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SCOTTISH DEVOLUTION & BASQUE HISTORICAL TITLES: TWO NATIONS SEARCHING FOR CO-SOVEREIGNTY?

When, among the happiest people in the world, bands of peasants are seen regulating affairs of State under an oak, and always acting wisely, can we help scorning the ingenious methods of other nations...?

—Jean-Jacques Rousseau, *The Social Contract*

1 Foreword

The legal and political process opened with Devolution within the UK-Scottish relations contains similarities and potentials of remarkable real and comparative interest with the constitutional clauses of recognition of Basque Historical rights or titles within the 1978 Spanish Constitution. In my view, the EU framework is suitable in both cases to ease and foster this interest within a context of progressive co-sovereignty at the EU, although the Scottish case might require further EU efforts because the UK is nowadays out of the EU.¹

For the British case, the Devolution process could be easily considered as the last on-time key moment in British “constitutional” history, according to Wicks. This author has selected eight “key moments” as follows: the 1688 “glorious revolution”, the 1707 Union of England and Scotland, Walpole’s long tenure (1721-1742) as the first Prime Minister, the 1832 reform of Parliament, the Parliament Act 1911, the 1950 European Convention on Human Rights, the UK’s accession to

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¹ Nevertheless, the results of the 2016 Brexit referendum in Scotland were clear: 62% voted to remain, 38% to leave the EU.

the European Communities and the aforementioned devolution legislation of 1998².

Even a long time before the previous studies, Meadows stated in 1976 that the necessity to turn

“to the question of why devolution has become a political issue at this time. In general terms, the essence of the controversy is reflected in the following statement: “Devolution! The very word contains a threat. The English pronounce it to rhyme with evolution, the Scots with revolution”³.

However, authors like Bogdanor and Voganaur recall the words of Dicey in his “Law of the Constitution” who underlined that

“a British writer on the Constitution has good reason to envy professors who belong to countries such as France... or the United States, endowed with constitutions on which the terms are to be found in printed documents, known to all citizens and accessible to every man who is able to read. Britain remains, together with New Zealand and Israel, one of just three democracies which are still not “endowed” with a “written”, or, more properly, a codified constitution”⁴.

Nevertheless, written or codified, the principle of British parliamentary sovereignty

“is no longer an unchallenged doctrine” (...) “and it is because there is scepticism concerning the value of the doctrine that voices have been heard calling for an enacted constitution. An enacted constitution would, however, have to confront at the outset the problem of whether or not the European Communities Act has limited the sovereignty of Parliament, and whether the practical limitation of sovereignty by the

² Wicks 2007.

³ Meadows 1977. More clearly, in my view, with the concept of recovering and updating sovereignty for Scotland through Historical Rights or Titles.

⁴ Bogdanor et al. 2008, 38.

*Human Rights Act and the devolution legislation should be registered in the Constitution. An enacted constitution would have to confront squarely the doctrine of the sovereignty of Parliament. We have been asked whether the enactment of a British constitution is feasible. Our answer is that there is no reason why it should not be feasible, no reason why, almost alone amongst democracies, Britain should be unable to enact a constitution. The problems involved in this enterprise are, however, formidable*⁵.

This paper will resume certain legal and political comparative sources and reflections on Basque Historical rights and Scottish Devolution within both “constitutional” cases to establish a brief comparative approach. It will underline the potential of these frameworks to develop the concept of co-sovereignty through mutual “constitutional” recognition with the UK and Spain and even towards the EU.

The proposal designed by the Basque Government and Parliament (approved by the Basque Parliament, December 2004) advocates for direct participation by the Basque Country and Navarre in the EU⁶, not in independent terms, but in harmony with other Spanish interests based upon the EU and constitutional principles of solidarity⁷. This would mean the participation of the Basque Country and Navarre within the Committees of the Commission and the Council of Ministers, as well as in the different working groups, as bodies that are permanent designers of new policies and regulations, both of which are also bodies with powers in the enactment of future treaties⁸. In fact, a real example of a new path towards co-sovereignty is stated in the

⁵ *Ibid.*, 56.

⁶ Relations with Navarre and the Basque provinces within French territory (Lapurdi, Basse Navarre and Zuberoa) are also reflected by the Proposal for a new Basque Statute (PSBC) in articles 6 and 7. This is a direct implication arising from the recognition of Basque Historical Titles in the First Additional Clause of the Constitution. *Vid.*, Ezeizabarrena 2019.

⁷ In the same sense, we have the same opinion as Murillo de la Cueva 2000, 133, 143 and 146. This author argues for a new implementation of autonomous participation based on criteria of exclusive competencies in relation to interests affected by EU decisions.

⁸ *Ibid.*, 123 – 124.

proposal for a new political statute for the Basque Country, which was approved by the Basque Parliament (PSBC).⁹

All these previous considerations are only a preliminary sketch of the different reflections that, *de lege ferenda*, inspire the content of this study, which takes a comparative approach to the devolution process in Scotland.

In the Basque case, it is therefore important to consider, if only briefly, some historical data concerning the legal framework that explains and presents the problem of Historical Rights in the different territorial contexts of Euskal Herria (The Basque Land)¹⁰. There are many perspectives in this context through which we could analyse the meaning of the historical rights or titles of the Basque territories. Any of them might be considered valid as long as the bases are solid and reasonable. However, I should underline here that my study chooses to follow the premises and their historic or legal evolution as a true example of a legal framework that has been active until today and still governs a good part of the public legal relationships of the Basque territories with Spain, such as the domestic structure of the Basque territories and their particularities vis-à-vis the rest of the common Spanish provinces.¹¹ If in the Basque case, we are talking from the point of view of a constitutional provision (the 1st Additional clause of the Spanish Constitution), the Scottish case is based upon the idea of Devolution (not necessarily written) but within the context of full historical national recognition of the Scottish nation.

According to Bengoetxea, from the Basque viewpoint, the interest in the Scottish process is not new.¹² In his view, it seems clear that Scotland is leading the path towards a higher degree of self-government

⁹ Plenary session of 30-12-2004. Proposal later rejected by the Spanish Parliament (February 2005). See the full text of the Proposal passed at the Basque Parliament in its English version (PSBC).

¹⁰ Preface and articles 1 & 2 of the PSBC.

¹¹ This is the point of view of many previous authors. Among them, mention should be made of Fernández 1985, as a true and fair view of the whole process.

¹² Bengoetxea, Joxerramon: "Escocia: enseñanzas para el País Vasco. El Diario Vasco, 12.03.2010 [online]. Available at: <https://www.diariovasco.com/escocia-ensenanzas-pais-vasco/>, accessed: 12.03.2010.

with general acceptance by the British establishment. In that sense, he quotes at least three advantages, such as a large democratic tradition, the absence of a written constitution and, therefore, the sovereignty of Parliaments according to their own powers, together with an independent judiciary, which normally avoids interfering in politics.

Bengoetxea stands that there is not only one process but two constitutional processes that may become one in the future. One was referred to the National Conversation launched by the Scottish National Party (SNP), while the other is based upon the report of the Calman Commission created by the Scottish Parliament without the SNP's participation.

In this line, the National Conversation implied a constitutional process for permanent consultation with Scottish society. Within this context, Bengoetxea states three different options:

- a) To maintain the current process of devolution;
- b) To increase Scottish self-government with new powers and, in particular, with financial and tax autonomy;
- c) To decide towards independence while maintaining the sovereignty of the British Crown, the Sterling Pound and the linkages of the Commonwealth.

