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**Publication date**

2014

**Document Version**

Final published version

[Link to publication](#)

**Citation for published version (APA):**

Brölmann, C., & Vandamme, T. (Eds.) (2014). *Secession within the Union: intersection points of international and European law: collected think pieces*. Amsterdam Centre for European Law and Governance, Amsterdam Centre for International Law.  
<http://acelg.uva.nl/publications/secession.html>

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Secession within the Union  
*Universiteit van Amsterdam*  
ACELG - ACIL

May 23rd 2014



**Collected Think Pieces**

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**Amsterdam Center for International Law**

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.

Published by Amsterdam Centre for European Law and Governance and Amsterdam Center for International Law, July 2014

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Design cover page: Catherine Brölmann, Thomas Vandamme & Eva Gielen

# **Secession within the Union**

## **Intersection points of International and European Law**

Catherine Brölmann & Thomas Vandamme (eds.)

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Paula García Andrade, David Haljan, Jan Willem Sap,  
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Amsterdam Centre for European Law and Governance  
Amsterdam Center for International Law  
July 2014

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# 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.<sup>1</sup> 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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<sup>1</sup> 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*<sup>2</sup>, 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.<sup>3</sup>

These un-encouraging 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.*

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<sup>2</sup> 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

<sup>3</sup> 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*"<sup>4</sup>. 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.<sup>5</sup>

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'

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<sup>4</sup> *Newsnet 2012*.

<sup>5</sup> 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).<sup>6</sup> 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,<sup>7</sup> 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

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<sup>6</sup> 1978 *Vienna Convention on Succession of States in respect of Treaties* 1946 UNTS 3

<sup>7</sup> 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

Amsterdam 7 July 2014

# Mapping the Theme of Secession

David Haljan\*

*In other words, maps hold a clue to what makes us human. Certainly, they relate and realign our history. They reflect our best and worst attributes – discovery and curiosity, conflict and destruction – and they chart our transitions of power.<sup>1</sup>*

*A map always manages the reality it tries to show. ... Rather than imitating the world, maps develop conventional signs which we come to accept as standing in for what they can never truly show.<sup>2</sup>*

## 1. Mapping: Scale, Projection, Perspective

There are three principal parties to a secession crisis whose interests generate legal issues: 1) the secession movement within the state affected; 2) the state affected (including those opposing secession within the territory affected), and 3) the international community which itself is made up of a number of intersecting interests including private international law interests (multinational corporations, foreign investors, ngo's), public international bodies (states, UN bodies, treaty organisations), the EU constellation of institutions (for secession crises within EU member states), and perhaps even the legal academy.

The interactions of these various parties generate an number of issues, many of which cut across perspectives/party interests. They include the right of self-determination; the interaction of international law, national law and EU law; the normative value and character of law; representative and deliberative democracy; constitutionalism and the rule of law; recognition; state succession; EU

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\* Dr David Haljan is a Visiting Research Fellow at the Institute for Constitutional Law, Katholieke Universiteit Leuven. Acknowledging with thanks comments and discussions with Catherine Brölmann, Thomas Vandamme, Ingo Venzke and the other participants in the ACIL-ACELG seminar of 23 May 2014

<sup>1</sup> S Garfield, *On the Map: Why the World Looks the Way it Does* (Profile Books 2012) 18.

<sup>2</sup> J Brotton, *A History of the World in Twelve Maps* (Penguin 2012) 7.

citizenship and integration, and the list goes on. All the issues in turn are generally mapped out along a common selection of axes: international–national; internal and external self-determination; legality–legitimacy, and (constitutional/public) law–politics.

The underlying *leitmotif* of tension and balancing, of thesis–antithesis–synthesis should not be thought of as wholly unintended. Likewise, the preference or predominance of one axis over another reveals more than just a facility with or interest in a particular area of legal study. From a map maker’s vantage point, it is a question of deciding on perspective, projection, and scale. These frame and colour how we examine and resolve the issues and what the horizon of possibilities is, in terms of premises argued and unargued, the measure of arguments, and the range of solutions. “Mapmakers do not just reproduce the world, they construct it.”<sup>3</sup> Hence the choice of axis does not merely chart the issues and answers. It constructs and reproduces them in its own image, in its own terms, with its own conceptual strengths and limitations.

Depending on our particular choice of perspective, scale, and projection, it appears therefore that any effort to chart out the issues and solutions to a secession crisis could – and often do – produce significantly different results. And this explains in large measure perhaps the ‘tension-reconciliation’ approach typical of the law and politics, and national public law and international public law axes, for example. My own view is that for all their complexities, the various issues on the national and international planes have a largely unexpressed common core issue, one that is for the most part as yet unanswered (and perhaps even unanswerable). There is a single, primary, root perspective and basic scale and projection which controls, expressly or impliedly, consciously or sub-consciously, all the other optics on secession. At its broadest, the issue is the nature of political association and the obligations, duties, rights, powers, advantages and disadvantages it generates. What is a constitutionally significant polity? When and how can it come into existence? Our own reflected or unreflected views on this core issue determine how we analyse and evaluate secession, and the law and politics of self-determination more broadly.

We can begin to get at this core issue – the perspective, projection, scale, by which we map out secession – by considering the following. Assume that, in an independence referendum in one part of an EU member state, 52% vote for independence on a total turnout of 80% of eligible voters. The secessionist party will claim victory and a

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<sup>3</sup> *ibid*

mandate to negotiate a transfer of sovereignty (and all its trappings) and the dissolution of the erstwhile state. The rump state had indeed consented to the referendum, but had made no promises or statements regarding the treatment of the outcome; nor was there anything expressed regarding threshold majorities.<sup>4</sup> Is it inconceivable or indefensible for the rump state to reject any claim for independence (except at an unacceptably high cost and disadvantage to the secessionist party), while nevertheless proposing constitutional amendments falling well short of substantial autonomy?

Now, it seems fairly certain and obvious that an inflamed secessionist party would accuse the rump state of unjustifiably obstructing and denying the legitimate democratic will of the people. It would turn to the EU and the wider international body of states and organisations for support and countervailing pressure, and likely pursue further a declaration of independence. The call and urge to intervene (and perhaps for the EU even before post-referendum discussions begin) will no doubt be unremitting and inescapable. May those third party states and organisations pressure a capitulation and compromise by either of those national parties, either of rejecting any independence claim or of dissolving the erstwhile state?

The point is not whether an independence referendum is merely a defeasible proposal to negotiate some sort of constitutional reform, nor the Montevideo criteria for statehood, but rather: when is a group a constitutionally significant political association, and who decides that? What you think the nature of the relationships are which are constitutive of a polity – if and how they bind, and whom – constitutes your primary conceptual framework which will expressly or impliedly direct how you answer all the other legal and political questions.

The problem for the international legal community and the EU, however, is that there has been no reflection on this critical, fundamental question of scale, projection, and perspective – and this despite calls for their active engagement in state disintegration crises.

## **2. Self-determination: 'the statement of a problem, but not the solution of it' <sup>5</sup>**

Since the first decades of the 20<sup>th</sup> century after World War I, international law has struggled to express, let alone contain, the political complexity of secession and independence movements in

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<sup>4</sup> Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (Edinburgh, 15 October 2012).

<sup>5</sup> A Toynbee 'Self-Determination' (1925) 484 *The Quarterly Review* 317, 318

states within its chosen framework of self-determination. True, it has never lacked for earnest proponents on its behalf, claiming a deciding – or at least prominent – role in managing secession crises. They champion international law as a guarantor of peace and reasoned compromise. The predominant human rights and humanitarian mindset has amplified their voice. Globalist, transnational perspectives and their attendant receptiveness to a constitutionalism of like scale add not insignificant support.

Yet considerable amounts of ink and effort continue to be spent on situating and attempting to justify in international law a right of independence-driven self-determination (and by extension a right of secession). International law remains notoriously unclear and uncertain about such a right for matters other than decolonisation/foreign subjugation, and perhaps also the more grotesque examples of abuse of power. The uncertainties, all well-known and thoroughly debated, run from anchoring self-determination in the instruments of international law (interpretation, normative effect) or state practice (case-by-case basis not producing a coherent precedent), to giving concrete meaning to the right. This includes the trigger for its operation and the actual content and nature of the right.

But most telling, most significant is the lack of a definition of the rights holder ‘people’. International law appears to leave members of a group to constitute themselves as a ‘people’, if not wholly to ignore the matter, at least until conflict and misery can no longer be dismissed. (This is the downside risk to leaving the situation play itself out and thus effectively generate a place for remedial secession.) But can just any group define itself as a people? Too wide a definition, too fluid and accommodating notions of self-determination and people contain the real potential for political instability, fragmentation into micro-states and ‘selfistans’. Reliance on cultural or ethnic ingredients as the basis for political association may fuel a resurgence of nationalism, which Europe has long struggled to contain and master. Adding further criteria, such as territory and economic viability, draws the definition of self, the governance of self, further away from the will and desire of group members. Self-determination is thus no longer an act of pure volition and choice, tied as it is to mere coincidence of property, resources, and birth-right.

It should come as no surprise, then, to find yourself questioning now what a ‘polity’ and a ‘people’ actually are, and indeed whether they are equivalent, or aspects of the same concept. No doubt you will also consider why a self-determining political association may end at the, say Scottish, Catalan, Brittany, or Friesen, border rather than encompassing all of the UK, Spain, France, or the Netherlands. Indeed,

this should also lead you to examine your own conception of political association, and why it should prevail over that of others. Needless to say, of course, international law remains for moment (wilfully) blind to or empty of these conceptual exercises.

### **3. Recognition: constitutive of whose declaration of what?**

Charting secession through the international law of recognition requires us to alter projection and perception. Foreign states have a decisive voice in whether a political association is constitutionally significant so as to be admissible to the club of states, or, indeed, whether that association represents instead an unjustified threat to the integrity of an extant state and to the peace and security of its population. Hence an exercise of self-determination, of political self-definition and self-constitution, is not simply a unilateral act when mapped onto international law. Third party states have a say in whether and how any putative act of self-determination may obtain.

Little wonder then, independence movements will seek out formal and informal, public and private support from other states in advance of any concrete acts towards secession. A failure to achieve recognition does not, of course, necessarily entail a collapse of self-determination. Nor does a lack of recognition by certain states bar recognition by other, more friendly states, or some form of existence in limbo. It simply limits what an independence movement may claim or expect from unilateral organisations and other states. But membership in transnational organisations may carry significant benefits and advantages, such that a denial or inadmissibility for membership may impose significant costs and hindrances in attaining full independence.

But what of recognition over the protests of the erstwhile state? Or the insistence on international involvement in constitutional negotiations between the erstwhile state and the secessionist movement after a pro-independence result to a referendum? Supporting an independence movement absent the consent of the erstwhile state appears at first glance as an undue interference in the internal affairs of a fellow state. Seeking to moderate negotiations or the discussions between the independence movement and rump state gives a presumptive political legitimacy to the secessionist group. The impression given is of acknowledging a constitutionally significant political association to be accommodated in its core demands, whether deserving or not. It may also reflect pressure (political, economic) being brought to bear on either side to force a capitulation on issues, such as perhaps a dissolution of the state with an eye to weakening or destabilising the rump state or its sponsor.

Underpinning the response of individual states are their respective strategic interests, of commercial cost and gain, regional influence, and other, wider geo-political considerations. A state's response will likely talk the language of human rights and international law, but will express in truth that strategic meaning. Certainly we may consider what weight – determinative or significant – the perspectives of the international club of states have and ought to have. Whose perspective should ultimately count?

But recognising that their perspectives are not necessarily contiguous or convergent with those of the independence movement nor of the rump state, we must rescale our mapping of self-determination. Our conception of self-determination and the modalities of its exercise cannot be determined unilaterally by the secessionist group. It must account for input from other stake-holders, public and private: the rump state, neighbouring, trading partner and other states, international organisations, and so on. These parties will therefore have a say in who may qualify for self-determination, whether a group does qualify, how self-determination may be exercised, and when. And this necessarily entails a much wider conceptual framework for what may and will count as a polity, as a constitutionally significant political association.

#### **4. The EU legal order: is EU membership indispensable?**

Despite a reluctance by the EU to pronounce on secession in advance, other than to reiterate that membership in the EU is subject to, and not concurrent with or independent of, achieving statehood in international law, many commentators see as inevitable and realistic the EU taking some active/proactive role in a secession crisis within a member state, even to the extent of participating in or regulating dissociation. The intensity and degree of that participation varies from commentator to commentator. But most if not all of these agree that the EU simply cannot afford to react in an ad hoc way. Its objective would be to reduce the costs of uncertainty, dispute, and any transfer of sovereignty, and to maintain the level of membership in and contribution to the EU. The EU constellation has a substantial interest in minimising the potential disruption of social and economic activity in other EU members states. Its role would presumably be voiced in terms of preserving social, economic and human rights.

To put this into better relief, consider that the independence movement in a member state has shown itself desirous of a momentous constitutional and political change. It would remove itself from an otherwise functioning, constitutional, representative



political order within the EU constellation. A population will have voted to leave a state with EU membership and with its particular mix of advantages, disadvantages, costs, and benefits. Why does that removal not carry through to reconsidering membership in the EU as a necessary consequence of that will to independence? If a group wants to strike out alone as a new state, why should it receive treatment preferential to that of other established states seeking to join? Put another way, what is so special about EU membership and citizenship that it ought to survive secession but not emigration? What makes it such an indispensable good? Even Article 50 TEU clearly contemplates an exit option.

