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Secession within the Union: intersection points of international and European law

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Secession within the Union
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Collected Think Pieces

**Interseccion Points of International and
European Law
Catherine Brölmann & Thomas Vandamme**

Secession within the Union

Intersection points of International and European Law

Catherine Brölmann & Thomas Vandamme (eds.)

Catherine Brölmann, Paul Dermine, Simone van den Driest,
Paula García Andrade, David Haljan, Jan Willem Sap,
Pierre Schmitt, Annette Schrauwen, Thomas Vandamme,
Henri de Waele

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Amsterdam Centre for European Law and Governance
Amsterdam Center for International Law
July 2014

Secession within the Union: Intersection Points of International and European Law

Catherine Brölmann and Thomas Vandamme*

Within the European Union have always existed highly mobile sub-state actors that, to varying degrees, aspire to independence. Thus Scotland is to hold a referendum on independence from the United Kingdom on 18 September 2014, and Catalonia a referendum (*ex ante* declared illegal by the Spanish Constitutional Court) on independence from Spain on 9 November 2014. Meanwhile, in the Belgian region of Flanders, a persistently vital pro-independence movement books one electoral success after another, rendering the country increasingly difficult to govern.¹ Political developments such as these remind one that secession of federated states, countries, or regions from EU Member States is a real possibility.

Moreover, while in the past secession of parts of the territories of EU Member States has taken place - with the gaining of independence by former colonies such as Algeria or the Congo - the potentially aspiring states currently under scrutiny seek independence, but they do not seek withdrawal from the Union. The Scottish, Catalan, and Flemish examples thus represent something unprecedented in the history of the EU.

An exploration of the legal and political aspects of this scenario is therefore a timely matter. The present collection offers a number of short think pieces on different aspects of secession and succession within the framework of the European Union, with the aim of swiftly identifying and outlining some of the legal questions at issue.

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¹ The elections of 25 May 2014 again increased the position of the nationalist *Nieuw-Vlaamse Alliantie* (N-VA) to an unprecedented 33 seats in the federal parliament. It is now by far the largest political party in the country.

In the absence of formal rules in EU law on secession and membership, a legal appraisal would seem to lead us, first of all, to the framework of public international law – both when it comes to the actual (unilateral or consensual) *secession*², and when it comes to *succession* to selected international rights and obligations (such as membership of an organisation) of a preceding state. This framework operates in a complex international landscape, as is indicated by Haljan’s mapping of the idea and the dynamics of secession.

The pieces by Schmitt and by Van den Driest both proceed from rules and practice of public international law regarding secession as part of the analytical framework for addressing the possible new states’ European Union membership. Schmitt especially takes a closer look at general precedents of new states’ membership in the UN and the Council of Europe, while Van den Driest evaluates the viability of the new states’ application for EU membership by considering a number of legal, (geo)political and economic factors.

As the legal framework of EU law itself does not address possible consequences of secession and succession of parts of current EU Member States, the EU’s political response is all the more relevant. This response (most notably through Romano Prodi, Viviane Reding and José-Manuel Barroso) has consistently been that secession of part of the territory of an EU Member state leads to an automatic exit by that territory from the EU; consequently a new application for EU Membership would have to be set in motion if the new entity desires to ‘become’ member state of the EU.³

These unencouraging signs reflect a legal problem that results from a lacuna in the EU overall design, defying its supposed autonomy and coherence (as explained by De Waele). Nevertheless, there are those who stress that in view of the high density nature of European integration, the solution must be sought (if only ‘by proxy’ as De Waele explains) primarily in EU law itself, complementing or even superimposing itself on whatever rules can be distilled from public international law. In that spirit, Scottish Prime Minister Alex Salmond claims: *“As many experts have confirmed, Scotland is part of the territory of the European Union and the people of Scotland are citizens of the EU.*

² Here the term ‘secession’ is used to refer to both unilateral and consensual breaking-away of a part of the territory of a state. The consensual variant is termed ‘separation’ by some authors

³ Already in 2004, the Commission issued such a statement in response to a question by an MEP on the possible secession by Wales of the United Kingdom, see ‘Answer given by Mr Prodi on behalf of the Commission’, *Official Journal of the European Union* 1 March 2004, C84 E/422. It was later repeated by Commission President Barroso on 10 december 2012, Ares(2012)146919, and by Commission Vice-President Reding on 20 March 2014, Ares(2014)686410.

There is no provision for either of these circumstances to change upon independence"⁴. In reality, expert opinions seem to diverge a great deal more than this quote would lead us to believe. The discussion primarily takes place on the axis of the '48 TEU versus 49 TEU question' and of the question on the 'autonomous versus derivative nature' of EU citizenship. In fact these two questions are closely intertwined.