This third option, maintained by the Scottish National Party and the Scottish Government, is known as "Independence in the EU." Meanwhile, the Calman Commission delivered its report in June 2009, underlining the necessity of a whole new tax and financial public system, which is limited nowadays. The Scottish Parliament has welcomed these proposals.

This option towards independence within the EU requires the Scottish Government to comply with the commitment to organising a referendum in 2010¹³. A different result would have implied a new open treaty on the Union agreement between Scotland and the UK in

¹³ The referendum took place in 2014: 45% in favour of independence, and 55% against was the result.

force since 1707. A clear result in favour of such a negotiation would give reason and more legitimacy to the independence of Scotland. In my view, there are at least two main bones of the Scottish proposal:

- The mutual recognition of Scotland as a nation.
- The example of Quebec.

The first item proclaims a recognition of the right to self-determination upon the previous existence of Scotland as a nation until 1707. The second one follows the principles and rules stated by the Supreme Court of Canada on Quebec (Consultative Opinion, 20-8-1998). In both cases, there is a key role of concepts like negotiation, agreement or treaty (1707) and referendum within a context of new or post-sovereignty through the ideas of Scottish professors like Neil MacCormick or Michael Keating, inter alia

According to Keating,

“Scotland is perhaps unique in facing no legal or constitutional bar to independence, nor much opposition in principle within the host state. (...) I argue that, total independence being impossible in the modern world, the key issue is how to manage interdependency in the (British) Isles, Europe, the Atlantic community, and the world. Even more difficult is the political economy of independence,..(..) For some years I have argued that we have moved from a world of absolute sovereignty to a post-sovereignty era, in which power is shared at multiple levels and self-determination does not necessarily imply statehood”¹⁴.

Moreover,

“concepts of statehood and political order in the eighteenth century are not what they were in the twentieth century, and in the present century they are changing again. So while it is justifiable to trace a Scottish polity and sense of common identity back to the Middle Ages, it is a mistake to confound this with modern nationalism or to assume

¹⁴ Keating 2009, VII:

*that a timeless Scottish frame is available to take over whenever the British one fails. Scottish identity is, rather, reforged and re-invested with political significance in different historical epochs. What we are seeing at present is a new Scottish nation-building project, contrasted with the old Union and in competition with an attempt at rebuilding a British nation. That is taking place in circumstances far removed from the classic nation- and state-building era of the nineteenth century*¹⁵. *“It jars with the sociological fact that some states contain more than one group whose members see themselves as a nation. (...) The “Jacobin” form of democracy, with its assumption of a single demos, has to be abandoned in favour of a more complex and pluralist understanding of democracy, citizenship, and solidarity. (...) In the United Kingdom, state and nation have long been in tension, and neither has a shared meaning*¹⁶.

MacCormick has a similar approach to the historic meaning of the British Union:

*“the United Kingdom is commonly referred to as “England”, “Angleterre”, “Inghilterra”, and the like, and we may in due course reflect why this should be so. But this “England” is properly the British State, at present the United Kingdom of Great Britain and Northern Ireland*¹⁷.

McCormick did not see, therefore, a real legal reasoning or practical decision within the 1707 Treaty but a sort of negotiation result of unequal forces. An example of a non-written “constitutional” anomaly with certain federal profiles¹⁸, without statehood formal recognition but indeed maintaining several structures of statehood or real sovereignty, in particular concerning the whole judicial system¹⁹. This might be as

¹⁵ *Ibid.*, 10.

¹⁶ *Ibid.*, 11.

¹⁷ MacCormick 2002, 49.

¹⁸ *Ibid.*, 60.

¹⁹ *Ibid.*, 183.

well a common ground shared by the remarkable institution of Basque Historical titles or rights.

The proposal of the current Scottish Government is useful and remarkable in four main concepts:

- a) Democratic: because is based upon the principle of self-determination internationally recognised;
- b) Constitutional: even though there is no written UK Constitution, it belongs to the mutual recognition as nations such as stated by the 1707 treaty;
- c) Social: because it is an open process to the whole society;
- d) European: recognising the clear will of participation within the EU process according to the EU Treaties in force.

This is also important because the Scottish proposal was based on the same rules and principles of the EU²⁰. In any case, this formal process towards the sovereignty of Scotland is fairly fulfilling the rules of democracy and, in particular, of an agreed Union through the 1707 Treaty. In fact, one of the characteristics in this context is the acceptance by both parties of the core part of their non written “constitutions”: Human Rights and democratic principles.

Keating underlines as well that

“since the 1990s a whole genre of literature has emerged about the question of Britain and the crisis of the Union”²¹. “The shock of a resurgent Scottish nationalism in the 1970s provoked a sharp reaction. Many English scholars refused to take it seriously, arguing that nationalist voting was a mere “protest”, implying that it represented a form of deviant behaviour, while voting Labour or Conservative was somehow normal. (...) The problem here is that pre-British identities

²⁰ According to Keating, “Britain has come apart under the influence of European integration as Scots have embraced Europe while the English reject it. The question of Europe does indeed touch the debate about Scotland’s place in the United Kingdom”, *op. cit.* 4.

²¹ Keating 2009, 1.

were not fully national in the modern sense... (...) Scotland existed before the Union but not as a modern state and society"²².

In the Spanish context, the legal stance of the Spanish Government and the Constitutional Court rendered the Basque Parliament Act for a consultative vote in 2008 unfeasible.²³ Therefore, what seems void under the rules of a modern, written Constitution like the Spanish is perfectly viable without a written Constitution and under pre-colonial rules. In my view, it seems to be a question of democratic culture and State vision from an old democracy like the one that ruled for centuries in the UK.

2 A Piece of Basque History

The particular nature of the "foral"²⁴ Basque regime has constantly been present within any historical analysis of our constitutional and legal texts.²⁵ As a starting point, I also have to underline the curious and relevant observation made by Loperena,²⁶ regarding the very similar terms of the First Additional Clause of the Spanish Constitution (1978) and the Act of 25-10-1839.²⁷ If, as quoted by this author, the Act

²² *Ibid.*, pages. 2 to 9. Within these lines, he also highlights the important participation of Scots in the Empire, something that is also present in the Basque context, in particular, along the most powerful periods of the Spanish empire and worldwide navigation and expeditions. In historical terms, he believes that the UK is very different from France while common grounds with Spain are easy to be found. This idea is also clear, as we will see, within the studies made by J. Arrieta.

²³ Spanish Constitutional Court Judgment 103/2008 (STC 103/2008).

²⁴ And, in that sense, based upon Historical Rights within the Constitution.

²⁵ In a surprising sense, a most important historic landmark was probably set by Antoine D'Abbadie, as has been recently explained to us by Monreal, Gregorio. in his interesting work "El ideario jurídico de Antoine d'Abbadie", Euskonews & Media no. 16, <http://www.euskonews.com>, accessed: 21.10.2024.

²⁶ Loperena 1988, 37.

²⁷ Act of 25 October 1839.

Artículo 1º. Se confirman los Fueros de las provincias Vascongadas y de Navarra sin perjuicio de la unidad Constitucional de la Monarquía.

Art. 2º. El Gobierno tan pronto como la oportunidad lo permita, y oyendo antes a las provincias Vascongadas y a Navarra, propondrá a las Cortes la modificación indispensable que en

of 25-10-1839 confirms the Basque and Navarrese “*Fueros*” (Rights) at the same time and through a common system, the First Additional Clause of the Constitution confirms and also respects the historical rights of those territories²⁸. All the aforementioned contains basic legal consequences for a contemporary and practical interpretation of the various perspectives and consequences deriving from the concept of Historical Rights²⁹.