Commentators considering a proactive role for the EU characterise this situation as one of “internal enlargement”. In effect they draw an analogy to a subdivision of state territories or provinces within a larger encompassing constitutional order, rather than frame a secession crisis as in terms of acquiring membership in a transnational organisation. Their discussions naturally focus on the many technical law points which require settling, not the least of which is the potential opposition by other member states to accession by the putative new state.

Yet underpinning all this, with the prospect of a comprehensive EU law solution, the references to ‘EU citizenship’, and to the rights and benefits attendant upon membership in the EU is, expressed or not, a conceptual framework of the constitutional signification of the EU. Even though at foundation the EU is an international organisation – albeit a very well developed one – the driving imagery here is of the EU as a supervening, integrated political association of EU citizens, one that subsumes or at least is co-ordinate with the constitutional orders of the other established member states and other political formations within them. Hence it arguably follows that an active role (in the negotiation stage) would be claimed for the EU so as to supervise and condition the creation of a new (member) state, and continue the status of the population as EU citizens even before the new state’s institutions, infrastructure, and economic viability have been tested.

But it is not simply the creation of a new member state *ex nihilo*. EU institutions will be supervising the possible dissolution of a member state. Vital, fundamental questions remain unanswered. By participating in negotiations, influencing their course and outcome, does this entail the EU having a say in evaluating/opposing/qualifying/limiting the arguments for dismantling a functioning constitutional democracy and member state? In how the state ought to be reconstituted? The EU arguably is conditioning the

right of self-determination, both of the secessionist movement and the rump state (and that tied to membership in an international body). More important is the concept of political association operative here. The EU will be regulating and managing the dismantling of a functioning constitutional democracy on the basis of views expressed by some majority (50%+1 or more) of voters in only one part of that member state. A minority of a state's population may dictate the political, economic, and social futures of the rest, an outcome that would not be acceptable for any other constitutional or EU treaty change. For all its institutional sophistication, the EU appears to have no developed concept of political association, other than a two-dimensional, positivistic one arising from out of the relevant European treaties.

### **5. The road ahead**

It always possible to legislate solutions: damn the torpedoes and full speed ahead. But given the political nature of independence movements and the unresolved aspects of political association, perhaps discretion here is the better part of valour. A wait-and-see attitude may avoid a misplaced need for legal efficiency. Yes, it may result in uncertainty and cost, conflict and contest. But having unchartable waters may be necessary to impress upon all parties the gravity and seriousness of such an undertaking as discarding an otherwise functioning, democratic, representative constitutional order.

# Member States, Aspiring States and the European Union

Pierre Schmitt\*

In view of the referendum on independence of Scotland to be held on 18 September 2014, this paper examines the consequences of an eventual secession on the membership within international organizations. It is not the aim of this paper to enter into discussions as to the legality of referenda on independence. Hence, this paper will not refer to the referendum to be held in Catalonia on 9 November 2014 given that the Spanish Government has strongly opposed the *Declaration of Sovereignty and of the Right to Decide of the People of Catalonia* and that the Constitutional Court has rendered a decision on 25 March 2014 rejecting the declaration and considering the referendum as unconstitutional. However, references will be made to the Scottish referendum, which has been subject to an agreement between the Scottish Government and the United Kingdom Government, the Scottish Independence Referendum Bill.

The first part of this paper presents the international rules applicable to the issue of membership in international organizations in case of succession of States followed by examples in the United Nations (the UN), the Council of Europe (the CoE) and the European Convention on Human Rights (the ECHR). The second part analyzes the consequences of secession with regard to the membership of the European Union (the EU) with a focus on the legal source applicable to regulate such situation.

## 1. Secession and membership in international organizations

The rules organizing the succession of States in relation to treaties have been codified by the International Law Commission in a Vienna

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Convention of 1978.<sup>1</sup> The question of membership in international organizations is only briefly mentioned in its Article 4, which states that '[t]he present Convention applies to the effects of a succession of States in respect of: (a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization; (b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.' Hence, the membership of an international organization mainly depends on the relevant rules of the organization.

The United Kingdom is not a party to this Convention (only 22 States parties have ratified the Convention so far). However, it seems generally accepted that Article 4 corresponds to the prevailing view that the membership of international organizations mainly depends on the articles of agreement or rules of the organization.<sup>2</sup>

### 1.1. Membership at the UN

In 1947, following the debate about whether Pakistan could succeed to British India's membership, the Sixth Committee of the UN General Assembly adopted the principles embodying its views on the legal rules 'to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject':

'That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

Beyond that, each case must be judged according to its merits.'<sup>3</sup>

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<sup>1</sup> Vienna Convention on Succession of States in Respect of Treaties (adopted 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3.

<sup>2</sup> J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 442-43.

<sup>3</sup> (1947-48) UNYB 39-40.

It follows from this statement that the continuity of the legal personality constitutes the core notion underlying the succession in UN membership. Pursuant to Michael P. Scharf, six factors may be identified in the India, USSR, Yugoslavia and Czechoslovakia cases to determine whether a State has been dissolved or whether a potential successor State has inherited its legal personality. These factors evaluate whether the potential successor has: '(a) a substantial majority of the former member's territory (including the historic territorial hub), (b) a majority of its population, (c) a majority of its resources, (d) a majority of its armed forces, (e) the seat of the government and control of most central government institutions, and (f) entered into a devolution agreement on U.N. membership with the other components of the former State.'<sup>4</sup> While the identification of the continuator State may be obvious as in the case of Singapore's separation from Malaysia, there are also more questionable situations, as illustrated hereafter.

After Singapore's separation from Malaysia in 1965, the latter retained both its international legal personality and UN membership while the former was admitted as a new State after application for membership with the UN.

Another example consists in the dissolution of the Union of Soviet Socialist Republics (the USSR) in 1990-91. Although part of the Soviet territory became newly independent States, the Russian Federation was regarded as continuing the legal personality of the USSR and the other States issued from the USSR accepted this position.

In the case of Czechoslovakia's dissolution, both the Czech Republic and the Slovak Republic agreed that neither would claim to continue the Czechoslovakia's identity. Hence, both applied for membership of international organizations and were admitted to the UN in January 1993.

As to the former Socialist Federal Republic of Yugoslavia (the SFRY), Slovenia declared its independence on 25 June 1991, Croatia on 26 June 1991, Macedonia on 25 September 1991 and Bosnia-Herzegovina on 3 March 1992. Serbia and Montenegro adopted a new Constitution under the name Federal Republic of Yugoslavia (the FRY) and declared on 27 April 1992 that the FRY, 'continuing the state, international, legal and political personality of the [Socialist Federal Republic] of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally.'<sup>5</sup>

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<sup>4</sup> MP Scharf, 'Musical chairs: The dissolution of states and membership in the United Nations' (1995) 28 *Cornell ILJ* 29, 67.

<sup>5</sup> Declaration of the Assemblies of Serbia, Montenegro and the FRY, 27 April 1992, S/23877, annex, 2 (1992), cited in *Application of the Convention on the Prevention and*

Yet, UN organs considered – with slight nuances in their respective positions – that the SFRY had ceased to exist and that FRY had not automatically taken over the SFRY's seat.<sup>6</sup> In 2000, the FRY was admitted to UN membership and it entered into an agreement on succession issues on 29 June 2001 through which it abandoned its claims for continuity. In 2006, a referendum on independence was held in Montenegro and on 3 June 2006, the National Assembly of Montenegro made a formal declaration of independence. On the same day, the President of the Republic of Serbia informed the UN Secretary-General that the membership of the State union Serbia-Montenegro in the UN would be continued by the Republic of Serbia.<sup>7</sup> On 28 June 2006, Montenegro was admitted as a new Member State to the United Nations.<sup>8</sup>

In view of the referendum on independence of Scotland, Professors James Crawford and Alan Boyle were requested to identify international law aspects of an eventual secession by Scotland following the 2014 referendum. Pursuant to their views, 'there may be no general rule in international law governing succession to membership of international organisations. But at least in the case of the UN, Scotland would be required to join as a new state whereas [the remainder of the United Kingdom] the rUK would retain the UK's membership – including its permanent seat on the Security Council.'<sup>9</sup>

## **1.2. Membership at the Council of Europe and the European Convention on Human Rights**

Membership of the CoE and of the ECHR are closely linked, as recalled by the Parliamentary Assembly of the CoE in 1994, stating that 'accession to the Council of Europe must go together with becoming a

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*Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Provisional Measures: Order) [1993] ICJ Rep 3, 15.

<sup>6</sup> UN SC Res 757 (1992); Letter dated 29 September 1992 from the Under-Secretary-General, the Legal Counsel, to the Permanent Representatives of Bosnia and Herzegovina and Croatia to the United Nations, UN Doc A/47/485, Annex; *Legality of the Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections: Judgment) [2004] ICJ Rep 279, 310.

<sup>7</sup> Letter of 3 June 2006 from the President of the Republic of Serbia to the UN Secretary-General, referred to in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 73.

<sup>8</sup> UN GA Res A/60/264.

<sup>9</sup> J Crawford SC and A Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects* (2013) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf), 95.

party to the European Convention on Human Rights. It therefore considers that the ratification procedure should normally be completed within one year after accession to the Statute and signature of the Convention.’<sup>10</sup>

There are no provisions on State succession in the Statute of the CoE, but there are interesting precedents, as the independence of Montenegro. Serbia-Montenegro was both a member of the CoE and a party to the ECHR. After Montenegro’s independence, Serbia’s membership continued and Montenegro joined the CoE as a new State in accordance with Article 4 of the CoE Statute. Interestingly, the European Court of Human Rights had been previously seized by an application against Serbia-Montenegro and after Montenegro’s declaration of independence, the applicants indicated that they wished to proceed against both States. In its judgment, the Court held that the ECHR had been ‘continuously in force’ in Montenegro, despite its independence.<sup>11</sup>

Pursuant to Professors Crawford and Boyle, ‘the consequences of Scottish independence are likely to be the same: the rUK will simply continue the UK’s membership of the Council of Europe and continue to be a state party to the *ECHR*. Scotland will probably have to accede to the Council of Europe as a new member, but the application of the *ECHR* to Scotland will continue uninterrupted. As the reference to the earlier precedent of Czechoslovakia indicates, even if both the rUK and Scotland were considered new states, the *ECHR* would similarly still continue to apply uninterrupted.’<sup>12</sup>

## **2. Secession and EU membership**

There is no clear precedent for a part of a EU Member State becoming independent and claiming automatic membership or seeking in its own right to join the EU. There is currently an intense debate as to the legal source and the corresponding procedure applicable to such cases. The two possible sources invoked are Article 48 TEU, which deals with the procedures for amendments to the EU Treaties and Article 49 TEU, which governs the accession of new Member States to the EU.

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<sup>10</sup> Parliamentary Assembly of the Council of Europe, Resolution 1031 (1994) on the honouring of commitments entered into by member states when joining the Council of Europe.

<sup>11</sup> *Bijelić v Montenegro and Serbia*, App no 11890/05 (ECHR, 28 April 2009).

<sup>12</sup> J Crawford SC and A Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects* (2013) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf), 98.

The official position articulated by the President of the European Commission in his letter dated 10 December 2012 consists in the following: 'The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that State because it were to become a new independent State, the Treaties would no longer apply to that territory. In other words, a new independent State would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.'<sup>13</sup>

Hence, upon independence, Scotland would cease to be a part of the EU and would have to apply for membership under the Article 49 TEU process. This position was almost *verbatim* identical to that of Romani Prodi delivered in 2004 during his tenure as President of the European Commission<sup>14</sup> and it has been reiterated by Herman van Rompuy, the President of the European Council<sup>15</sup> and Viviane Reding, the Vice-President of the European Commission, in a letter of 20 March 2014.<sup>16</sup>

Article 49 has been applied over the years as the basis for accession procedures for candidate Member States provided that certain conditions – the accession criteria also named the Copenhagen criteria<sup>17</sup> – were fulfilled. Although Scotland has been part of the EU through the United Kingdom since 1973, these criteria are not automatically met by Scotland. There are for instance economic criteria that have to be assessed in the specific case of an independent Scotland (viable market economy, ability to respond to the pressure of competition and market forces within the EU, etc.). Moreover, the EU has to assess whether it is capable of welcoming a new Member State (additional EU Commissioner, judges, etc.) – the absorption capacity is

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<sup>13</sup> Letter from José Manuel Barroso, President, European Commission, to Lord Tugendhat, Acting Chairman, U.K. House of Lords Econ. Affairs Comm., 12 October 2012.

<sup>14</sup> Romani Prodi, 'Answer given by Mr. Prodi on behalf of the Commission', 2004 O.J. C84 E/422, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0422:0425:en:pdf>.

<sup>15</sup> S Johnson, 'Herman Van Rompuy deals EU blow to Alex Salmond's independence plans', The Telegraph, 14 December 2013.

<sup>16</sup> Letter from Viviane Reding, Vice President of the European Commission, to Ms McKelvie, Convener, European and External Relations Committee, Scottish Parliament (20 March 2014), available at [http://www.scottish.parliament.uk/S4\\_EuropeanandExternalRelationsCommittee/Inquiries/Letter from Viviane Reding Vice President of the European Commission dated 20 March 2014 pdf](http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Inquiries/Letter%20from%20Viviane%20Reding%20Vice%20President%20of%20the%20European%20Commission%20dated%2020%20March%202014.pdf).