The discussion about Articles 48 and 49 TEU revolves around the proposition that the secession and subsequent EU membership of a part of a Member State can be legally resolved 'simply' through the amendment of the Treaties under Article 48 TEU (sometimes coined as 'internal enlargement'), thus avoiding a legal vacuum that might occur if the new state were to apply for EU Membership anew under the procedure of art. 49 TEU. The procedure of article 48 TEU does not seem to be generally accepted as a convincing approach to the Scottish and Catalan situations. Such is also the opinion of Dermine, who, however, proposes a procedure under article 49 that is implemented in a novel and streamlined fashion, with an intricate process of simultaneous and interconnected rounds of negotiations that would ensure speedy accession to membership of the new states and would minimise the burden for the populations.

The arguments to support the 'article 48 thesis' are manifold; but the one most often used involves the concept of EU citizenship. As explained by both Schrauwen and Garcia Andrade, the plethora of possible rights at stake in case of loss of EU citizenship is impressive, ranging from social security to basic free movement rights. Indeed, the appreciation by the public at large of their EU citizenship, more than two decades after the latter's inception in the Maastricht Treaty, seems extensive if judged by the anxiety over its possible loss in case of secession. The Citizens' Initiative on the preservation of EU citizenship in case of secession of a territory of a Member State is highly informative in this respect.⁵

Those who advocate the 'article 48 scenario' stress the *autonomous* nature of EU citizenship by legally constructing the notion of 'internal enlargement' on the basis of an uninterrupted EU citizenship status for the subjects of the new state. The contrary position, namely that of EU citizenship as *derivative* of national citizenship, implies of course that one loses one's status as EU citizen following the secession of the territory of which one becomes a 'new'

⁴ *Newsnet 2012*.

⁵ See Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva', 1 April 2012. The initiative was rejected official registration by the Commission as it was deemed to be outside the competences of the EU to deal with such a matter.

subject, a thesis that according to Garcia Andrade would still be the one that can be most easily defended despite the growing status of EU citizenship under EU law (in particular in the case law of the European Court of Justice). Dual citizenship may be an attractive ‘palliative’ but, as highlighted by Schrauwen, is likely to bring new conundrums.

Lastly, it should be mentioned that even though the present project was inspired directly by the Scottish and Catalanian aspirations to independence, there are other regions in the EU with special historic, cultural and linguistic characteristics that might go down the same path someday. Sap points in this regard to the Dutch Province of Friesland and pleads for an effective use of all the legal instruments in place to optimize the region’s cultural and linguistic uniqueness, thus curbing any claims to full independence.

To the extent that independentist claims within EU member states can be expected to be resolved through *legal* means, a general question is how public international law and European law in such scenarios intersect and possibly interact. Do the various rules of international law on secession and legal succession (if and when these are normatively complete to begin with) operate ‘normally’ within the context of the EU? Technically, the legal aspects of secession – grounded in the complex doctrine of self-determination – are placed in the sphere of international law. Legal *succession* of the new state to rights and duties of the predecessor state in practice is negotiated and decided on a case by case basis (leaving aside the contested regime of the 1978 *Vienna Convention on Succession of States*, which, though in force, has not found wide acceptance).⁶ Meanwhile, in case such rights and duties are related to membership of an international organization, international law construes the institutional order of the organization as *lex specialis* and defers decisions on membership to the organization,⁷ in this case the EU. This leads us back to the inconclusive debate about the choice between article 48 and 49 TEU.

For now the stakes are out on whether the traditional picture of adjacent international law and EU legal spheres can fully capture the scenario of Secession within the Union. As to the legality of *secession*, it might turn out that the concept of EU citizenship infuses new substance to the ‘external’ right of self-determination, and will lower the threshold for unilateral secession as this had been conceptualized in post-colonial international law. In regard of *succession* it is clear in any event that the inter-state paradigm prevailing in PIL and to a large extent in EU law – witness the fact that

⁶ 1978 *Vienna Convention on Succession of States in respect of Treaties* 1946 UNTS 3

⁷ See for example the reservation clauses in art 4 of the UN Charter, and art 5 of the *Vienna Conventions on the Law of Treaties* of 1969 and 1986

the choice of means seems to boil down to article 48 or article 49 -, does not do justice to the unprecedented scenario of Secession within the Union. Here, the outcome might prove to ultimately depend on the perspective we take: the member states ('sovereign statehood') or the population ('citizenship'). In the latter case, a construct such as that of 'automatic succession', as has emerged in human rights discourse, may open up new possibilities while remaining within a classic legal framework.

This collection of think pieces is based on an Expert Round Table hosted by the *Amsterdam Centre for European Law and Governance* and the *Amsterdam Center for International Law* at the University of Amsterdam, on 23 May 2014.

Catherine Brölmann and Thomas Vandamme

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