Another curious aspect leads us once more to the Constitution that is presently in force, for a brief mention of its Second Derogatory clause in relation to all the above. This indeed represents a paradox within the whole analysis. When the Second Derogatory clause of the Constitution annuls the Act of 25 October 1839 for Alava, Guipuzcoa and Vizcaya, the Constitution shows the difficulties experienced by central governments when interpreting the Basque and Navarrese regimes, as well as the problems of a section of Basque nationalism in its understanding of the relationship of the Basque territories

los mencionados fueros reclame el interés general de las mismas, conciliándolo con el general de la Nación y de la Constitución de la Monarquía, resolviendo entretanto provisionalmente, y en la forma y sentido expresados, las dudas y dificultades que puedan ofrecerse, dando de ello cuenta a las Cortes.

²⁸ Loperena 1988 *op. cit.*, 37.

²⁹ This is a concept that, in the French Basque Country, within a different perspective and without any constitutional clause at all, is also present in the words of Lafourcade with regard to the peculiar identity of the French-Basque territories (‘Iparralde’ in Basque): *Dans une Europe en pleine mue, les Etats-nations, constructions artificielles, semblent aujourd’hui dépassés. Les revendications identitaires des minorités sont universelles. Pour éviter toute homogénéisation culturelle, chaque peuple doit prendre conscience de sa réalité et, pour cela, connaître son passé et retrouver son identité qu’il doit conserver tout en s’adaptant à la société moderne. Or, le peuple basque, plus que tout autre, possède des caractères propres qu’il a préservés tout au long de son histoire, du moins en Iparralde jusqu’à la Révolution de 1789. Son système juridique, qui servait de fondement à son organisation sociale, ne fut pas influencé par le Droit romain qui, partout ailleurs en Europe occidentale, modifia profondément la tradition juridique populaire. Conçu par et pour une population rurale, il a été élaboré à partir des maisons auxquelles s’identifiaient les familles et qui, comme elles, se perpétuaient à travers les siècles, donnant à la société basque une grande stabilité* (see her work “Iparralde ou les provinces du Pays Basque nord sous l’ancien régime”, *Euskonews & Media* no. 3, <http://www.euskonews.com>, accessed : 22.10.2024.

with the State itself, according to the Constitution.³⁰ Considering all these disagreements, we might be facing one of the most important paradoxes within the process of Spanish constitutionalism.

If the Second Derogatory clause of the Constitution annuls the Act confirming the 'foral' system of 1839, it incurs in a direct and express contradiction of the recognition of and respect for the "foral" Historical Rights assumed by the First Additional clause of the Constitution. The approach is difficult to understand if we do not take into account the political perspective previously mentioned. But the failing might have an even wider reach, because the Derogatory clause only affects Alava, Gipuzkoa and Bizkaia, as Navarre is not mentioned at all. Should we understand, then, that the Act confirming the 'foral' system of 25-10-1839 is still in force for Navarre? There might be various legal answers too, if we forget the political course of the disagreements and fights that have coloured Basque reality up until now. Similar fights and disagreements were also the order of the day during the constitutional process, using arguments that were more political than legal in most of the cases³¹.

In my view, the Historical Rights of the Basque Country constitute the logical transit from the historic concept of '*Fueros*' to the constitutional integration of certain territories which maintained during the whole of that process a voluntary, uninterrupted political and juridical public will of identity³². That is also present very clearly in the case of Scotland.

³⁰ We have to remember here that the Act to "confirm the *fueros*", of 25 October 1839, was considered by a sector of Basque nationalism as an abolishment ruling, even though its sense and aims were simply to adapt the particular regimes in the Basque territories to the new Constitution at that time.

³¹ An interesting example of this was quoted by Tamayo Salaberría, Virginia, in her impressive work *La autonomía vasca contemporánea. Foralidad y estatutismo 1975-1979*, Oñati: IVAP, 1994, 617. The author recalls a relevant event from our 'foral' and constitutional history during the debate in the Spanish Parliament on the First Additional Clause of the Constitution about the Basque Historical Rights. At that time, the representatives of the Spanish Socialist Party (PSOE) refused to concede more explicit recognition of the Historical Rights of the Basque territories.

³² This is the core idea of the First additional clause of the Constitution and the whole PSBC.

The common point for both situations is the nature of agreement between two parties throughout history³³, (in Scotland since 1707)³⁴. Additionally, we might emphasize the prevailing challenges in acknowledging that position from both the State and EU viewpoints. Herrero de Miñón has adeptly illustrated potential frameworks for the incorporation of Basque Historical Rights into constitutional reality, while setting aside various political disputes.³⁵

The words of Eduardo Nieto Arizmendiarieta are also clear in this respect.³⁶ But my aim here is not to go deeper into the historical analysis of the concept of Historical Rights, but to mention, at least briefly, some of the real possibilities of this singular legal institution at a domestic level, in order to go further into its particular integration at the EU level as well taking the Basque and Scottish examples as relevant ones in terms of identity, history and recognition of public Law towards co-sovereignty or even sovereignty.

³³ Authors like T. Urzainqui clearly disagree with the idea of agreement, whereas they consider absolutely evident that the Basque territories were conquered in their entirety through military and violent means at different moments of history. See his enormous historical and legal works clarifying the identity of Navarre as the Historical Basque State, while 'Euskal Herria' continues as its cultural global identity, principally through language. In other words, both are the same body with different titles: Urzainqui – Olaizola 1998. Urzainqui 2002. Urzainqui 2004.

³⁴ 1707 Act of Union between Scotland-England, article 1: *“that the Two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date hereof and forever after be United into One Kingdom by the Name of Great Britain And that the Ensigns Armorial of the said United Kingdom be such as Her Majesty shall appoint and the Crosses of St Andrew and St George be conjoined in such manner as Her Majesty shall think fit and used in all Flags Banners Standards and Ensigns both at Sea and Land”*.

³⁵ Herrero De Miñón 1987. Charged with drafting and reporting on the 1978 Spanish Constitution he was the first to interpret Basque Historical Titles in terms of the right to self-determination, understood as voluntary integration within a different political-legal framework.

Herrero De Miñón, 2000a. Herrero De Miñón 2000b. Herrero De Miñón 2000c. Herrero De Miñón 2003a. Herrero De Miñón 2003b.

³⁶ Nieto Arizmendiarieta 1999, 142 – 143.

3 Sovereignty & the Rule of Law

Both the Basque proposal for a new political statute and the Scottish process led by the Government of Scotland are based upon certain common grounds:

- a) The legal and political structure of a State is not something eternal³⁷. Nowadays, the undeniable legal issue is the requirement of protection and assumption of Human Rights and democratic principles. A possible solution to these questions could be present, to a certain extent, within the Proposal for a Political Statute for the Basque Country (PSBC) approved by the Basque Parliament (30-12-2004) but rejected by the Spanish Parliament without any kind of previous negotiation (February 2005)³⁸: “Sharing sovereignty, democratic principles and also Human Rights” is the essence of the PSBC and its drafted text to amend the current regime. The rest of the issues pending could perfectly well be the subject of negotiation in a democratic system. In a sense, this is also the general consideration made by the Supreme Court of Canada in 1998 regarding the case of Quebec³⁹.
- b) Both History in the British case and the Spanish Constitution in the Basque one are suitable tools to push forward the idea of sharing sovereignty with full legitimacy or even claiming for self-determination within the context of protection and fulfilment of International Human Rights and within the EU framework.
- c) The idea of written or non-customary historical rights is present in both cases despite the important details to be subject to mutual

³⁷ Nevertheless, the 1707 Union Act states that the Union is “forever”.