<sup>17</sup> For further information on the accession criteria or the Copenhagen criteria, see [http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria\\_en.htm](http://ec.europa.eu/enlargement/policy/glossary/terms/accession-criteria_en.htm).



another key element in any new enlargement. This requires public opinion support both in the Member States and in the applicant States. Finally, a number of additional decisions have to be taken as to Scotland's participation to the Schengen Area, to the Eurozone, etc.

Yet, there is something problematic in this view following which the new State will lose all its rights because of independence. Even if Scotland votes yes, it will not become independent immediately; the independence will only be effective in March 2016 according to the Scottish Government's timetable. Nevertheless, it will not be able to negotiate with the EU since it has no *locus standi* in the EU.

Hence, it seems that a more pragmatic view should be advocated so that Scotland could be able to negotiate before its independence in order to organize its relations with the EU and EU Member States as long as it is still part of the EU. The United Kingdom could grant the right of Scotland to start external negotiations.

An additional argument in favor of the application of Article 49 to this specific case is that this provision constitutes a *lex specialis* as mentioned by Professor Armstrong, 'in respect of an entity voluntarily taking on the obligations arising from the EU treaties and the law made under the treaties.'<sup>18</sup> Consequently, it would be difficult to avoid this procedure of Article 49.

The Scottish Government rejects these arguments, claiming that Scotland would not become a new State and that this case consists in the separation of an existing State into two States. It requests the establishment of a specific procedure for starting negotiations for accession to the EU within the period between the referendum and the effective independence. Article 48 could be used in this way to amend the EU Treaties and to start negotiations during Scotland's transition to independence – thus during a period where Scotland remains within the EU by virtue of being within the United Kingdom.

Yet, such view encounters a number of obstacles. First, nothing obliges any other EU State to enter into such revision process and the negotiations may face a veto by other Member States and their domestic ratification requirements. Second, Article 48 is only applicable to Member States and the Scottish Government only has competence over devolved areas and no mandate to negotiate with other EU Member States. Consequently, the United Kingdom would have to negotiate the modification of EU Treaties. Pursuant to the Scottish Government, this duty to engage into negotiations could be based upon the obligation of sincere cooperation in relation to EU institutions.

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<sup>18</sup> K Armstrong, *Scottish Membership of the European Union*, CESL Working Paper (2014) 3.

Third, opening up a treaty revision process could lead to a congestion of the procedure caused by disparate attempts to revise the Treaties.

As demonstrated by these opposing views, the issue is and remains very much debated.

### **Concluding observations**

In my view, it seems that Article 49 would be the correct legal basis in case of Scottish secession to apply for EU membership since it organizes the process of accession for candidate Member States. The only terms on which to discuss and obtain accession to the EU are those of Article 49. Although Scotland has already been part of the EU through the United Kingdom, its membership of the EU without the rUK is a different issue that requires negotiations through an accession procedure. However, this procedure should be approached pragmatically. For instance, in relation to the notion of 'State' contained in Article 49, perhaps could Scotland start discussing the process earlier than at the moment of its independence – provided that it would obtain the United Kingdom's agreement. If Scotland would become independent before the end of the ratification process, interim measures could be set up in order to guarantee a continuity notably in relation to the internal market and to the rights of citizens.

# Secession within the Union Some Thoughts on the Viability of EU Membership

Simone F van den Driest\*

## 1. Introduction

In a number of European Union (EU) Member States, the issue of secession has recently emerged on the political agenda. In 2013, the Scottish Parliament approved to hold a referendum on Scotland's independence from the United Kingdom (UK) on 18 September 2014, with the consent of the UK government in Westminster.<sup>1</sup> Likewise, Catalonia's Parliament has decided to organize a referendum on Catalonia's independence from Spain on 9 November 2014, albeit without the approval of the Spanish government. The request by the Catalan authorities to hold such referendum was rejected by an overwhelming majority of the Spanish Members of Parliament earlier this year.<sup>2</sup> Despite this fundamental difference as regards their respective central governments' stance or strategy towards the issue of independence, the cases of Scotland and Catalonia have in common that both entities aspire to secede from their parent State, but remain part of the EU at the same time. These developments raise a variety of interesting questions of both international and European law. The secession of part of the territory of a EU Member State with the newly established State seeking to retain EU membership is unprecedented.

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<sup>1</sup> Following the so-called Edinburgh Agreement, which was signed by Scottish First Minister Alex Salmond and UK Prime Minister David Cameron and gives Scotland the powers to hold a referendum, the Scottish Parliament approved the terms of the plebiscite in: Scottish Independence Referendum Bill, SP Bill 25B, 27 June 2013, <[http://www.scottish.parliament.uk/S4\\_Bills/Scottish%20Independence%20Referendum%20Bill/b25bs4-aspassed.pdf](http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25bs4-aspassed.pdf)> accessed 30 June 2014.

<sup>2</sup> On 8 April 2014, the Spanish Parliament rejected the Catalan request to hold a referendum on Catalonia's independence on 9 November 2014 by 299 votes against, 47 votes in favor and one abstention. See BBC News, 'Spanish Parliament Rejects Catalan Independence Vote' (8 April 2014) <<http://www.bbc.com/news/world-europe-26949794>> accessed 30 June 2014.

To date, non-State entities gaining independence from EU Member States has primarily occurred in the decolonization context and has always led to the withdrawal of the newly independent State from the European Union. Examples in this respect are the independence of Algeria from France and the independence of Congo from Belgium. Hence, a prominent legal question is whether a newly established State can automatically continue its membership of the EU, or whether the new State is required to (re)apply for EU membership.

This post aims to shed some light on this issue and, more specifically, highlight a couple of pertinent factors that are of interest with respect to EU membership following 'secession within the Union'. To that end, this post will first address the question of EU membership from the perspective of international law, as the EU functions as a 'classical' international organization in this respect. In doing so, the legal opinion by professors James Crawford and Alan Boyle on the international law aspects of Scottish independence will be used as a convenient starting-point for the discussion. Assuming that an application for EU membership by the newly constituted State is required, this post will subsequently consider two factors that may influence the viability of such applications: the importance of parent State consent and the presence of secessionist entities within other existing Member States.

## **2. Secession within the Union and EU membership**

In view of the envisaged Scottish independence referendum, James Crawford and Alan Boyle were asked to advise the UK government on the international law aspects of a possible negotiated independence.<sup>3</sup> In their 2012 opinion, three possible legal outcomes of Scottish independence were explored. The possibilities of the dissolution of the UK, which would give rise to the emergence of two new States, and a reversion of the Scottish State as it existed before the 1707 union with England, were both dismissed as unrealistic.<sup>4</sup> The third possible outcome would involve the separation of Scotland from the UK, which would give rise to a new State (i.e., Scotland, also referred to as the successor State) and the continued existence of the remainder of the UK (England, Wales and Northern Ireland, referred to as the continuator

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<sup>3</sup> J Crawford SC and A Boyle, *Annex A. Opinion: Referendum on the Independence of Scotland - International Law Aspects* (10 December 2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf)> accessed 30 June 2014.

<sup>4</sup> *ibid*, paras 71-94, 95-115.

State).<sup>5</sup> This was considered to be the most likely one in view of State practice with respect to the creation of States in international law.

Taking this scenario as their starting point, Crawford and Boyle considered the issue of succession to membership of international organizations. As they rightly pointed out, international law provides that this issue is regulated by the relevant rules of a particular organization. However, leaving aside exceptions such as the IMF and the World Bank, most international organizations do not have specific rules regulating the issue of succession to membership. In practice, they usually allow the continuator State to retain its membership, while requiring the newly established State to submit its own membership application. Although refuted by the Scottish government,<sup>6</sup> this scenario seems to apply to the European Union as well. As the President of the European Council, Herman Van Rompuy, noted in reply to a question about the situation of Catalonia:

The separation of one part of a Member State or the creation of a new State would not be neutral as regards the EU Treaties. The European Union has been established by the relevant treaties among the Member States. The treaties apply to the Member States. If a part of the territory of a Member State ceases to be part of that state because that territory becomes a new independent state, the treaties will no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the Union and the treaties would from the day of its independence, not apply anymore on its territory.<sup>7</sup>

The President of the European Commission, José Manuel Barroso, made a similar statement in the context of Scotland's independence.<sup>8</sup> This supports the conclusion that States which have emerged through the secession from existing EU Member States, will not remain within the Union automatically, but have to apply for EU membership in their own right instead. The accession of aspiring Member States is regulated by Article 49 Treaty of the European Union (TEU), which prescribes that a State can only accede to the EU if the relevant EU bodies deem

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<sup>5</sup> *ibid*, paras 50-70.

<sup>6</sup> The Scottish Government, *Scotland in the European Union* (27 November 2013) <<http://www.scotland.gov.uk/Resource/0043/00439166.pdf>> accessed 30 June 2014, paras 3.5-3.10.

<sup>7</sup> Council of the European Union, 'Remarks by President of the European Council, Herman Van Rompuy, on Catalonia' (12 December 2013) EUCO 267/13, PRESSE 576, PR PCE 241.

<sup>8</sup> BBC News, 'Scottish independence: EC President José Manuel Barroso on new states membership' (12 September 2012) <<http://www.bbc.com/news/uk-scotland-scotland-politics-19567650>> accessed 30 June 2014.

membership in accordance with certain procedural and substantive requirements. Crucially, a treaty of accession must be signed and ratified by *all* existing Member States. This means that, legally speaking, every Member State has a 'veto' to block the admission of new States to the EU.

### **3. The viability of an application for EU membership**

Assuming that a successor State would indeed have to apply for EU membership in its own right, the next important step is to consider the viability of such application in cases of 'secession within the Union'. In this respect, the stances of existing EU Member States are vital. Their attitudes and, accordingly, the course of negotiations will be determined by a variety of factors, which may be legal, (geo)political and/or economic in nature. Two factors that deserve to be singled out in this regard concern the consent of the parent State and the presence of secessionist entities within other existing Member States.

#### **3.1. The consent of the parent State**

First, some remarks deserve to be made about the importance of the modality of State creation and, more specifically, the consent of the parent State in decisions on membership applications. As was explained above, Article 49 TEU requires the unanimous approval of accession to the EU by all existing Member States. Consequently, a State that has emerged as a consequence of unilateral secession will probably not be admitted to the EU, due to a negative vote ('veto') by its parent State. In the context of the EU, however, it is questionable whether a parent State will be able to sustain its opposition to EU membership of a State that has seceded unilaterally. Significant economic motives and trade interests, in particular, may induce the parent State to agree to the admission of the new independent State to the EU in the end. Therefore, it is relevant to consider the responses of other Member States as well. In the absence of any precedents within the framework of the EU, the practice of the United Nations (UN) may provide for some useful insights in this respect. While the procedural and substantive requirements for admission to the UN differ from those of the EU, UN practice may be relevant as the organization has witnessed numerous States emerging from existing UN Member States that subsequently sought to be admitted to the UN in their own right.

When looking at the admission of newly proclaimed States to Membership of the UN, the modality of State creation and the consent of the parent State have always played a prominent part. State

practice demonstrates that beyond the context of decolonization (i.e. situations covered by Chapter XI or Chapter XII of the UN Charter), UN Member States have been very reluctant to admit entities that have been created as a result of unilateral secession. As was observed by Crawford, “no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the [continuator] State”.<sup>9</sup>

The position typically adopted by UN Member States can be usefully illustrated by contrasting the experience of Bangladesh in the early 1970s with the more recent creation of the State of South Sudan. On 10 April 1971, East Pakistan (currently known as Bangladesh) unilaterally declared itself independent from West Pakistan (now Pakistan) after decades of domination and large-scale military actions by the central authorities to violently suppress its demand for autonomy and independence. Eventually, India intervened to fight the forces of West Pakistan. The newly proclaimed State of Bangladesh sought to accede to the UN in 1972,<sup>10</sup> but was not admitted at first.<sup>11</sup> Only after the troops of the West were defeated and Pakistan had given its tacit consent by recognizing Bangladesh in 1974 was the latter State admitted to the UN.<sup>12</sup> By that time, Bangladesh was no longer under the control of Pakistan and no territorial counterclaim was upheld. As such, this example of unilateral secession demonstrates the unwillingness of UN Member States to admit an entity as long as the parent State opposes its emergence as an independent State. In contrast, South Sudan emerged as an independent State in 2011 after the central authorities of Sudan had agreed to respect the outcome of the referendum on independence. The referendum was held under the terms of the 2005 Comprehensive Peace Agreement, which was signed between the government of Sudan and the Sudan Peoples’ Liberation Movement/Sudan Peoples’ Liberation Army.<sup>13</sup> Given the express consent of its parent State, South Sudan did not emerge as an independent State as a result of a successful attempt at unilateral secession, but instead as a consequence of consensual secession. In view of its consensual mode of creation, South Sudan was admitted to

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<sup>9</sup> J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 415.

<sup>10</sup> See UNSC, ‘Application of the People’s Republic of Bangladesh for admission to membership in the United Nations: Note by the Secretary General’ (8 August 1972) UN Doc S/10759.

<sup>11</sup> UNSC Draft Res S/10771 (23 August 1972) UN Doc S/10771.

