge for the court, and again place it at the centre of the tensions between Holyrood and Whitehall. What the Catalan process highlights is that political conflicts between both levels of government cannot be resolved by the courts alone.

C. 'PLEBISCITARY ELECTIONS' AS A PATHWAY TO INDEPENDENCE

In the light of a negative decision from the Supreme Court, the holding of 'plebiscitary elections' may appear as a viable alternative for the Scottish Government to be able to consult their citizens on independence. It may also appear as the most effective means to continue to put pressure on the central authorities, to keep the referendum at the forefront of the political and constitutional debate, and also to persuade the EU and wider international sphere of the legitimacy of their cause. However, the Catalan example highlights again very clearly the potential risks that this would entail.

The Spanish Government's refusal to engage with the possibility of holding the referendum led the Catalan Government to call 'plebiscitary elections' on the independence of Catalonia on the 27th of September 2015. The shortcomings of this pathway became evident from the start. Firstly, neither the other political parties in standing for election in the Catalan Parliament nor the Spanish authorities recognised these as such, and therefore did not frame their position or the participation in the political campaigns and debates accordingly. It seems that the same would occur if such a referendum was held in Scotland. Secondly, by using the frameworks and processes for the ordinary elections to the Catalan Parliament to enable a 'yes-no' vote on independence, the 'plebiscitary referendum' lacked many of the specific procedural safeguards generally required for a referendum process, and which strengthen the legitimacy of the overall result. It seems that the same argument would apply in the Scottish case. As a result of both of these factors, the plebiscitary referendum on independence in Catalonia was also not recognised as such by the European Union or in the wider international sphere. Indeed, the Catalan pro-independence process was clearly framed within EU law and directed at securing the recognition and support of the EU institutions and member states.¹² Yet the use of alternative pathways such as 'plebiscitary elections', rather than persuading the Union of the legitimacy of their cause, has been met with calls to support the rule of law and the Spanish constitutional framework, and with clear support for the position of the Spanish state.¹³ The EU's response to the Catalan process is of particular relevance to Scotland, as the legitimacy of the process by which it becomes independent will be a fundamental factor for consideration in a future application to re-join the Union.

¹¹ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. See, for example, C McCrudden and Halberstam, "Northern Ireland's Supreme Court Brexit Problem (and the UK's too)", U.K. Const. L. Blog, available at <https://ukconstitutionallaw.org/>.

¹² E Casanas Adam, D Kagiarios and S Tierney, "Democracy in question? Direct democracy in the European Union" (2018), 14 *European Constitutional Law Review*, 261-282.

¹³ *Ibid.*

A similar situation then occurred with the responses to, and recognition of, the results of the Catalan 'plebiscitary referendum'. The 2015 vote resulted in a majority in favour of independence in the Catalan Parliament, with 47.7% of the votes.¹⁴ However, again, neither the Spanish authorities nor the European Union conferred any significance on the outcome going further than that given to ordinary Catalan election results or agreed to open any type of negotiations directed to discussing Catalan independence. While a lot of emphasis was placed on the fact that the pro-independence parties only attained 47.7% of the vote, it seems that even if they had received the 50%+ they were aiming for, this would not have made a significant difference to either the Spanish authorities or the EU's response. Again, it seems a similar situation would arise in the Scottish case. The lack of recognition of the referendum or of the significance of the outcome then left the Catalan authorities in an impossible situation, where they had promised their voters that they would initiate a process towards independence, but due to the lack of internal or external recognition of the vote their possibilities for taking this forward in a way considered compatible with the constitutional framework were extremely limited. This then highlights another potential risk of the use of alternative pathways to an independence referendum, which is that they become a notably slippery slope. As is well known, the Catalan authorities decided to proceed with their process regardless, leading to an escalation of the conflict and a significant constitutional crisis where Catalan autonomy was suspended and the leaders of the process either left Spain or were prosecuted for sedition. While it may be difficult to imagine such an outcome for Scotland, the fact remains that if the obtained a victory in an unofficially recognised vote, the Scottish Government would be under intense pressure from their voters to act on this, but would at the same time have very few legal options to do so if the UK authorities continued to refuse to negotiate.