³⁸ In this case very clearly, once again, in breach of the Spanish Constitution, specifically, article 151.2. In the same sense, this also went against the provisions recognising a right to negotiate this text through article 137 of the Spanish Parliament Statutory Regulation.

³⁹ More specifically in the principle of the right to negotiate a possible different status for Quebec recognised by the Canadian Supreme Court (Decision of 20-8-1998). See as well Arts. 12 & 13 PSBC with a very concrete approach to self-determination based upon the principles stated by the Canadian Supreme Court in 1998 (the right to a bilateral negotiation on the Basque political status).

negotiation, including the basic elements of public constitutional law: organisation, territory, and population.

- d) Any political or legal approach to both cases should take into consideration the EU's new framework as a new relevant context of sovereignty or even post-sovereignty, according to Scottish professors like MacCormick⁴⁰ or Keating⁴¹.

These common general ideas are indeed present in Scotland within the Devolution process, in particular through the Scotland Act 1998 and notwithstanding of the referendum proposed by the Government of Scotland.

Even within the context of the 1707 Act or Treaty of Union between England and Scotland, the latter maintained certain particular institutions and bodies such as the judiciary, education, universities, the presbyterian church and its systems of Civil and Criminal Law⁴², based upon Roman Law but influenced by Common Law as well. In this sense, the legislative projects concerning Scotland have been historically considered and analysed mainly by members of Parliament from Scotland.

In any case, and even within the devolution context, Westminster clearly limits and controls the system adopted. There is, in fact, an essential principle of British Constitutional Law stating that Westminster Parliament is sovereign. No institution or body can abolish an Act except the same Parliament, and this one can intervene in any matter whatsoever. Hence, article 28 of the Scotland Act 1998 assumed the competence of the Scottish Parliament to approve legislation, stating the competence of the British Parliament as well to approve Acts for Scotland.

For the British case that is all in force without a formal Constitution. Feldman, for example, questions if the *"United Kingdom have no constitution, one constitution, or several competing constitutional visions?"*⁴³ *Despite*

⁴⁰ Inter alia at MacCormick 2002.

⁴¹ Inter alia in Keating 2009.

⁴² See in this regard the interesting comparative approach made by Arrieta, Jon. between the Spanish 1707 and the British one, in "El 1707 español y el británico", in *Conciliar la diversidad. Pasado y presente de la vertebración de España*, Arrieta 2009, 28.

⁴³ Feldman 2005, 350.

the formal data, Feldman is clearly more in favour of shared or co-sovereignty, with no single source of authority for constitutional rules.

*“for the United Kingdom’s constitution (or any other constitution) to work successfully in this way, there must be a commitment to peaceful methods of resolving, temporarily and contingently, a constantly changing set of conflicts between visions”.*⁴⁴

Another interesting approach was made by McLEAN & McMILLAN, even concluding one of his most interesting studies with the idea of the UK as a Union State without Unionism or quoting his view as “The Death of Unionism”:

*“Unionism was an elite creed before it was a popular one. English politicians needed Union in 1707 because of the Scottish threat to the security of England after the death of Queen Anne. Scots politicians, their state bankrupt and subject to economic and military threats from England, had no realistic choice but to accept Union. However, they secured safeguards for their religion and law, safeguards that have been (more or less) honoured ever since”.*⁴⁵

⁴⁴ *Ibid.* 351.

⁴⁵ McLean, I. & McMillan 2005, 239.

4. Basque Historical Titles Within the Spanish Constitution and the Eu Context⁴⁶

First Additional Clause of the Spanish Constitution:

“La Constitución ampara y respeta los derechos históricos de los territorios forales.

La actualización general de dicho régimen foral se llevará a cabo, en su caso, en el marco de la Constitución y de los Estatutos de Autonomía”⁴⁷.

As quoted by Herrero De Miñón and T. R. Fernández, the Basque Historical Rights are much more than a mere accumulation of competencies and public bodies. They represent a real legal and political concept, previous to our current constitutional reality (common ground as well with Scotland) and, in that sense, not liable to derogation through any unilateral decision once the legal nature of the contract or agreement has been proven⁴⁸. Co-sovereignty is also present in this idea. Moreover, according to Herrero De Miñón, these titles are indeed a constitutional recognition of the right of the Basque Country to self-determination in terms of a possible voluntary integration or an open demand for a different political status for the Basque territories⁴⁹.

In this sense, I would also like to include the words of J. Cruz Alli (former President of Navarre), during his speech in the debate in the Spanish Senate on the General Commission of Autonomous Communities in 1994. He warned the Senate and the Spanish Premier of the possible consequences deriving from a breach of those agreements due to the actions of the Spanish Government, namely, against the com-

⁴⁶ See: Ezeizabarrena 2003, together with the interesting foreword to the book by M. Herrero De Miñón.

⁴⁷ *The Constitution protects and respects the Historical Rights of the “foral” territories. The general updating process of this regime shall be enacted, when appropriate, within the framework of the Constitution and the Acts of Autonomy.* The four foral territories quoted, within the context of this article, had been defined by the Spanish Constitutional Court as Alava, Gipuzkoa, Navarre and Bizkaia

⁴⁸ See their works, Herrero De Miñón 1998 and Fernández 1985.

⁴⁹ See: Herrero De Miñón 1998, and Ezeizabarrena 2005.

mon institution of the Historical Rights of the Basque Country and Navarre, specifically, with regard to a constitutional conflict presented by the central government and another autonomous community, against some competencies of the government of Navarre in terms of its Historical Rights as expressed in the First Additional Clause of the Constitution⁵⁰.

If we consider the EU system to be the global sum of different approaches by the various states to the question of integration, the domestic particularities of which are expressed in their respective Constitutions, might be the right formula, in my view, for the EU to accept all the above.

In order to get this into focus and assume its real dimension, we may use the institution of Human Rights as an example. They are an inherent prerequisite for membership in the EU system and characteristic of every single one of the member States. Article 6.1 of the TEU is clear in this sense. This is an essential matter because the EU assumes *ab initio* that the nuclear part of its legal regime is not going to be controlled by the EU itself but through the common constitutional traditions of the Member States. This is indeed directly linked with sovereignty and the rights of individuals who are entitled to demand these rights before any administrative or jurisdictional body.

So, the real existence of a sum of constitutional agreements seems here to be a suitable procedure for recognising those Human Rights at the EU level, even though the EU itself lacks the tools to protect them directly. There is a principle of mutual trust for the protection of Human Rights at each domestic level. If this is so in such a core matter in our legal systems, there should be a similar principle of mutual trust to recognise and assume the participation of nations like Scotland or the Basque Country within the whole process, specially in the case of

⁵⁰ *Diario de Sesiones del Senado* (Spanish Senate), V Legislatura, Comisiones, No. 128, 1994, 62-63, Comisión General de las Comunidades Autónomas (26-9-1994). J.C. ALLI's speech proved again the peculiar nature of Historical Rights and the eventual consequences of their breach by central Government, contributing at the same time some other historic references. (*Diario de Sesiones del Senado*, V Legislatura, Comisiones, No. 129, 1994, 31, Comisión General de las Comunidades Autónomas, 27-9-1994.)

entities possessing powers of legislation and enforcement, or that even take collective Historical Rights as the fundamental starting point for the powers with which they are vested (Scotland & Basque Country, inter alia). Such nations are singular both in terms of the material content of their competencies, and of the procedures they are endowed with for updating them⁵¹. Such a process took place without significant problems within the context of Human Rights, whereas previously, there was a huge distance between the different systems for protection within each Member State. Today, there is a growing mutual impact in this area through the enforcement of the general principles of Law and the jurisprudence of, principally, the European Court of Human Rights.