<sup>12</sup> UNSC Res 351 (1974) (10 June 1974) UN Doc S/RES/351 (1974); UNGA Res 3203 (XXIX) (17 September 1974) UN Doc A/RES/2010 (XXIX).

<sup>13</sup> See ‘Southern Sudan Referendum Commission’ <<http://southernsudan2011.com>> accessed 30 June 2014.

the UN without opposition as its 193<sup>rd</sup> Member State on 14 July 2011.<sup>14</sup> The example of South Sudan shows that States that have been created with the express consent of the parent State are generally admitted to the UN rapidly.

So in general, outside the context of decolonization, a new State will only be admitted to the UN when the parent State consents to – or at least no longer opposes – the separation of part of its territory. The opposite appears to hold true when the parent State maintains a territorial counterclaim. This State practice affirms the value that is generally ascribed to the principle of territorial integrity.<sup>15</sup> In view of the fact that EU Member States are also members of the UN, it stands to reason that they will act along these lines when deciding on applications for EU membership. A secessionist entity and its parent State will probably have to solve their issues on a bilateral level first, before an EU membership application by the new State will be considered.

### **3.2. The presence of secessionist entities within existing Member States**

In addition to the relevance of parent State consent, another factor that may influence the viability of an application for EU membership following ‘secession within the Union’ concerns the significance of domestic political considerations and, in particular, the presence of secessionist entities within other EU Member States not directly involved in the secession at hand. Often, the position of States on independence questions is influenced by their own domestic political situation, with States having active secessionist entities on their territory generally more reluctant to approve or recognize secessionist attempts in other States, for fear of being taken to implicitly condone or even encourage similar attempts at home. The international responses to Kosovo’s unilateral declaration of independence and its attempt to secede from Serbia illustrate this. For example, Argentina, Azerbaijan, China, and Spain – States dealing with secessionist groups on their respective territories – have all refused to recognize Kosovo, while emphasizing the value of the principle of respect for the territorial

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<sup>14</sup> UNSC, ‘Report of the Committee on the Admission of new Members concerning the application of the Republic of South Sudan for admission to membership in the United Nations’ (11 July 2011) UN Doc S/2011/420; UNGA Res 65/308 (14 July 2011) UN Doc A/RES/65/308.

<sup>15</sup> See Crawford (n 9), 417-418.



integrity of States.<sup>16</sup> While such position particularly applies to instances of unilateral secession, for States having active secessionist groups on their territory, even consensual secession (or: negotiated independence) is a highly sensitive issue.

The example of Scotland and its wish to remain part of the EU illustrate the difficulties that may arise in this respect. The UK government has indicated that it will respect the outcome of the referendum to be held on September 18<sup>th</sup>: “[i]f a majority of those who vote want Scotland to be independent then Scotland would become an independent country after a process of negotiations”.<sup>17</sup> Hence, if the Scottish population will vote for independence, secession will involve a negotiated agreement between the Scottish authorities and the UK government. It is therefore not to be expected that the UK will block or obstruct Scotland’s accession to the EU. Less certain, however, is the stance of the other EU Member States. Will the UK’s approval be sufficient to induce them to approve Scotland’s membership application – or will potential (domestic) costs lead them to a different decision? These are pertinent questions, since the Member States themselves rather than the European Parliament or the European Commission will ultimately decide on the accession of aspirant Members. In this respect, it cannot be ruled out that Spain, for instance, will not consent to Scotland’s accession given the calls for independence by both Catalonia and the Basque Country. What is more, it remains to be seen under which conditions the present EU Member States will let Scotland do so. It may well be that Spain or other States having secessionist entities on their territory will insist on certain conditions for their support to the accession of the aspirant Member State. So in sum, it seems that EU membership following secession within the Union is by no means self-evident and may come at a certain cost.

#### **4. To conclude**

This post has explained that when a non-State entity secedes from an existing EU Member State, it is to be expected that the latter State qualifies as the continuator State that continues its membership in the EU, while the seceding entity emerges as a new State that will have to apply for EU membership in accordance with Article 49 TEU. In such

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<sup>16</sup> For an analysis of the international responses to Kosovo’s declaration of independence, see SF van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Intersentia 2013), 233-275.

<sup>17</sup> UK Government, ‘Scottish Independence Referendum’ <<https://www.gov.uk/government/topical-events/scottish-independence-referendum/about#what-happens-if-there-is-a-yes-vote>> accessed 30 June 2014.

situations, the attitude of existing EU Member States will ultimately determine the viability of an application for EU membership. Two factors that may impact the positions of EU Member States were singled out. It was argued that the consent of the parent State to the secession and the presence of active secessionist entities within existing Member states are important factors with respect to 'secession within the Union'.

When looking at current developments on the European continent, it seems that the absence of consent by the Spanish authorities to the separation of Catalonia will decrease the likelihood that an independent Catalonia will be admitted to the EU in its own right. The first mentioned factor will probably not affect Scotland's accession to the EU, given the (promised) approval of Scottish independence by the Westminster government. Notwithstanding such favorable position by the parent State, however, Scotland's accession process may well be hindered by other EU Member States having active secessionist movements at home and fearing for implicitly condoning or encouraging their attempts to separate. Spain, for instance, may not be willing to approve Scotland's membership of the EU or may impose certain conditions for its approval.

Since the cases of Scotland and Catalonia are unprecedented within the EU, it is difficult to predict to what extent the factors discussed above will actually influence the accession of States emerged through 'secession within the Union'. Time will tell.

# Secession and Succession in the EU Fuzzy Logic, Granular Outcomes?

Henri de Waele\*

1. What is the legal position of regions that venture to secede from an EU Member State?<sup>1</sup> Do they automatically succeed to the rights and obligations that were in place previously, when they were still part of a country that was solidly locked into the Union's legal system? The only answers to these questions that international and European law are able to provide closely resemble the notion of fuzzy logic: no binary, 'true' or 'false' statements seem possible, merely approximate indications.<sup>2</sup> As is undoubtedly also outlined in many of the other contributions to this collection of 'think pieces', the relevant rules are far from fixed, and their application in practise anything but an exact science.

2. A doctrinal position adhered to by some is that, in an actual situation where parts of Member States choose to 'break away', when issues of succession will need to be addressed sooner or later, the solution to every query that might arise has to be principally sought within the EU legal order itself. The latter is, after all, a *new legal order*, and its founding Treaties are to be regarded as undergirding a *sui generis* political structure, differing from conventional international law.<sup>3</sup> However, whether the EU truly stands out so magnificently from 'conventional' international law (in so far as that term is not employed too recklessly to begin with) is debatable.<sup>4</sup> For our purposes though, a

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<sup>1</sup> For our purposes,

the term 'region' means to include, *inter alia*, provinces, communities, or any other self-governing territories capable of surmounting the thresholds for obtaining statehood.

<sup>2</sup> cf Lotfi A. Zadeh, 'Fuzzy Logic and its Application to Approximate Reasoning', in JL Rosenfeld (ed), *Information Processing 74, Proceedings of the IFIP Congress* (Amsterdam/London: North Holland Publishing Company, 1974), 591-594.

<sup>3</sup> Case 26/62 *Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>4</sup> cf only Bruno de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, CUP, 2012) 19-57.

more important datum is that, when it comes to Member States falling apart, EU law unfortunately offers no guidance whatsoever. We are, alas, confronted here with a vast lacuna – something that could perhaps almost be expected in a structure originally designed as a *traité-cadre*. Still, it is a most remarkable situation when successive Commission Presidents, requested to take a stance, but facing a dearth of principles in this supposedly autonomous and coherent legal construct, can do little more than defer to public international law.<sup>5</sup> Surely this is a harrowing abdication, flying right in the face of the celebrated *Van Gend & Loos* judgment and its progeny. Thus, even when one might want to stress that in actual secession scenarios, the solutions to every query should principally be *sought* within the EU legal order, they can unfortunately not so easily be *found* there.

3. Public international law, then, is not just the relevant framework for (attempts to resolve) the arising issues – it is in reality *shockingly* important, as the founding Treaties only care to pronounce about scenarios wherein Member States *as a whole* decide to break away. Beyond Article 50 TEU, there lies a deafening silence indeed. This should give us pause with regard to the identity of this supposedly autonomous, coherent, post-Westphalian legal construct – is this a deliberate *traité-cadre*, or simply an ill-designed franchise, still surprisingly strongly reliant on external legal sources?

4. That public international law represents the most important frame of reference is all the more problematic, since the rules contained in this frame a) provide no absolute clarity on when secession should be deemed (un)lawful, nor on the consequences a successful secession process necessarily entails; b) in matters of succession, these rules give way to specific agreements agreed upon by the successor(s) and successee(s). In both respects, therefore, the available ‘logic’ remains inevitably fuzzy. As regards the former, we may only point to the ICJ’s ambiguous *Kosovo* Opinion, which has been justifiably labelled as a new petal of the *Lotus* flower.<sup>6</sup> As regards the latter, the extant state practice lacks coherence, and merely a handful of principles has attained the status of customary international law. Moreover, on this topic, there exists no generally accepted codification; while we should of course not overlook the Vienna Convention on

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<sup>5</sup> Answer to Question P-524/04 by Eluned Morgan MEP, OJ [2004] C 84E/492; Answer to Question H-1086/06 by Catherine Stihler MEP, OJ [2004] C84E/422; Answer to Question E-007453/2012 by Mara Bizzotto MEP, OJ [2013] C 228E.

<sup>6</sup> PM Eisemann, ‘L’avis de la Cour internationale de justice concernant la déclaration unilatérale d’indépendance relative au Kosovo: une nouvelle fleur de lotus?’, in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law* (Leiden, Brill, 2011) 281-292.

Succession of States in Respect of Treaties, it entered into force as recently as 1996, features just 19 contracting parties, and in many respects does not reflect the *communis opinio* on the current state of the law.<sup>7</sup> Consequently, breakaway regions in the EU risk to catapult themselves right in between a rock and a hard place, and would be ill-advised to initiate the process without even attempting to agree terms in a 'devolution compact'.

5. Whatever hard and fast conclusions are ultimately drawn in practice, beforehand, we may at least qualify as legally doubtful the suggestion that secession from an EU Member State leads automatically to a situation of dual succession – ie, the emergence of *two* new states which *both* take on the rights and obligations of the country concerned when it was still in one piece. Rather, most of the established precedents exhibit a keen preference for continuity whenever possible, with the seceding part enjoying a *tabula rasa*, while the 'rump' of the former whole retains the legal position in full of the country in its previous form.<sup>8</sup> Ergo, in the cases of Scotland breaking away from the United Kingdom, Catalonia from Spain, or Flanders from Belgium, the paucity of international law principles do convincingly point out that there will be only one successor to the rights and duties flowing from EU membership: a rump-UK, rump-Spain or rump-Belgium as the continuator state.

6. Granted, we ought to pay due attention here to the argument from Union Citizenship, contending that in the special environment that is the EU, this particular status accruing to all persons with the nationality of a Member State would somehow trigger dual succession. Arguably, a mass deprivation of that status could not possibly be deemed proportional for violating the conditions imposed by the European Court of Justice in its *Rottmann* ruling.<sup>9</sup> The sole means of avoiding this calamity would be to allocate in law *both* the newly emerging *and* the rump state to the position previously held by the former whole. This line of reasoning is intrinsically fuzzy, specious – if not to say thoroughly unconvincing. After all, from a public international law perspective, as long as statelessness is prevented, no obstacle to secession exists, and no deviation from the general presumption of continuity is necessary. From an EU law perspective, lest we forget, even when the ECJ has been tirelessly rehearsing the 'fundamental' character of Union citizenship, Article 9 TEU and Article

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<sup>7</sup> Its sibling, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983, has not entered into force yet.

<sup>8</sup> cf eg Daniel Thürer and Thomas Burri, 'Secession', in *Max Planck Encyclopedia of Public International Law*, <<http://opil.ouplaw.com>> accessed 24 June 2014.

<sup>9</sup> Case C-135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449.

20 TFEU continue to underscore its derivative quality.<sup>10</sup> In addition, the *Rottmann* judgment did not rule out deprivation *per se*. Equally, notwithstanding the staunch dicta of the Court, a provision such as Article 50 TEU, allowing for withdrawal of entire Member States, illustrates that Union citizenship is subject to changes in the political landscape, and not a status that should be preserved at all times. To the mind of this author, inhabitants of seceding regions that nevertheless cling on to the latter argument risk to find themselves in a completely different place – cloud cuckoo land – already.

7. Let us next consider another excruciatingly fuzzy argument, predicated on the spirit of Article 50 TEU, that militates in favour of a legal duty for both the seceding part and the rump-state to engage in pre-independence negotiations and reach an amicable settlement prior to separation.<sup>11</sup> In brief, the underlying reasoning holds that if a situation of withdrawal of (more or less sizeable) constituent parts of the Union is explicitly regulated, then roughly the same legality standards and procedural rules of thumb should be adhered to in cases where sub-national entities decide to ‘release’ themselves from the larger whole. Indeed, were we to regard the Union as an autonomous, coherent, post-Westphalian legal construct, the drawing of such analogies would seem perfectly obvious – yet, doubts were expressed already on whether the contemporary EU can indeed lay claim to such a stature, even when in some respects, its constitutional architecture can be adequately defined in federal terms.<sup>12</sup> Moreover, talk of the ‘spirit’ of a Treaty provision that necessarily guides the process carries more than a whiff of *Van Gend & Loos*. Eventually, it might give rise to a kindred political mythology (or rather: theology). A very first troubling point may be how the true ‘spirit’ of said article could be persuasively divined. More importantly perhaps, for the black-letter lawyer, a pivotal question is how the Court may be seized to shed its light on the matter. A comparable – but comparably fuzzy – case can be made in favour of interpreting Article 4(2) TEU with regard to the required respect for regional and local identities; certainly,

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<sup>10</sup> See eg Case C-184/99 Grzelczyk [2001] ECR I-6193; though cf Henri de Waele, ‘The Ever-Evolving Concept of EU Citizenship. Of Paradigm Shifts, Quantum Leaps and Copernican Revolutions’, in Leila Simona Talani (ed), *Globalisation, Migration and the Future of Europe. Insiders and Outsiders* (Abingdon, Routledge, 2011), 191-207.