Having seen all of the above, it is worth noting that there is a significant difference between the cases of Scotland and Catalonia. The Spanish Government's ongoing refusal to allow agree to Catalonia to hold an independence referendum is based on the (albeit strongly contested) understanding that this would be incompatible with the Spanish Constitution.¹⁵ For the Catalan authorities, therefore, the move to 'plebiscitary elections' was seen as their only remaining option. In the United Kingdom, on the other hand, the transfer of competence to the Scottish Parliament to hold the 2014 referendum sets a clear precedent for any such requests in the future. The UK Government cannot shield itself behind the argument that such a referendum is not constitutionally possible, and therefore must provide reasons as to why they are refusing such a transfer again. This can be seen in the responses of both Theresa May and Boris Johnson to the Scottish Government's requests.¹⁶ With opinion polls pointing to an overall SNP majority in the May 2021 Holyrood elections, it may be better strategy for the Scottish Government to continue insisting on a s30 order, as if the pro-referendum parties

¹⁴ The unionist parties obtained 39% of the vote, and the remaining votes went to parties that had not established a clear position on the independence debate.

¹⁵ See, E Casanas Adam, "The Independence Referendum and Debates on Catalonia's Constitutional Future" (2014) 2 Tijdschrift voor Constitutioneel Recht, 162-171.

¹⁶ H Stewart, P Walker and S Carrell, "Theresa May rejects Nicola Sturgeon's referendum demand", The Guardian, available at <https://www.theguardian.com/politics/2017/mar/16/theresa-may-rejects-nicola-sturgeons-scottish-referendum-demand>; and "Boris Johnson refuses to grant Scotland powers to hold independence vote", The Guardian, available at <https://www.theguardian.com/politics/2020/jan/14/boris-johnson-refuses-to-grant-scotland-powers-to-hold-independence-vote>.

sustain a consistent majority in the Scottish Parliament, the UK Government's refusal will become progressively more difficult to justify.¹⁷

D. FINAL CONSIDERATIONS

It may seem that the main lesson to be learned from the Catalan experience is that it is not possible to hold a sub-state independence referendum without the agreement of the host state. Yet from a different viewpoint, it could also be that the refusal to negotiate with sub-state authorities and the blocking of the referendum via the courts (and by force) will not resolve the issue. The elections held in Catalonia immediately after the crisis returned a new pro-independence majority committed to another Catalan independence referendum, and recent polls indicate that support for the pro-independence parties has since increased.¹⁸ The strong citizen support for the leaders of the failed process has also caused significant embarrassment for Spain, as the ex-Catalan President, Carles Puigdemont, and two of his ex-ministers have been elected to the European Parliament.¹⁹ The new government stemming from the Spanish general elections has therefore finally opted for establishing a dialogue with the Catalan representatives to try and reach a negotiated solution to the conflict.²⁰ While this has come far too late, it is undoubtedly the only way forward. The UK Government may also therefore benefit from paying close attention to the Catalan case.

¹⁷ S McIlkenny, "Latest poll predicts SNP set for huge win at 2021 Scottish elections", The Herald, available at <https://www.heraldscotland.com/news/18502527.latest-poll-predicts-snp-set-huge-win-2021-scottish-elections/>.

¹⁸The pro-independence parties obtained 47.5% of the vote in 2017. A recent poll predicted this would go up to 51% in the forthcoming elections, to be held in February 2021. "ERC afianza su ventaja sobre JxCat, que se asegura la segunda plaza pese al ascenso del PSC", La Vanguardia, available at <https://www.lavanguardia.com/politica/20200905/483322119740/encuesta-la-vanguardia-elecciones-catalunya-erc-ventaja-jxcata-independentismo-mayoria-quim-torra.html>.

¹⁹ J Rankin, 'Ex-Catalan leader who fled to Belgium takes up European parliament seat', The Guardian, available at <https://www.theguardian.com/world/2020/jan/13/puigdemont-arrives-to-take-up-european-parliament-seat>.

²⁰ "Pedro Sánchez defends "dialogue for reconciliation" after meeting with President of the Regional Government of Catalonia", La Moncloa, available at <https://www.lamoncloa.gob.es/lang/en/presidente/news/Paginas/2020/20200206sanchez-torra.aspx>.