This has not been an obstacle against the EU system developing certain frameworks for protecting Human Rights in matters directly linked with the principles and objectives of European Law. Thus, Human Rights continue to be a relevant part of the EU tradition as a core point with at least three sources of recognition and assumption of Human Rights:

- a) EU Law with the limits mentioned.
- b) International Law, particularly through the ECHR.
- c) The domestic Law of each Member State.

It was actually the existence of a common constitutional tradition that substantially helped to produce the developments mentioned in Human Rights. And this may serve as well to adopt similar approaches in cases where the Historical Rights of certain sub-state entities might be lacking in protection, even though they have direct constitutional recognition as in the Spanish case. This lack might also be considered a breach of EU Law so long as those Historical Rights do not contravene European Law. Indeed, as against the previous theoretical distance

⁵¹ Historical Rights that would find their limits in Human Rights (arts. 9, 10 & 11 PSBC); rights that are recognised within the EU context and as a relevant part of their tradition. Even more now with the constitutional project pending. That is the real will behind the proposal for a new Basque status (PSBC). For Scotland with the Devolution Act as a clear point of reference.

between the Spanish Constitutional Court and the Court of Justice of the EU (CJEU), we are now facing a mutual situation of inter-linkages within the context of Human Rights. And this process was based upon the implementation in both bodies of the general principles of Law as an interpretative pillar for all matters relating to European Law. Non-existence of a real positive charter of Human Rights at the EU level, despite the recognition expressed in Treaty of the EU, article 6, did not prevent the EU from assuming its responsibilities in this area, even through CJEU jurisprudence that was also inspired, *inter alia*, by the common general principles of Law of the Member States.

So, if in a matter such as Human Rights, the importance of the domestic regime is extremely clear for real protection at EU level, the European bodies, member States and, eventually, the CJEU should also take up the challenge to define the extent to which Basque Historical Rights should be considered, in this case before the EU, in order to perceive where their limits lie. In brief, to find those common grounds and limits would be a task of the CJEU, whose opinions would undoubtedly follow the grounds supported by the Spanish Constitutional Court, just as that body did in direct enforcement of article 10.2 of the Spanish Constitution⁵².

Within this process, the domestic jurisdictional bodies have been adapting themselves to the portrait made by the CJEU of the relationship between the EU and the domestic level. The conclusion is clear and may suggest to us some considerations in order to adequately interpret the figure of Basque Historical Titles in relation to the whole European system:

1. The CJEU made clear that European law has direct prior enforcement effects. This means that any damage or impact caused by a Member State to citizens and in breach of EU Law will produce liability to be assumed by the Member State.

⁵² Article 10.2 of the Spanish Constitution: *Las normas relativas a los derechos fundamentales y a las libertades que la Constitución reconoce, se interpretarán de conformidad con la Declaración Universal de Derechos Humanos y los tratados y acuerdos internacionales sobre las mismas materias ratificados por España.*

2. To enforce compliance with the above, the domestic courts have a leading role – expressed at its highest level via Constitutional Courts or similar figures – in the constitutional monitoring of possible violations and in ensuring the pre-eminence of the domestic Constitutions, as well as the practical implementation of EU Law. That is indeed the task of domestic jurisdictions (i.e. the Spanish Constitutional Court, for the cases of Human Rights and Basque Historical Rights)⁵³.

However, the current reality does not provide real consideration for those Historical Rights within the EU as a substantive part of one of the agreements or covenants that are now present in the EU. This is because of a lack of political will at the Spanish domestic level. An example of this situation is how Germany, Belgium or Austria dealt with the issue absolutely differently from Spain.

Finally, implementation at the European level of constitutional reality within every social, territorial and legal ambit makes it vital to distinguish the existence of these sub-state complexities that are not easily defined under the general concept of “Regions”. We find here that domestic realities with constitutional recognition within Member States may require peculiar treatments in order to implement that constitutional scope and singular approach. This can be seen in particular for entities with legislative powers, such as in the cases of the Basque Country and Scotland in accordance with, *inter alia*, their written or customary Historical Titles and within some of the most significant competencies in force⁵⁴.

⁵³ Both the Spanish Constitutional Court and similar European domestic bodies are obliged to guarantee European Law, and must even request, for example, a preliminary ruling from the CJEU when they need an interpretative ruling from the Court of Justice of the EC (article 234 of the EC Treaty). See also arts. 14, 15 & 16 of the PSBC.

⁵⁴ It is obviously necessary to distinguish the situations and specificities of the German Länder, Basque Country or Scotland for example, and some other cases such as those of the French *départements* or the British counties. The case of Basque Historical Rights and Scottish demands at least three main approaches (article 65 PSBC for the Basque case):

More participation of the Basque and Scottish Parliaments in the EU institutional activities.

Participation of both delegations within the EU Council of Ministers.

Direct right of standing (*locus standi*) of both entities in appeals to the CJEU in matters affecting their respective competencies.

These ideas are very much in force today, right 50 years after the first Basque Premier died in Paris. José Antonio Aguirre y Lekube's deep Europeanism is once again present in his thoughts and writings. Indeed, the EU, regardless of the contents of the Lisbon Treaty now in force, is still facing important transformations. Many of these ideas and proposals were seen by Aguirre y Lekube as pioneer statesmen since the 40s.⁵⁵

Moreover, Aguirre y Lekube made a forecast on the necessity of Europe underlining the protection of Human Rights as a clear limit of any modern political system. Even in 1944 Aguirre wrote that, "*la garantía de los pueblos, principalmente de los pequeños, reside precisamente en estas más amplias estructuras supraestatales*" („a népek, különösen a kis népek számára garancia éppen ezekben a tágabb, állam feletti struktúrákban rejlik"). Only a year later, Irujo, in his book, "*Inglaterra y los Vascos*", calls to Saint Luis: "*todas las libertades son solidarias*". Therefore, Europe must be a space of rights and freedom. And for Aguirre, the Basque Country played and plays a key role in Basque Historical Rights, even as a real exercise of sovereignty to be updated towards the new EU. This legal reality foreseen by Aguirre and Irujo, inter alia, is far away from the Spanish approach during the Spanish Presidency of the EU. There is not even a single proposal of real Sub-State participation within the EU context.

Meanwhile, Germany, Belgium, and Austria have constitutionally acknowledged Sub-State involvement in the EU. This is significant in those countries and in Spain, as the principle of subsidiarity should be a fundamental necessity for the interactions between the EU and its member states, as well as among states and their sub-state levels. Thus, it is imperative to acknowledge the respect for the national identities of member states, which are often distinctly plurinational, as noted by Aguirre y Lekube.