<sup>11</sup> Advanced by Sir David Edward, former Judge at the European Court of Justice, in a post on the SCFF weblog: <<http://www.scottishconstitutional futures.org/OpinionandAnalysis/ViewBlogPost/t abid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>> accessed 24 June 2014.

<sup>12</sup> Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, OUP, 2009).

in similar vein, from that proviso a duty *could* be distilled for the Union institutions, offices and bodies to duly recognise and involve in further negotiations a newly independent region. Again though, attractive as this position may appear *in abstracto* to proponents of a smooth post-secession transition phase, no such outcomes can be guaranteed *ab initio* without an authoritative elucidation from the Union's judiciary.

8. Does there then not exist some way in which such an elucidation might be procured, so that the EU legal order *would* actually be able to offer solutions to all arising queries itself, whether related to secession or succession, either as regards substance or procedure? Interestingly, ex Article 218(11) TFEU, the Court can be involved when it comes to assessing the compatibility with the Treaties of a Member State's withdrawal agreement – since, in conformity with Article 50 TEU, this would concern an international treaty to which the Union itself is a party. Conversely, accession agreements, as dictated by Article 49 TEU, are concluded between the applicant country and the Member States – a treaty to which the Union is *not* a party, hence rendering it impossible for the ECJ to be approached on the basis of Article 218(11) TFEU. Of course, *tertium datur* in the form of Article 267 TFEU: for it is far from unthinkable that preliminary reference questions are submitted to the Court, offering it a splendid opportunity to speak out on the terms of withdrawal of seceding countries or regions, the methods by which these were agreed, and the remit and function of Articles 4, 49 or 50 TEU. In such a scenario, it is not unlikely for the argument from Union Citizenship to serve as a linchpin, coming back to haunt the continuator state after all (imagine eg a Scottish, Catalanian or Flemish person also in possession of the nationality of another Member State, not acquiescing in her being stripped of a British, Spanish or Belgian passport pursuant to the secession of Scotland, Catalonia or Flanders).<sup>13</sup>

9. Alternatively, without intending to embark on a different trail leading straight to cloud cuckoo land, it can at this stage not be ruled out that the International Court of Justice would be engaged, if only because some of the secession scenarios prompt a rethink on the current composition of the UN Security Council (whereby it should be noted that the Vanguard class submarines that carry the UK's current nuclear arsenal are currently stationed at the Faslane naval base in Scotland).<sup>14</sup> The most intriguing upshot of ICJ involvement could be a reverse *Kadi* – the UN's most prominent judicial

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<sup>13</sup> Arguably, if such a preliminary reference was to be submitted after a referendum in which a majority speaks out in favour of independence, but before the actual enactment of the separation, questions on eg the deprivation could not be considered manifestly hypothetical by the Court under its *Foglia/Novello* doctrine.

<sup>14</sup> The incredulous reader is also referred to the Kosovo precedent.

body pronouncing on, and possibly censuring, the EU's handling of key international law precepts.<sup>15</sup>

10. Just as hard cases make bad law, it will by now have dawned on the reader that fuzzy logic produces granular outcomes. In fact, the singularity of constituent parts of a EU Member State 'breaking away' from their surroundings constitutes a veritable litmus test for both the European and the international legal order. In matters of secession, nor of succession, do the extant rules provide answers other than by proxy. Seceding regions retaining the rights and obligation enjoyed previously within the Union? Essentially doubtful. Dual succession of both the newly independent and the remainder state? Most improbable. Treaty articles imposing legal obligations on parties to ensure an orderly transition? Conjecture. Supranational and/or international courts proffering some much-needed guidance? Not implausible. Evidently, considering the sluggish progress in agreeing on additional principles and theorems thus far, no firmer answers are to be expected from public international law in either the short or the medium term. At forthcoming instances though, at least on the occasion of a revision of the Treaties to accommodate one or more new Member States, preferably some sharp baselines are drawn in EU law for the conundrums that were only very briefly touched upon here. To be sure, no opulence of pointers is called for, and neither can an ever closer union in any way be bound to dispense a recipe for its incremental fragmentation. At the same time, in light of the contemporary EU's sheer incapability to offer parameters for determining the veracity of many of the opinions expressed, in political as well as academic circles, its legal order seems hardly worthy of the autonomous epithet it was so happily endowed with over fifty years ago.

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<sup>15</sup> cf Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.



# Succession and EU Treaty Obligations

Paul Dermine\*

## I. State Succession to EU Membership in the event of secession

1. When addressing the topic of 'Succession and EU Treaty Obligations', one should first examine how the phenomenon of State secession can be captured through the rules of State succession as regard to EU membership. Would a newly independent State created by secession succeed to membership, thus automatically entering the EU as a fully-fledged member State (*dual succession* thesis)? Or would it exit, having thus to go through the entire accession process, as any other candidate country would (*ex novo accession* thesis)?

2. When scrutinizing EU Law, it must simply be conceded that it does not deal with succession issues regarding membership, or at least, that it does not convincingly support dual succession.

A first observation to make is that the EU Treaties remain deafeningly silent on the issue of succession: there is no provision that sets out what would happen in the event of part of a member State becoming independent. Primary law does address situations of territorial enlargement (Article 49 TEU) or contraction (Article 50 TEU), but does not deal with phenomena of fragmentation (*internal enlargement scenarios*)<sup>1</sup>.

A thorough review of the territorial evolutions of the EU also fails to provide conclusive elements. There is indeed a clear lack of fully relevant precedents. Neither the Algerian secession case, nor the Greenland (withdrawal without secession) or the German reunification (enlargement by absorption) precedents could be successfully applied by analogy to the scenario of part of a member State seceding<sup>2</sup>. Those precedents however reveal the existence in

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<sup>1</sup> M Chamon and G van der Loo, 'The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?', [2013] *European Law Journal* (published online on 22 5 2013).

<sup>2</sup> A Ortega *et al*, 'Scission et permanence au sein de l'Union Européenne', [2002] *Politique Etrangère* 2,

EU law of a 'moving treaty boundaries' principle<sup>3</sup>, that could potentially rule out dual succession. They also show that the EU institutions, when facing major and unforeseen territorial upheavals, have been able to display pragmatism, flexibility and innovation.

The 'EU Citizenship' argument proves equally inconclusive when it comes to support dual succession. Arguments derived from the *Rottman* and *Ruiz Zambrano* rulings<sup>4</sup> are clearly too weak to back such claims<sup>5</sup>.

The dual succession thesis can thus find no favor in the eyes of EU law.

3. The inconclusiveness of EU law regarding this issue of State succession to EU membership forces us to turn to another set of rules, those of public international law, the relevance of which has been convincingly established by Crawford and Boyle<sup>6</sup>.

When it comes to State succession to membership in international organizations, one has to concede that international law lacks uniformity.

It has been shown that the 1978 Vienna Convention on Succession of States, the main conventional instrument in the field, is insufficiently helpful here, despite the fact that it generally consecrates the principles of *de jure* continuity and universal succession (article 34, § 1): on the one hand, because the Convention places paramount emphasis on the rules of accession of the international organization (article 34, § 2), its object, purpose and internal functioning (article 4), and on the other, because it has been scarcely ratified, especially in Europe<sup>7</sup>.

The relevant practice of the international organizations, especially that of the UN, has proven much more enlightening. The numerous UN precedents and the 1946 'Sixth Committee' principles strongly suggest that in the event of secession, there could only be one

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<sup>3</sup> See the Commission's document « The Community and German Unification », *Bull. EC*, Suppl. 4-1990, 27

et seq.; T Giegerich, 'The European Dimension of German Unification', [1991] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 421.

<sup>4</sup> Case C-184/99 *Grzelczyk* [2001] I-06193; Case C-34/09 *Ruiz Zambrano* [2011] I-01177.

<sup>5</sup> See, for example, A O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', published on 14 November 2011, <http://eutopia.law.com>.

<sup>6</sup> J Crawford and A Boyle, 'Referendum on the Independence of Scotland-International Law Aspects', Opinion published in annex to the UK Government's Report on 'Devolution and the Implications of Scottish Independence', February 2013, para 184.

<sup>7</sup> See *ibid*, paras 120-125.

successor, namely the continuator state, i.e the state continuing the legal personality of the predecessor state<sup>8</sup>. In the reference publication on the topic, Bühler has made it very clear: within political international organizations (that he distinguishes from technical organizations) such as the UN, or the EU, '*a stronger community character seems to prevail among the member states, which makes membership a personal right*'. As a result, those political organizations tend to be '*closed to universal succession to membership*'<sup>9</sup>.

4. There is thus no general rule, neither in EU law, nor in international law, that supports dual succession, and that would *a priori* allow a seceding entity in Europe to automatically succeed to the system of the Treaties and to EU membership. This entity would face a legal obligation to re-apply for its 'lost' membership. This is the stance the European Commission has always defended. A breakaway from the mother State is also a breakaway from the EU.

## II. Avoiding the Limbo - The Paths to EU Membership

5. The conclusion reached on this first legal issue is not satisfying in itself. As there will be no succession to EU membership, one should thus seek ways to reconcile this fact with the constraints of the practice.

It has been shown that a rigorist application of the abovementioned conclusion could have a devastating impact concretely. If it were to be strictly apply without any form of anticipation, Europe would end up with this new State born by secession being sent in some kind of legal limbo vis-à-vis the rest of the EU, until an accession treaty is signed and ratified, which is not to be taken for granted, or which will at least take some considerable time<sup>10</sup>.

This section intends to explore the ways to minimize disruption and to push towards synchronicity between formal independence and accession to the EU?

### a) *The EU institutions facing imminent secession*

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<sup>8</sup> The continuator state being identified on the basis of a set of criteria that have already been discussed (see Scharf, 'Musical Chairs: The Dissolution of States and Membership in the United Nations', *Cornell ILJ* (1995), 67.

<sup>9</sup> KG Bühler, *State Succession and Membership in International Organizations-Legal Theories versus Political Pragmatism* (Kluwer 2001), 302.

<sup>10</sup> D Edward, 'EU Law and the Separation of Member States', *Fordham JIL* (2013) 36, 1165.

6. In the event of imminent secession, we are of the opinion that the EU institutions should try by all means to avoid disruption in the application of EU law, simply because the breakaway region will have been part of the EU for decades, and naturally belongs to it.
7. In this regard, Sir David Edward, quite convincingly in our view, has inferred from several elements of EU law that the EU institutions, and the other member States, would have to take a proactive stance and enter in pre-independence talks, even before independence is officially proclaimed, in order to avoid as much as possible disruption in the application of EU law<sup>11</sup>.

*b) Three simultaneous and interconnected rounds of negotiations*

8. In order to ensure a transition as seamless and smooth as possible, negotiations could be structured around three rounds of talks, based on the following basic principles: pragmatism, flexibility, good faith, timing, interconnection, synchronization and inclusiveness.
9. The EU has shown pragmatism and innovation in the past. It could do so again. The EU institutions and the member States do enjoy some room for manoeuvre. While relying on the existing procedures of the Treaties, original *ad hoc* solutions could be designed.
  - i. First round: Internal negotiations between the seceding entity and the “mother state”
10. This first purely internal round of negotiations will aim at settling anything that needs to be settled between the newly independent entity and the State it is seceding from, such as nationality, financial, monetary or territorial issues.
  - i. Second round: External negotiations on membership
11. We saw an independent Scotland, Catalonia or Flanders, could not bank on automatic membership, but would have to re-apply for it. But on the basis of which legal provision? There is still intense debate on this question.

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<sup>11</sup> This duty of pre-separation negotiation can be inferred from the following elements: Article 2 TEU (democracy and minority rights), Article 4 TEU (respect of national identities), Article 20 TEU (EU Citizenship), the principles of sincere cooperation and federal loyalty, the spirit of Article 50 TEU (the emphasis it puts on pre-withdrawal negotiations), the Greenland and German precedents (where EU has displayed flexibility and inventiveness as it had to face unprecedented internal territorial upheavals, with a very high potential for disruption).

12. The Scottish Government has claimed that Article 48 of the TEU, which organizes the Treaty revision procedures, was the suitable legal route to EU membership for Scotland<sup>12</sup>. In its view, since the Treaties already apply to Scotland as part of the UK, they should continue to do so after independence, through their renegotiation and revision under Article 48.