There are Sub-State proposals to ease one of its representatives' negotiating rules and treaties within the state delegations. In fact, Germany, Belgium, and Austria follow that path with representatives from the different Länder, Wallonia, or Flanders. Within the Spanish

⁵⁵ See Mees2006, and particularly his constant letters with Manuel de Irujo.

context, Historical Rights should legitimate similar possibilities for the Basque Country.s

The bilateral nature of these Historical Rights would be useful in easing Basque participation before the EU. This may imply participation within the Commission's committees, the Council of Ministers, and the working bodies. In the German case, the Länd are taking part as observers within the different bodies, while in the case of Belgium, there is a rotary representation. In this case, a Minister of Flanders could even chair an EU Council of Ministers.

The example of Historical Rights could be useful in reconciling both approaches, updating the Europeanism of Aguirre y Lekube to the requirements of the present day. If sub-state participation is not directly regulated in the European Treaties, it does not mean that it will become fully forbidden. Therefore, we have the very illustrative cases of Germany, Belgium and Austria, in which representatives can eventually compromise their member States in certain matters.

All this has nothing to do with the nostalgia of certain nationalism or the search for political advantages; it is indeed positive Law coming from the source of a pioneer of Europeanism since the 40s, like the Basque first premier, José Antonio Aguirre y Lekube.

5. The 2010 Proposal to Amend the Scotland Act 1998

A formal proposal to amend the 1998 Scotland Act, the so-called Scotland Bill, was introduced in the House of Commons on 30 November 2010. The Scotland Act was finally amended in 2012, 2014, 2016, and 2018 within the Brexit agreements and final withdrawal Act.

In fact, the Bill makes changes to the devolution settlement for Scotland and gives effect to some of the recommendations as set out in the Commission on Scottish Devolution's (Calman Commission) final report, *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century* published in June 2009.

The bill and the amendments also included a number of technical amendments to the Scotland Act 1998, which were not related to the

Calman Commission's report but would update the operation of the devolution settlement. In the introduction, this Bill contains provisions that trigger the Sewel Convention. As the Bill changes the devolution settlement for Scotland, the Bill contains provisions which alter the legislative competence of the Scottish Parliament (for example, clause 11 relating to air weapons) and provisions which alter the executive competence of the Scottish Ministers (for example, clause 20 relating to the power to prescribe drink-driving limits). The Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament.

Clause 1: The powers of Parliament

This clause transfers certain powers relating to Scottish Parliament elections, which are currently exercisable by the Secretary of State, to the Scottish Ministers. Section 12 of the 1998 Act confers powers to regulate the conduct of Scottish Parliament elections on the Secretary of State.

Subsection (3) amends section 12(2), which clarifies the scope of the order-making powers of the Scottish Ministers to make provisions under section 12(1)(a). Section 12(2)(d) allows Scottish Ministers to combine polls of the Scottish Parliament with other devolved elections where the polls are held on the same day. The powers to combine polls of the Scottish Parliament with UK Parliament elections are dealt with in clause 2 and are retained by the Secretary of State. The provisions in section 12(2)(b), (e) and (f), which are omitted by this clause, are also retained by the Secretary of State (see sections 12A(1)(b)-(c) and 12A(2)(a) inserted by subsection (9)).

Clause 5: Scottish Parliamentary Corporate Body

This clause amends section 21(2)(b) of the 1998 Act to allow for a minimum of four members of the Scottish Parliament to be appointed as members of the Scottish Parliamentary Corporate Body (SPCB). Currently, the number of MSP members of the SPCB is fixed at four. Any

increase in the number of SPCB members will be implemented by a change to the standing orders of the Scottish Parliament.

Clause 7: Partial suspension of Acts subject to scrutiny by Supreme Court

This clause allowed a new procedure under which a Bill may be given Royal Assent where only part of the Bill is subject to a reference to the Supreme Court under section 33 of the 1998 Act. If a Bill is given Royal Assent with only some of its provisions being subject to a reference, those provisions would have no effect until the decision on the reference is made.

In fact, currently, under section 32(2)(b) of the 1998 Act, the Presiding Officer of the Scottish Parliament is prohibited from submitting a Bill for Royal Assent if the Advocate General, the Lord Advocate or the Attorney General has referred the Bill to the Supreme Court under section 33 of the 1998 Act. This is so even if just one provision of it is considered to be out with the competence of the Scottish Parliament.

This clause amends the 1998 Act to introduce the concepts of a “limited reference” and a “general reference” to the Supreme Court. New section 33(6) of the 1998 Act (inserted by subsection (5)) defines “limited reference” as being a reference to the Supreme Court in which some provisions of the Bill are specified as being unaffected by the reference. A general reference is any other reference (i.e. one in which the whole Bill is referred to the Court). A general reference may likely be used in relation to short or single-purpose Bills, for example.

The new section 33A(6) confers on the Scottish Ministers power to make whatever order they consider appropriate in relation to the coming into force of the affected provisions if the Supreme Court determines that the provisions referred to it are within the legislative competence of the Scottish Parliament. However, this power is subject to any order that may be made by the Court. Any order made by the Scottish Ministers is also subject to annulment in the Scottish Parliament (see subsection (10), which inserts the appropriate reference into Schedule 7 to the 1998 Act.

Clause 10: Continued effect of provisions where legislative competence conferred for limited period

This clause amends section 30 of the 1998 Act, which gives Her Majesty the power by Order in Council to make any modifications of Schedule 4 or 5 which She considers appropriate. It would be possible for such an Order in Council to specify that the modification ceases to have effect at some point in the future, thereby giving the Scottish Parliament legislative competence in relation to a matter for a limited period of time (known as a 'sunsetting clause'). Clause 10 inserts new subsections (5) and (6) into section 30 so that, where an Order in Council includes a sunsetting clause, it may provide that any Act of the Scottish Parliament which is made prior to the sunsetting should continue to have effect notwithstanding the change in the Scottish Parliament's legislative competence.

Clause 14: Antarctica

This clause re-reserves the regulation of activities in Antarctica. The effect of this clause is that it will no longer be within the legislative competence of the Scottish Parliament to pass Acts relating to this regulation. The Scottish Parliament has never, in fact, exercised this competence.

Subsection (2) provides that the amendment to Schedule 5 takes effect retroactively, so it is regarded as having effect from the date Schedule 5 entered into force. The impact of this provision is that executive functions in relation to the regulation of activities in Antarctica are regarded as never having transferred to the Scottish Ministers under section 53 of the 1998 Act (where they would otherwise have been exercisable within devolved competence) and always have been exercisable by Ministers of the Crown.

Clause 15: The Scottish Government

Subsection (1) renamed the Scottish Executive as the Scottish Government. This empowers the Scottish administration to use the term Scottish Government in formal, legal documents, following the increasing use of that term by the current Scottish administration and others in the public domain.

Clause 16: Time limit for Human Rights actions against Scottish Ministers

This clause inserts a time limit for actions against the Scottish Ministers under the 1998 Act, where it is claimed that they have acted incompatibly with Convention rights.

In the *Somerville* case in 2007, the House of Lords held that actions for breaches of Convention rights by Scottish Ministers under the 1998 Act were not subject to the same statutory time limit of twelve months as the Human Rights Act. As a result, there was no time limit on when proceedings could be brought against Scottish Ministers.

In response to this, the Scotland Act 1998 (Modification of Schedule 4) Order 2009 (S.I. 2009/1380) was made. This enabled the Scottish Parliament to pass the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 (asp 11), giving a time limit to proceedings brought against Scottish Ministers. But this was appropriate only as a temporary solution. Subsection (6) makes essentially the same amendment as was made by the 2009 Act of the Scottish Parliament. Accordingly, the 2009 Order is revoked and the Act of the Scottish Parliament is repealed.