This view has been successfully challenged by Kenneth Armstrong and Jean-Claude Piris<sup>13</sup>, who have raised numerous arguments against using Article 48 to extend the scope of the Treaties to a newly independent State. First, Article 48 has never been used for internal enlargement. Secondly, the case law of the ECJ is very clear on the fact that a Treaty provision cannot be chosen freely; this choice must be based on the aim and the content of the act to be taken. Moreover, specific articles should take precedence on general ones. In the case of a seceding entity seeking membership, a consistent analysis of the decision at stake clearly indicates Article 49 as the most specific and suitable legal basis. Article 48 and the revision procedures it organizes have solely been set up for altering the legal relationship existing between current member States. From a constitutional point of view, the eventual accession of a new member State triggers major political change and alters the composition and the balance of the institutions, thus justifying the strict procedural requirements of article 49 to be met.

Article 49 appears to be the most plausible legal basis. As things stand, an accession based on Article 48, through the back door, does not seem likely.

13. Under which tempo could membership be negotiated from outside, under Article 49? The lodging of the application for membership, the signature of an accession treaty and the initiation of the ratification procedure could only occur once the applicant State has formally gained independence and has emerged as a fully-fledged subject of international law.

However, one could argue that negotiation talks might be launched earlier. There is indeed no reason why proper negotiations could not start informally once independence has become certain. In the case of Scotland for example, talks could be initiated right in the aftermath of the referendum (in the event of a Yes vote, of course).

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<sup>12</sup> Scottish Government, *Scotland's Future – Your Guide to an Independent Scotland*, White Paper on Independence, November 2013, 221.

<sup>13</sup> See Armstrong's and Piris' written evidences submitted to the European and External Relations Committee of the Scottish Parliament in January 2014.

Objections related to legal personality seem unduly formalistic. More crucial is the fact that the State-to-be is able to negotiate on its own behalf, without any interference from the mother-state. Under such a scheme, full accession could theoretically have been pre-negotiated once Scotland gets independent.

14. The content of those negotiations would be rather classical. As for any accession, the applicant State would need to meet the legal, procedural, political and economic criteria for membership (known since 1993 as the 'Copenhagen' criteria). Concerning Scotland or Catalonia, this could be quickly achieved, regarding their long-standing familiarity with the structures and processes of the EU. The 1995 enlargement towards EFTA countries has been usefully pinpointed by Armstrong, and might be an enlightening precedent<sup>14</sup>. Swift and easy negotiations should however not be taken for granted, as potential sticking points may naturally pop up.
15. An important hurdle could appear if the new State claimed to inherit, as an EU member State, the opt-outs and other preferential treatments its former mother-state had secured within the EU. The issue is particularly salient concerning Scotland, since its SNP-led government has promised its electorate that an independent Scotland would, as fully-fledged member State of the EU, inherit all the opt-outs and special regimes the UK has secured through its EU history. This would be so for the financial rebate, EMU membership or Schengen membership<sup>15</sup>.

Those claims are however not legally supported, neither by EU law nor by international law. An independent Scotland would not succeed to EU membership, and would thus not be legally entitled to claim a British-like status under EU law. Legally speaking, it would have to accept, as any other acceding state, full membership without any *a priori* preferential treatment. Under EU law, no applicant state can claim a natural right to this opt-out or to that specific arrangement.

It may of course happen differently in the practice, depending on the results of the 'internal' negotiations and the negotiating approach privileged by the EU institutions.

16. The most important hurdle is of course the procedural one: accession under Article 49 requires unanimity among existing member States - in the Council when receiving the application for membership, at the national level when ratifying the accession treaty according to internal constitutional requirements - which is

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<sup>14</sup> Armstrong, n13, para. 33.

<sup>15</sup> See the Scottish Government's White Paper, 221-24.

clearly not to be taken for granted, considering the fear of some European capitals to open Pandora's box and create a precedent.

ii. Third round: External negotiations on the transitory regime

17. The applicant country will face a hiatus between its formal independence and its entry in the EU, since its accession treaty, if it could be pre-negotiated before independence, would be at best signed the day of that formal independence. It would then have to be ratified by all member States, in accordance with their constitutional requirements. For reasons we have already evoked, this could take some time.
18. This transitional gap will have to be filled with sound practical solutions, such as an interim arrangement, in order to ensure continuity in the application of EU law. The idea is that in practice, firms, workers, students, citizens do not perceive any concrete disruption in the application of EU law.
19. In this regard, the spirit and *rationale* of Article 50 TEU may be relevant. It is true this provision is not fully applicable to situations under discussion here<sup>16</sup>. Those situations could however be analyzed as withdrawals, although unwanted and occurring in a totally different context than the one Article 50 was designed to address. Nevertheless, Article 50 was set up to ensure smooth and negotiated transitions in situations where the geographical scope of application of EU law may contract from one day to the next, and this is exactly what is at stake here. Therefore the spirit of Article 50, and the emphasis it puts on the necessity of an organized transition, should be used as prevailing sources of inspiration in the event of secession within the EU.
20. Some plausible solutions to secure minimal continuity in the application of EU law have already been put forward. Kenneth Armstrong, for example, has suggested that the accession treaty could be agreed on as having provisional effect pending on formal ratification<sup>17</sup>. This is rather unprecedented, but we saw the EU has displayed inventiveness and flexibility in the past. It could do so again, if facing yet another exceptional territorial upheaval.

### III. Conclusion

21. One has to recognize the scenario we have sought to sketch out here remains an ideal model, the various involved actors should

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<sup>16</sup> For the main reason that Article 50 only applies to withdrawal of whole member States.

<sup>17</sup> Armstrong, n13, paras 37-39.

however try to strive for in the event of imminent secession within the EU. It is clear that the various negotiation rounds will be profoundly complex, and that potential seceding states should be ready to enter uncharted waters, and face many hurdles on their way to membership.

22. However, we also showed that there is a certain room for manoeuvre, innovation and flexibility. Continuity can be ensured, disruption can be avoided and seceding entities may finally not end up in the legal limbo.
23. In the end, one has also to admit that this entire legal debate is resting upon one fundamental moral issue : to what extent does European regionalism and secessionism run against the essence of the European project?



# State Succession and EU Citizenship

**Paula García Andrade\***

At a time in which the political debate on the secession of part of the territory of an EU Member State is gaining relevance as shown by future referenda on independence to be held in Scotland and perhaps in Catalonia, multiple legal and political challenges are in need of reasoned responses both in international and European law. The effects of secession and subsequent State succession on the status of natural persons from the pre-existing State and the seceding entity constitute one of these challenges. Although this issue has not received much attention, it has nevertheless acquired particular significance in view of the existence of EU citizenship, and the will of pro-independence sectors to preserve the advantages conferred by this status and by the European integration process as a whole<sup>1</sup>.

The aim of this short paper is therefore to explore the role and place of EU citizenship in a scenario of secession affecting an EU Member State and subsequent State succession. In particular, the subject will be addressed from two different perspectives. Firstly, it is important to determine the effects of secession and State succession on the status of EU citizens, both of nationals of the separating territories as well as of EU citizens from other Member States residing in those territories (1). Secondly, the role that the concept of EU citizenship as such may play in State succession, as basis for the controversial theory of "internal enlargement" of the EU or automatic succession to EU membership, will be tackled (2).

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<sup>1</sup> See the Citizens' initiative 'Fortalecimiento de la participación ciudadana en la toma de decisiones sobre la soberanía colectiva', 1 April 2012, whose objective was ensuring that citizens from seceding territories of Member States preserve EU citizenship. The Commission's refusal was based on the lack of EU competences, 30 May 2012. See also the parliamentary questions for written answer to the Commission, E-007453/2012 and E-008133/2012; and the answers given by Mr Barroso, 28 August 2012 and 12 November 2012, respectively.

## 1. Effects of State succession on EU citizenship

Analyzing the effects of State succession on EU citizenship draws firstly our attention to the future status of nationals from the seceding region who, until secession occurs, have been enjoying EU citizenship and the rights associated to it. Secondly, it will also be of interest to inquiry about the consequences for EU citizens from other Member States who reside in the seceding territories.

A straight answer can be given to the first question. According to the Treaties, EU citizenship is contingent on the nationality of Member States - art. 20.1 TFEU -. As the latter concept is to be settled only by reference to national law<sup>2</sup>, the EU as such lacks the autonomous power to grant its citizenship. Consequently, when part of a territory separates from a Member State, its citizens will lose the status of EU citizenship provided, of course, that they cease to be nationals of the pre-existing State. The loss of the nationality of a Member State implies the loss of EU citizenship.

Cyprus and Greenland have been put forward as examples of flexibility and pragmatism within the EU<sup>3</sup>. However, they do not seem to be pertinent precedents. Although it is true that the suspension of the application of the EU *acquis* in the North of Cyprus has not affected individual rights, the people in the North of the island continue to hold EU citizenship as long as they hold the nationality of the Republic of Cyprus, thus the nationality of a Member State. The same can be said with regard to Greenland, albeit in a different context. Despite the exclusion of this Danish autonomous territory from the EU, Greenlanders continue to hold EU citizenship because of their Danish nationality. This territory left the EU, but did not separate from a Member State, showing how EU citizenship is linked to nationality, not to a territory.

For this reason, it is necessary to determine how nationality issues will be settled in a scenario of State succession following separation of part of the territory of an EU Member State. Questions on nationality are to be governed by internal law of the States involved. Nevertheless, certain restrictions are imposed by

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<sup>2</sup> Declaration on nationality of a Member State, annexed to the Treaty of Maastricht, 7 February 1992.

<sup>3</sup> Advisory Council for the National Transition, Government of Catalonia, 'Las vías de integración de Catalunya en la Unión Europea' (14 April 2014) <[http://www20.gencat.cat/docs/Departament\\_de\\_la\\_Presidencia/Ambits\\_actuacio/CATN/Informes\\_publicats/inf\\_6\\_vies\\_integracio\\_cat\\_ue\\_castella.pdf](http://www20.gencat.cat/docs/Departament_de_la_Presidencia/Ambits_actuacio/CATN/Informes_publicats/inf_6_vies_integracio_cat_ue_castella.pdf)> accessed 24 June 2014, 14-15.

international law<sup>4</sup>. To this effect, the International Law Commission's Draft Articles on nationality of natural persons in relation to the succession of States must be taken into consideration<sup>5</sup>, together with the principles enshrined in international conventions such as the European Convention on nationality of 1997 or the Council of Europe Convention on the avoidance of statelessness in relation to State succession of 2006<sup>6</sup>. Once each State involved in a succession of States has enacted legislation on nationality according to the rules contained in these instruments<sup>7</sup>, the population of the primary State could be divided into three groups.

A first group would be composed of those persons preserving the nationality of the predecessor State. They will maintain their status as EU citizens in their capacity of nationals of a Member State. A second group of people will acquire the nationality of the successor State. Since, as a consequence of the separation from a Member State, the newly created States would cease to belong to the EU<sup>8</sup>, its nationals will become third-country nationals for EU law purposes in case they lose the nationality of the predecessor State in conformity with international rules. It would be possible indeed for the successor State to make the attribution of its nationality dependent on renunciation to the previous one, while the predecessor State may also provide that persons acquiring voluntarily the nationality of the successor State shall lose its own nationality<sup>9</sup>.

Nonetheless, there would also be possible, depending on the internal legislation of each State, to preserve both nationalities, giving rise to a third group of people composed of holders of dual nationality. In the debates that are being held in Catalonia and Scotland, dual nationality has been in fact proposed as a good solution on the basis of family, social, cultural, economic and affective connections, highlighting at the same time the fact that this will ensure their status of

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<sup>4</sup> See Marie Isabel Torres Cazorla, *La sucesión de estados y sus efectos sobre la nacionalidad de las personas físicas* (Universidad de Málaga, 2001).

<sup>5</sup> UN General Assembly Resolution 55/153, 12 December 2000.

<sup>6</sup> In force since 1 March 2000 and 1 May 2009, respectively. None of the EU Member States affected by secession debates - Spain, United Kingdom or Belgium - have ratified these conventions.

<sup>7</sup> Art. 6 ILC's Draft Articles on nationality. As the EU is not able to grant its citizenship independently, EU law must not regulate or foresee the effects of a State succession on this issue.

<sup>8</sup> See Araceli Mangas Martín, 'La secesión de territorios en un Estado miembro: efectos en el Derecho de la Unión Europea' (2013) 25 *Revista de Derecho de la Unión Europea* 47.

<sup>9</sup> Art. 9 and 10.1 ILC's Draft Articles on nationality. See also art. 11.

EU citizens<sup>10</sup>. Applicable international or domestic rules could lead to consider that the effective nationality is the one from the new State on the basis of a criterion of domicile or residence. However, as the ECJ has set, the competences of the Member States on nationality are to be exercised “having due regard to [EU] law”, that is, to guarantee the *effet utile* of EU law and the fundamental freedoms of its internal market<sup>11</sup>. The effective nationality for EU law purposes will always be the nationality of the Member State<sup>12</sup>.

An alternative scenario would also be likely: the non-recognition of the newly created State entity by the pre-existing State after secession *stricto sensu* or unilateral secession. As the rules on the effects of State succession are only applicable to a succession occurring in conformity with international law<sup>13</sup>, the international principles referred to above on determination of nationality shall not apply. Individuals from the seceding territory would still be considered nationals of a Member State and thus EU citizens.