Clause 23: International obligations

Clause 23 makes provision so that a single piece of subordinate legislation, made by UK Ministers or following consideration by the UK Parliament, dealing with the observation or implementation of international obligations can have effect throughout the United Kingdom, irrespective of whether or not it deals with matters falling within devolved competence.

Subsection (2) inserts a new section 57A into the 1998 Act to allow UK Ministers, concurrently with Scottish Ministers, to implement international obligations in relation to matters within devolved competence. The 1998 Act already allows UK Ministers to act concurrently with Scottish Ministers to implement European Union obligations in areas that are devolved to the Scottish Government. New section 57A will allow UK Ministers to implement international obligations using a similar approach.

Subsection (3) inserts a new section 118(4A) into the 1998 Act, which qualifies section 118(4). Section 118(4) provides that where subordinate legislation dealing with devolved matters is made, confirmed or approved under a pre-commencement enactment, and the pre-commencement enactment concerned provides for some form of Parliamentary procedure in relation to the subordinate legislation, references in the enactment to "Parliament" (or either House) are to be read as references to the "Scottish Parliament". The new section 118(4A) effectively provides that any requirement of Parliamentary procedure will be satisfied if either:

- (a) the requirements of the pre-commencement enactment are complied with subject to section 118(4) i.e. the procedure is carried out in the Scottish Parliament; or
- (b) the requirements of the pre-commencement enactment are complied with disregarding the modifications made by section 118(4) i.e. the procedure is carried out in the UK Parliament.

In this sense, for example, an Order in Council made under the International Organisations Act 1968 (which section 10 of that Act requires to be laid before Parliament and approved by a resolution of each House of Parliament) that deals with devolved matters will be properly made either if it is laid and approved by the Scottish Parliament (under section 118(4) of the 1998 Act) or if it is laid before and approved by both Houses of Parliament (under section 118(4) as modified by section 118(4A)).

This means that it will be possible to make a single Order in Council having UK extent and dealing with both reserved and devolved matters, rather than having two such Orders, one dealing with reserved matters (made following consideration by the UK Parliament) and one with devolved (following consideration by the Scottish Parliament).

Clause 24: Taxation

This clause provides the structure within which the Scottish Parliament may legislate on tax. The UK Government is providing for the Scottish Parliament to set a rate of income tax for Scottish taxpayers; it is

devolving stamp duty land tax and landfill tax to Scotland, and it is making provision for new devolved taxes.

Section 28 of the 1998 Act gives the Scottish Parliament the power to make laws, to be known as Acts of the Scottish Parliament, within the limits set out in the 1998 Act. Sections 29 and 30 of, and Schedule 5 to, that Act specify that tax policy is outside the Scottish Parliament's legislative competence, although an exception is made for local taxes (e.g. council tax and business rates).

Section 80A(1)(b) introduces Chapters 3 and 4, which provide that the Scottish Parliament may legislate with respect to the devolved taxes (that is, taxes on land transactions and disposals of waste to landfills).

Section 80A(3) provides that a devolved tax introduced by the Scottish Parliament may not be imposed where to do so would be incompatible with the UK's international obligations. Section 80A(4) defines a "devolved tax" as meaning a tax specified in the new Part 4A as a devolved tax.

Subsection (3) of the clause amends section 93 (agency arrangements) of the 1998 Act to provide that the collection and management of a devolved tax is a specified function of Scottish Ministers. This will enable the Scottish Ministers to contract-out the collection and management of devolved taxes, should they wish to do. Subsection (5) provides that devolved taxes, including their collection and management, are excepted from the reserved tax matters, bringing these taxes within the Scottish Parliament's power to legislate.

Compatibility with the European Convention on Human Rights

Section 19 of the Human Rights Act 1998 required the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined in section 1 of that Act). The appropriate Minister has made a statement pursuant to section 19 of the Human Rights Act 1998 to the effect that, in his view, the provisions in the Bill are compatible with Convention rights.

While this Bill confers powers on the Scottish Parliament or Scottish Ministers, such as the making of regulations of air weapons, the

transfer of the conduct of elections, or the powers to prescribe drink-driving limits, it is not thought that any human rights incompatibility will arise. This is because those powers are being transferred from the UK Parliament or Ministers; they are not new powers. It should also be noted that, by virtue of sections 29(2)(d) and 57(2) of the 1998 Act, the Scottish Parliament and Scottish Ministers have no power to make legislation or otherwise act incompatibly with Convention rights.

Clause 16 amended section 100 of the 1998 Act to insert a time limit for actions against the Scottish Ministers where it is claimed that they have acted incompatibly with Convention rights. The time limit is twelve months, or such longer period as the courts consider equitable in the circumstances, and is consistent with the time limit that applies to actions brought under the Human Rights Act 1998. A time limit giving rise to issues under Article 6 and Article 1 of Protocol 1 of the Convention, but it is considered that this provision is compatible with those articles as it pursues a legitimate aim and complies with the principles of proportionality and legal certainty.

The clause does have retrospective effect, but the Minister does not consider this to alter the human rights assessment, given the scope of the court's extending the time limit where it is equitable to do so. The Bill also enables the Scottish Parliament to vary the rate of income tax and to create new taxes in place of stamp duty land tax and landfill tax in Scotland, as well as providing the Scottish Parliament with new borrowing powers. These have been examined individually to determine whether those provisions comply with Convention rights.

6 Conclusions

The Basque Historical Titles have been unable to formally present their peculiarities at the EU level, while some other sub-state entities did so within their respective Member States. In the cases of the Basque Country and Navarre, their respective scopes of competencies have sometimes been disregarded by the EU's decision-making system. Even though many authors recognise the federal approach of the

European Treaties, this is not so easily seen from the perspective of the Historical Rights analysed here. The principle of respect for the national identities of the Member States (Article 6 of the EU Treaty)⁵⁶ should be a useful tool for granting the legitimacy of the Spanish constitutional agreement on Historical Rights expressed in the Spanish Constitution in terms of a real path towards co-sovereignty between Spain and the Basque territories. A similar theoretical approach could be useful as well for the Scottish case within the context of the devolution of powers or customary “historical rights”.

“Useful constitutionalism”, in the terms of Herrero de Miñón and Lluch for Spain,⁵⁷ requires an implementation of this question at the EU level, and that is clearly (but only formally) granted by the Spanish Constitution.⁵⁸ Herrero de Miñón reaffirms his support for this idea in very clear terms.⁵⁹ A similar approach is followed by J. Cruz Alli, who even suggests linkages to connect with the EU process.⁶⁰

In that sense, the proposal for a new Political Statute approved by the Basque Parliament (30-12-2004), assuming the right to self-determination through Historical Titles and bilateral negotiation⁶¹ was a unique opportunity in order to resolve the situation of the Basque territories within the Spanish Constitution and, in particular, where the EU constitutional process is concerned.

Regarding the EU framework for sub-state participation, the path followed already by Germany, Belgium or Austria and their sub-state entities offers clear examples of real participation, integration and co-sovereignty in terms of national and European solidarity.

⁵⁶ Article 5 for the failed Project of Constitution.

⁵⁷ Former socialist politician and Spanish minister killed by ETA in 2000 in the city of Barcelona.

⁵⁸ Herrero De Miñón – Lluch 2000, 17.

⁵⁹ Herrero De Miñón, Miguel. 2000b, 219 – 221.

⁶⁰ Alli 2000, 329.