The second question that needs to be addressed in this section relates to the effects of State succession on EU citizens from other Member States who reside in the separating entity at the time of independence. Obviously, their status as EU citizens would not be altered, since it depends on the nationality of a Member State. Nevertheless, this assertion requires to be nuanced when it comes to the rights associated to the status of EU citizenship. It is true that the right to enjoy protection of diplomatic and consular authorities of any Member State in a third country in which the Member State of nationality is not represented would not be affected<sup>14</sup>; neither would the so-called ‘improper EU citizens’ rights’, that is the right to petition to the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language<sup>15</sup>. As far as the right to free movement and residence is concerned, EU

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<sup>10</sup> El Mundo, ‘Junqueras aboga por la doble nacionalidad por “el lazo emocional con España”’ (22 September 2013); Scottish Government, ‘Scotland’s Future: Your Guide to an Independent Scotland’ (26 November 2013) [www.scotland.gov.uk/Publications/2013/11/9348/0](http://www.scotland.gov.uk/Publications/2013/11/9348/0) accessed 24 June 2014, 271ff.

<sup>11</sup> Case C-369/90 *Micheletti* [1992] ECR I-4239, para10.

<sup>12</sup> See also Case C-122/96 *Saldanha* [1997] ECR I-5325, para15, where the Court stated that the mere fact that a national of a Member State has also the nationality of a third country, in which he resides, does not deprive him of Community-based rights.

<sup>13</sup> Art. 3 ILC’s Draft Articles on nationality; art. 6 Vienna Convention on Succession of States in respect of treaties, 1978; art. 3 Vienna Convention on Succession of States in respect of State property, archives and debts, 1983.

<sup>14</sup> Art. 20.2.c) and 23 TFEU.

<sup>15</sup> Art. 20.2.d) and 24 TFEU.

citizens will obviously lose it in the territory of the seceding entity, at least on the basis of EU law, something that will not prevent the newly created State from granting rights of free movement to EU citizens under its internal law. The exercise of the freedom of movement 'within the territory of the Member States' requires citizens, of course, to move to a Member State in the first place.

The residence in an EU Member State is also an indispensable condition to exercise the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections, at least as far as EU law is concerned. The Treaties enjoin Member States to confer the right to vote in EP elections to EU citizens residing in a Member State, without requiring this right to be conferred on EU citizens residing abroad. This will depend on the national legislation of the Member State of origin<sup>16</sup>, as EU law does not preclude it either. These lessons clearly arise from ECJ case law on EU citizens residing in OCTs, that can be applied *a fortiori* to third countries<sup>17</sup>.

## **2. Role of the concept of EU citizenship in State succession**

The most controversial issue raised by the connections between EU citizenship and secession relates to the so-called theory of the 'internal enlargement' of the EU. According to this approach, advocated by some pro-independence positions, the new States would not have to apply for EU membership on the basis of article 49 TEU but instead would be considered members of the EU uninterruptedly after their separation from their respective Member State<sup>18</sup>. The concept of EU citizenship is used as an argument to support this theory, since it is argued that the ECJ, developing its case law on the issue, could set that the deprivation of this status and of the individual rights associated to it would serve to oppose the automatic exit of these territories from the EU.

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<sup>16</sup> See Jean-Thomas Arrighi et al., 'Franchise and electoral participation of third-country citizens residing in the European Union and of European Union citizens residing in third countries' PE 474.441 (*European Parliament study*, 2013).

<sup>17</sup> Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paras 52-57.

<sup>18</sup> Advisory Council for National Transition (n 3), 34ff; Jordi Matas i Dalmases, 'The Internal Enlargement of the European Union' (2010) Centre Maurits Coppieters <<http://irla.cat/documents/the-internal-enlargement-of-the-EU.pdf>> accessed 24 June 2014; The Guardian, 'Alex Salmond insists independent Scotland would remain in EU', (28 April 2014). In favour of a succession by both Scotland and the remaining UK to the UK's existing membership of the EU, see A. O'Neill, 'A quarrel in a faraway country? Scotland, independence and the EU' (*Eutopia law*, 14 November 2011) <<http://eutopialaw.com/2011/11/14/685/>> accessed 24 June 2014.

This approach is however difficult to follow<sup>19</sup>. As will be argued in the following lines, the ECJ case law on EU citizenship, and more specifically its *Rottmann* case, is not well-suited to this effect<sup>20</sup>.

In this case, the Court recalled, as stated in several judgments<sup>21</sup>, that ‘citizenship of the Union is intended to be the fundamental status of nationals of the Member States’<sup>22</sup>. Bringing to mind the *Micheletti* formula, the Court accepted that the deprivation of the nationality of a Member State and therefore of EU citizenship constitutes a situation governed by EU law<sup>23</sup>. Therefore, it can be argued, in our context, that the loss of nationality of an EU Member State *ex lege*, as a consequence of voluntarily acquiring the nationality of the separating State, i.e. a new third State, would fall within the ambit of EU law because that would imply the loss of EU citizenship. The fact that the case would have a collective dimension rather than an individual one does not seem to make a difference<sup>24</sup>.

However, having an EU dimension did not entail that the controversial national measure in *Rottmann* was contrary to EU law. The deprivation of nationality was considered to be legitimate because of deception used in acquiring nationality; this withdrawal was validated in international law<sup>25</sup>; it was not an arbitrary act; and, finally, the legitimacy of the measure was upheld even when the deprivation of nationality meant the loss of EU citizenship, provided that it was in conformity with the principle of proportionality<sup>26</sup>. This principle implies, in this context, that the consequences for the individual and his family with regard to the loss of citizenship rights, the seriousness of the offence, the lapse of time between naturalization and withdrawal,

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<sup>19</sup> James Crawford, Alan Boyle, ‘Opinion: Referendum on the Independence of Scotland – International Law Aspects’, (UK Government, December 2012) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf)> accessed 24 June 2014, 104ff; Spanish Ministry of Foreign Affairs and Cooperation, ‘Por la convivencia democrática’ (2014) <[www.exteriores.gob.es/Portal/es/SalaDePrensa/ElMinisterioInforma/Paginas/Noticias/20140206\\_MINISTERIO1.aspx](http://www.exteriores.gob.es/Portal/es/SalaDePrensa/ElMinisterioInforma/Paginas/Noticias/20140206_MINISTERIO1.aspx)> accessed 24 June 2014, 104.

<sup>20</sup> The position of the ECJ on the characteristics of the EU legal order (‘whose subjects comprise not only Member States but also **their** nationals’, Case 26/62 *Van Gend en Loos* [1963] ECR 3 [emphasis added]) has also been underlined to support the automatic succession to EU membership.

<sup>21</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast* [2002] ECR I-7091, para 82; Case C-148/02 *García Avello* [2003] ECR I-11613, para 22.

<sup>22</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449, para 43.

<sup>23</sup> *Ibid.* para 42.

<sup>24</sup> Phoebus Athanassiou and Stéphanie Shaelou, ‘EU Accession from Within? – An Introduction’ (2014) *YEL* 1, 22-23.

<sup>25</sup> Art. 7.3 1997 European Convention on nationality and art. 8.2.b) 1961 Convention on the reduction of statelessness.

<sup>26</sup> *Rottmann* (n 22), paras 50-55.

and the possibility to recover the original nationality were to be taken into account<sup>27</sup>.

Applied to our subject, the following question could be posed: if a withdrawal of nationality that may even lead to statelessness might be justified, wouldn't that be also the case when the loss of nationality is the consequence of a voluntary acquisition of another nationality? A measure entailing the *ex lege* loss of nationality in this case would also be validated in international law<sup>28</sup>, and the proportionality would be easier to justify than when the adverse consequence is statelessness<sup>29</sup>.

AG Maduro, in its Opinion to the *Rottmann* case, also considered that it was not impossible to deprive a person of nationality where such deprivation would entail the loss of Union citizenship. Otherwise, that would exclude the competence of Member States to regulate nationality and lead to the 'paradoxical solution whereby the secondary would determine the primary: maintenance of Union citizenship would serve as a basis for demanding maintenance of the nationality of a Member State'<sup>30</sup>. This would be contrary not only to art. 20 TFEU, but also to the respect of national identities (art. 4.2 TEU) and the loyal cooperation principle (art. 4.3 TEU)<sup>31</sup>.

In this context, it could also be interesting to refer to another line of case law, in which the ECJ excluded 'national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'<sup>32</sup>. These cases concern national immigration measures ordering the expulsion of a third-country national, parent of a child holding EU citizenship. These measures were considered to be contrary to art. 20 TFEU, since that would mean to force an EU citizen to abandon the Union and not be able to exercise the essence of EU citizenship, i.e. free movement and residence. However, in my view, this reasoning would not be applicable to the situation we are tackling as, in cases of secession, EU citizens strictly speaking are not deprived of the rights associated to EU citizenship, e.g. residence in the EU, but instead lose the nationality of a Member State which is the basis of that status. The deprivation of rights is thus a consequence of

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<sup>27</sup> Ibid. para 56.

<sup>28</sup> See art. 7.1.a) 1997 European Convention on nationality.

<sup>29</sup> Athanassiou and Shaelou (n 24), 23.

<sup>30</sup> Case C-135/08 *Rottmann* [2010] ECR I-1449, Opinion of AG Poiares Maduro, para 24.

<sup>31</sup> Ibid. para 25.

<sup>32</sup> Case C-34/09 *Zambrano* [2011] ECR I-1177, para 42; Case C-434/09 *McCarthy* [2011] ECR I-3375, para 47; Case C-256/11 *Dereci* [2011] ECR I-11315, para 64; Joined cases C-356/11 and 357/11, *O.S.* [2013] OJ C26/11, para 45.

the loss of the status, without following the logic of making EU citizenship not effective.

We can be critical about the approach taken by the ECJ in cases such as *Rottmann* for not being sufficiently courageous to uphold the autonomy of EU citizenship with regard to the acquisition and loss of State nationality<sup>33</sup>. However, at this point of development, EU law cannot give a different answer to the questions we are addressing here.

Nonetheless, the most important obstacle against the idea of using EU citizenship in favour of the "internal enlargement" of the EU is that, even if it could be possible to recognize some acquired rights for individuals on the basis of this status, that would not grant the new State – a political organization which lacks any acquired rights – the automatic membership of the EU<sup>34</sup>.

Another possibility to justify the preservation of EU citizenship by nationals of hypothetical new States could be an argument based on a possible customary rule of automatic succession to treaties on human rights binding on the predecessor State<sup>35</sup>. As the ECtHR has stated, 'fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession'<sup>36</sup>. The treaty in question would be the EU Charter on Fundamental Rights, whose Title V enshrines EU citizens' rights<sup>37</sup>. Certain objections may however be presented against this argument too. Firstly, this hypothesis of automatic succession is not a consolidated rule in customary international law<sup>38</sup>. Secondly, the newly created States could recognize the rights in the Charter to all EU citizens, but that would not support the recognition of their nationals as EU citizens by EU Member States. EU citizenship is not defined in the

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<sup>33</sup> For an in-depth discussion on the *Rottmann* case, see J. Shaw (ed.), 'Has the European Court of Justice challenged Member State sovereignty in nationality law?' (2011) 62 EUI Working Paper <[http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS\\_2011\\_62.corr.pdf?sequence=3](http://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3)> accessed 24 June 2014.

<sup>34</sup> Ignacio Molina, 'Independientismo e integración europea (I): la imposible adhesión automática a la UE de un territorio secesionado' (2012) 80 *ARI* Real Instituto Elcano <[www.realinstitutoelcano.org](http://www.realinstitutoelcano.org)> accessed 24 June 2014, 8.

<sup>35</sup> See Yves Gounin, 'Les dynamiques d'éclatements d'États dans l'Union européenne: casse-tête juridique, défi politique' (2013) 4 *Politique étrangère* <<http://politique-etrangere.com/2014/01/06/les-dynamiques-declatement-detats-dans-lunion-europeenne-casse-tete-juridique-defi-politique/>> accessed 24 June 2014, 21, n 28.

<sup>36</sup> *Bjelic v Montenegro and Serbia* App no 11890/05 (ECHR, 28 April 2009), para 69.

<sup>37</sup> Art. 39 to 46.

<sup>38</sup> See A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?' (2003) 14(1) *EJIL* 141. For an opposite view, see M.T. Kamminga, 'State Succession in Respect of Human Rights Treaties' (1996) 7 *EJIL* 469.



Charter and the rest of Member States would continue to define it by reference to art. 20.1 TFEU, and thus to Member States' nationality. Thirdly, although the political and residence rights linked to EU citizenship might be considered as fundamental rights, would that be the case of EU citizenship in itself? In any case, this argument of automatic succession to treaties on human rights would not be useful for upholding the theory of 'internal enlargement', as EU Treaties as a whole cannot be considered treaties on the protection of human rights<sup>39</sup>.

Consequently, EU citizenship is not suitable to sustain an automatic succession to EU membership by new States created after the separation of part of the territory of an EU Member State<sup>40</sup>. A hypothetical independence of Scotland or Catalonia from the United Kingdom and Spain, respectively, will entail their exit from the EU. In case of being interested in being part of the EU, these newly created States would need to apply for accession, following the procedure regulated in art. 49 TEU.