⁶¹ Afterwards, during 2008 the Basque Parliament enacted an Act regulating public consults in this regard, and the consultation organised for the 25-10-2008 was banned by the Spanish Constitutional Court Judgment 103/2008 (STC 103/2008).

Nevertheless, this whole juridical and political approach should also be clarified and properly interpreted nowadays in light of the new concepts of sovereignty and governance. Whether we like them or not, let me suggest that those boundaries are more than welcome; there are important limits to sovereignty and governance. Those limits are represented by human rights within the Western world but are slowly globalised for most countries worldwide. This means that there are limits to the exercise of powers and duties by Governments, States, Sub-State entities and any public or private administrations whatsoever. Indeed, public and private bodies involved in any decision-making process are not fully sovereign enough to adopt and enforce decisions. Any exercise of a process towards self-determination must also take all these into serious consideration. This is remarkable regardless of the very different previous considerations for both cases analysed here. The non-written constitutional scope for the case of Scotland, meanwhile, the Basque Country is moving within the context of full constitutional written recognition of its Historical Rights or titles.

Written or not, both represent a life-long approach to constitutional law. Therefore, this constitutional law is analogous to a living, breathing, changing creature that is continuously evolving in its complex, polemic form, constantly adapting to newly emerging legal challenges. We need to assume this complexity with relevant legal analysis, but in that sense, overcoming any severe formalism, to what many lawyers are finally defeated, showing that conflicts and problems are to be resolved by Law whether written or not. But not necessarily through mere procedural techniques but rather focusing on their own substance. Politics serves as the foundation for Constitutional Law, much as economics or the market underpins Commercial Law. This should exemplify a genuine exercise of "*prudentia iuris*."

While Scotland is an internationally recognised Nation without a State but historically fully shaped, the Basque Country is entitled to its Historical Rights through its own history and will, together with the protection given by the first additional clause of the Spanish Constitution. That should mean at least the future of Basque self-government and identity within the European Union. Dealing with this also means

facing the wind, looking for risks, and proposing solutions. Some of them are interpretative while others are “de lege ferenda”, but all of them are based upon positive Law together with its analysis from different authors and jurisprudence. That is, to extract the final meaning of legal rules to make them useful to their spirit and objectives and even to prepare their amendments if necessary. That is, to a certain extent, one of the highest duties of a jurist: to ease the path to the legislative branch, even guiding him, not only enforcing his decisions.

Furthermore, the EU framework has a big job to do with regard to this whole study in general. Inter alia, because the EU integration horizon does not directly facilitate the strengthening of Basque self-government towards co-sovereignty. The second one, and probably the most important, because Historical Rights are not looking towards the past but to the future. And in that sense, this study makes a great effort to recognise the constitutional concept developed since 1978 on such an important institution for the Basques and, in another context, even for the particular but also Historical case of Scotland after Brexit.

Indeed, regardless of their constitutionalisation in 1978, those Historical Rights or Titles were firstly misunderstood and marginalised by the authors and the constitutional jurisprudence thereon. Herrero de Miñón clearly saw that.⁶² But case-law has demonstrated the singular possibilities of this institution and its constitutionalisation in Spain. Many recent works together with political and legal practice today recognised that the first additional clause was not an empty clause and very soon showed its effectiveness. In fact, the assumption of singular competencies not extendable to other Autonomous Communities – such as financial regime, police or education-, even defining a new subject with Historical Rights (Euskadi or the Basque Community), to build up the own autonomy of the Historical Territories of the Basque Country, to build up a bilateral system of relations between Euskadi and its Historical Territories, to propose and to a certain extent obtain a degree of jurisdictional singular exception (likewise with the amendment of the Act of the Spanish Constitutional Court); and even

⁶² Herrero De Miñón, 1991, 17 et seq.

the same singular basis of the Basque self-government is what the first additional clause has been able to reach until these days, *inter alia*. It is not strange, therefore, that many authors, leaving apart previous ideas, have deeply studied this category while many of us keep on relying on its future usefulness⁶³.

This work can be resumed within this context of re-assessing Historical Titles and, for its purposes, underlining two complicated aspects. On the one hand, there is the notion of agreement, which is present within Historical Titles because they express something previously and outside the boundaries of the Constitution. This is also common for the Basque and Scottish cases. Only a previous and external institution can be assumed and respected in both cases.

On the other hand, assuming as well the idea of the constitutional framework as a limit foreseen by the First Additional clause for the Spanish case, a framework that, of course, cannot be related to the whole Constitution because that would mean becoming a void clause and this clause intends to add something to the entire Constitution: that means the exception to its literal approach together with the submission to its principles. Therefore, there are pieces of evidence for all the aforementioned. The “framework”, therefore, is not the whole VIII Title of the Constitution, but certain principles: a substance of the Constitution. In my view, mainly through the concept of Human Rights. That is also a common ground for Scotland because any exercise of self-determination has legal boundaries within this concept through the UK’s different Acts and charters, the EU Treaties in force and, of course, the 1950 European Convention on Human Rights.

Nevertheless, that substance is not easy to define for the Spanish jurisprudence. Even the Constitutional Court failed to determine a series of principles that seem to be more suitable for a handbook of administrative practice.⁶⁴ Against this backdrop, the thesis of D. Loperena, reducing the Constitution’s framework to the barrier of fundamental

⁶³ Arrieta 2000, 225 et seq. In the case of J. Arrieta, even considering them applicable to other territories apart from the Basque ones.

⁶⁴ Judgment of the Constitutional Court 16/1984, FJ 2.

rights, is remarkable,⁶⁵ mainly due to the Law in force enacted by the EU and the 1950 European Convention on Human Rights. Indeed, and happily, fundamental rights have become universal, and therefore, they are useful to identify a process for political integration. Therefore, they are clear boundaries for States and any other bodies whatsoever, in particular within the EU framework.

Moreover, those fundamental rights quoted previously by D. Loperena should be developed together with the notion of collective rights according to the work of B. Clavero,⁶⁶ provided that they include an institutional ingredient that overlaps any declaration of rights. However, is there any doubt that even for the more radical liberalism, these fourth-generation rights constitute the real horizon to the effectiveness of individual fundamental rights? Indeed, the previous pages to this conclusion are useful to link those collective rights with the political identity of those territories entitled with Historical Rights, as Scotland and the Basque Country.

From all the aforementioned, one can resume the idea of a European Union as a “sum of constitutional agreements”, domestically within every State, among States and, under the integration process, among the different political bodies present within the EU. This is one of the most attractive common grounds for the Scottish and the Basque cases. The consequences are also of the highest practical importance, likewise the necessity of actual participation in the EU of the bodies entitled to historical rights, in accordance with the most authorised comparative law and by the most solvent authors.

The Historical Titles of Scotland and the Basque Country are not located in the past but in the future, and, therefore, they have developed their own efficiency throughout the time, even nowadays. They recognise an important political demand that may be in agreement with the proposals of the liberal “foral” branch, Basque socialists, traditionalists, nationalists or defenders of *Euskal Herria* in the Basque case. It was an institution capable of facilitating the transition from the “foral” roots to

⁶⁵ Loperena 1985.

⁶⁶ Clavero 2000, 61.

the modern constitutionalism. Once assumed by the Constitution, they manage to lead towards building a singular political and legal regime of autonomy, together with its own political structure and competencies. In my view, they should serve to consolidate the options of the Basque Country towards co-sovereignty and to insert that land properly into the European integration process. Those interesting conclusions are common grounds in the case of Scotland.

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