In particular, this would mean the end of the enjoyment of EU citizenship and the rights associated to it by the individuals who lose the nationality of a Member State. Would it be possible, for nationals of the hypothetical new States, to retain the essence of that status, i.e. the right to free movement and residence in the EU? Apart from the option of applying for EU membership, the only alternative, in my view, would be the signature of an international agreement between the EU and the new State in order to extend freedom of movement in reciprocal terms. Nevertheless, the demanding requirement of unanimity in Council, needed for accession, could not be avoided, since an association agreement would be required<sup>41</sup>. In my view, it would not be feasible to deduce implied external competences from the free movement rules of the Treaties, as the conclusion of international agreements with third countries does not seem to facilitate the objective of EU competences on this issue. Neither the use of implied external competences on immigration would be possible for these purposes, since the logic of free movement differs from the one on migration<sup>42</sup>. Consequently, the

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<sup>39</sup> Gounin (n 35), 21, n 28.

<sup>40</sup> In a similar vein, see M. Medina Ortega, *El derecho de secesión en la Unión Europea* (Marcial Pons, 2014), 108.

<sup>41</sup> Art. 217 and 218.8 §2 TFEU. In addition national ratification of the agreement may be called for in case of 'mixity', as it is usually the case with association agreements. However, see, for a controversial exception, the negotiations of a Stabilization and Association agreement with Kosovo, COM (2012) 602 and European Commission, MEMO/13/938, 28 October 2013.

<sup>42</sup> For a discussion on this question, see Paula García Andrade, 'Privileged Third-Country Nationals and Their Right of Free Movement and Residence to and in the EU:

legal basis of the association – art. 217 TFEU – constitutes the only external competence susceptible of extending freedom of movement to third-country nationals, as it allows the EU to include in this kind of agreement commitments ‘in all the fields covered by the Treaty’<sup>43</sup>.

### **Concluding remarks**

The effects that a hypothetical secession of a part of the territory of a Member State may have on the status of EU citizenship, now enjoyed by its nationals, and also the most controversial question of what impact this concept may have for the so-called "internal enlargement" of the EU merit particular attention in the debate around the independence of territories such as Scotland and Catalonia. Put it simply, individuals who lose the nationality of a Member State would lose EU citizenship and the rights associated to it, while that loss of EU citizenship, still not autonomous from Member State nationality, would not allow the new States to circumvent the accession procedure to the EU. For these reasons, there is a need, in my view, of a sincere and honest debate, whereby the specific consequences of independence on the status of individuals should be correctly explained, avoiding misleading arguments not always based on the current legal context. Nevertheless, we might also concentrate on the positive side of things. In times of existential crisis, this debate shows that the EU project and its benefits matter and are seen by its citizens as a valuable and cherished conquest.

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Questions of Status and Competence’ in Elspeth Guild, Christina. J. Gortázar Rotaeché, Dora Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Brill-Nijhoff 2013), 121ff.

<sup>43</sup> Case 12/86 *Demirel* [1987] ECR 3719, para. 9.

# Secession and the Loss of Rights for EU Citizens

Annette Schrauwen\*

In the Scottish and Catalanian debates on independence EU citizenship has been invoked as a prism through which to view secession as internal enlargement of the EU. One could qualify this as a mere strategic position. Nevertheless, this positive view on the potential of the concept of EU citizenship, though not shared by the EU itself, is quite remarkable and could not have been foreseen when the Maastricht Treaty introduced the concept. The likelihood that such a view becomes reality is rather small, as Paula Garcia Andrade shows in her contribution to this series of think pieces. It seems therefore inevitable to look at secession as exit from the EU. Whereas the procedure for withdrawal provided for in Article 50 TEU obliges the Union to try to negotiate for at least two years an agreement, also taking into account the future relationship EU-withdrawing State, it is arguably not applicable in the case of secession because the procedure can only be set in motion by a Member State – a status which a seceding entity does not possess. The lack of a legal EU framework for secession renders thinking about consequences for individual EU citizens within the scope of secession rather speculative, but very necessary if we want people to cast an informed vote on independence.

This short paper discusses possible scenarios following secession, and tries to reflect on some of its consequences individual citizens might have to face when Scotland or Catalonia become independent. The first section of the paper assesses the consequences of possible approaches of nationality law of both the predecessor and the seceding polity for the status of EU citizens. It continues by looking at what might happen to individuals affected by secession both living in the seceding state (section 2) and living in Member States of the EU (section 3). A final section will look at possible ways to remedy loss of EU citizenship rights.

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Before we start our assessment, one remark on the role of EU citizens in the process of secession itself needs to be made. Depending on national law, EU citizens residing in the seceding territory may or may not participate in the decision to secede. In Spain, only nationals can participate in a referendum.<sup>1</sup> For Scotland, Section 2 of the *Scottish independence referendum (franchise) bill* not only entitles British citizens, Commonwealth citizens and citizens of the Republic of Ireland resident in Scotland, but also citizens of other EU countries resident in Scotland to vote in the independence referendum.<sup>2</sup> This can be explained by the fact that eligibility to vote is based on the franchise at Scottish Parliament and local government elections as set out in section 2 of the (UK) Representation of the People Act 1983. However allowing these citizens to participate in such a fundamental political and constitutional choice shows a very positive approach to the political rights attaching to EU citizenship.<sup>3</sup> Furthermore, it is an explicit recognition that the position of EU citizens residing in Scotland will be affected by secession.

## 1. Nationality law and secession

Article 20.1 TFEU accords citizenship of the Union to nationals of the Member States. It implies that retaining or losing EU citizenship after secession all depends on nationality laws and it is very unlikely that loss of previous nationality will not cause loss of EU citizenship. It is no wonder that the separatists point at double nationality as the best available option. For now, both Spanish and British nationality law make that possible. Spanish nationality law does not cause loss of Spanish nationality if within three years after acquisition of a new nationality a declaration to retain Spanish citizenship is submitted.<sup>4</sup> However, that declaration is not necessary if the new nationality is that of South-American countries, Portugal, Andorra, Philippines or Equatorial Guinea. The likelihood that Spain would add Catalonia to this 'community of Ibero-American nations' is rather speculative. On the other hand, withdrawing Spanish nationality would imply recognition of Catalonia as independent State, which for now seems a very unlikely path. UK nationality rules are quite complex and recognize different

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<sup>1</sup> See <http://eudo-citizenship.eu/electoral-rights/comparing-electoral-rights?application=ElectoralRightsNonCitizen&p=&search=1&modeby=country&country=Spain> (last visited 1 July 2014).

<sup>2</sup> <http://www.scottish.parliament.uk/S4/Bills/Scottish%20Independence%20Referendum%20Franchise%20Bill/b24bs4-aspassed.pdf> (last visited 1 July 2014).

<sup>3</sup> J. Shaw, EU citizenship and the edges of Europe, CITSEE working paper 2012/19, available from [www.law.ed.ac.uk/citsee/workingpapers](http://www.law.ed.ac.uk/citsee/workingpapers), p. 9.

<sup>4</sup> Article 24 of the civil code as reformed by Ley 36/2002, of 8 October.

types of citizenships, where British citizens, and not other British nationals, are EU citizens.<sup>5</sup> British citizens can renounce their nationality, but will not lose it upon acquisition of a new nationality.

Of course, double nationality would also have to be accepted by the seceding entity. The statements made by those in favour of secession hint indeed at accepting double nationality and in such a case the nationals of the seceding States will retain their EU citizenship status and furthermore, for EU law purposes the effective nationality will always be the nationality that brings EU citizenship with it.<sup>6</sup> But the solution of dual nationality does not necessarily guarantee preservation of EU citizenship status for a longer term. Needless to say that for dual British-Scottish nationals, EU citizenship will be lost in case the UK decides to leave the EU. Furthermore, next generations might lose the status as most nationality laws have set limits to the perpetuation of generations of nationals living abroad. Article 24.3 of the Spanish Civil Code provides that children born abroad from a Spanish father or mother also born abroad will lose the Spanish nationality when the country of residence attributes them its nationality, unless they declare their will to retain it within three years of their attaining majority or emancipation.<sup>7</sup> In general, a person born outside the UK to a British citizen otherwise than by descent is born a British citizen by descent. Thus, British citizenship by descent generally lasts one generation.<sup>8</sup>

Both the UK and Spain could change their nationality laws with respect to dual citizenship. Though the point of reference for the CJEU in dealing with nationality is no longer state sovereignty but shifts towards EU citizenship as a status worthy of protection,<sup>9</sup> the European

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<sup>5</sup> Most recently Declaration on nationality by the UK no. 63 annexed to the Lisbon Treaty. See also Case C-192/99 *Manjit Kaur* [2001] ECR I-01237.

<sup>6</sup> See also Paula Garcia Andrade in her contribution to this series, p. 3.

<sup>7</sup> Nationality legislation in Spain has remained strongly anchored in the paradigm of a country of emigration, and has a strong focus on the links with Spanish communities abroad, see R. Rubio Marín a.o., *Country Report: Spain. Revised and updated November 2012* EUDO Citizenship Observatory Country report, RSCAS/EUDO-DIT-CR2012/11, p. 1. Emancipation from parental authority comes upon achieving majority, when a minor marries, with consent of those exercising *patria potestas*, or with judicial authorisation.

<sup>8</sup> Section 2 British Nationality Act 1981. See also C. Swayer and H. Wray, *Report on United Kingdom. Revised and updated November 2012* EUDO Citizenship Observatory Country report, RSCAS/EUDO-CI-CR 2012/04, p. 22. There are exceptions for persons whose parents retain a connection with the UK through a residence period or when the parent is a member of the armed forces or diplomatic staff.

<sup>9</sup> S. Mantu, *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives* PhD thesis, Nijmegen, especially Chapter 5.

proportionality principle that limits state powers of citizenship withdrawal does not seem to oppose such a change. As predecessor States UK and Spain may provide that those acquiring voluntarily the nationality of the new state will lose their previous nationality. If they do, nationals of the newly created states would indeed lose EU citizenship status and the enjoyment of free movement and residence rights in EU member states.<sup>10</sup> The only way to guarantee EU citizenship status for citizens of the seceded states would be accession to the EU.

## 2. (Former) EU citizens in the seceding State

In case the nationals of the new states would have double nationality and keep their EU citizenship status, they would be both nationals of the new states and EU citizens living in third countries. In such a case, they would profit from all the rights and benefits of EU citizenship in the EU member states, but not necessarily in their own, new state.

Arguably, there would also be a category of EU citizens not acquiring the nationality of the new state, depending on how nationality law of the new states defines its potential citizens. Does it consist of only citizens of the predecessor State residing in the seceding territory and having opted for the new nationality, or is the option to voluntarily take on the new nationality open to all those who have been residents for a certain amount of time? In any case, those retaining EU citizenship status will lose the rights attached to that status in the new State. Their residence status would become entirely dependent upon the internal law of the new State, as would be their right to work in the new State. The internal law of the new State could indeed grant free movement and equal treatment rights to EU citizens, and even provide that development of the *acquis* and interpretation of the relevant provisions by the CJEU will be followed by courts in the new State. It would of course curtail the new State's freedom to issue legislation that is divergent from that of the EU, and hence create an illusion of sovereignty.<sup>11</sup> Obviously, the courts of the new States would have no possibility to address preliminary questions to the CJEU.

In case the nationals of the new State lose their former nationality, the rights they acquired while working in other EU States are at jeopardy. The right to be joined by family members with the nationality of a third country upon return to the new State no longer

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<sup>10</sup> Paula Garcia Andrade, as cited above, p. 2-3.

<sup>11</sup> A similar approach, but then on a voluntary basis and in the context of bilateral agreements, can be found in the EU-Swiss agreements. See R. Schwok, "Switzerland's Approximation of its Legislation to the EU *acquis*: Specificities, Lessons and Paradoxes", *European Journal of Law Reform* 9 (2007), p. 449-466.

falls under EU law and thus would depend on the internal law of the new State. Again, internal law could follow EU law in this respect.

Regulation 883/2004 with respect to social security would no longer apply in case nationals of the new State lose their nationality.<sup>12</sup> Even though the acquired rights are defined with respect to the possession of the nationality of a Member State at the time of the employment and the payment of the contributions,<sup>13</sup> the payment of benefits acquired under the social security system of one or more Member States is guaranteed only to persons who reside in the territory of a Member State.<sup>14</sup> The effects of non-application concern both EU citizens and non-EU citizens alike. As a consequence, the payment of pensions and other social security benefits such as pre-retirement benefits or family benefits for which contributions were paid during employment in an EU Member State is no longer a matter of EU law, but becomes dependent on the national legislation of the Member State where the contributions were paid and might result in deductions or limitations as long as no agreements have been signed between the new State and the respective EU Member State.

### 3. Citizens of the new States in EU Member States

In case citizens of the new States obtain dual nationality and hence retain their EU citizenship status, they keep enjoying the free movement and residence rights attached to that status when they reside in other EU States than that of their former nationality. In case these citizens lose their former nationality, they will become third country nationals for EU law purposes in the entire EU. The consequences would be rather drastic, similar to those for British expatriates if the UK leaves the EU that Steve Peers qualified as leading to a status that would be 'solitary, poor, nasty, brutish and short'.<sup>15</sup> *In concreto*, it means that travelling into the EU might become more cumbersome, as the EU would be free to impose visa requirements. Though it seems unlikely the EU would impose visa requirements,

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<sup>12</sup> Article 2 of the Regulation limits its scope to nationals of a Member State, stateless persons and refugees residing in a Member State.

<sup>13</sup> Case 10/78, *Belbouab* [1978] ECR 1915 with respect to former Regulation 1408/71 (now Regulation 883/2004).

<sup>14</sup> Case C-105/89, *Buhari Haji* [1990] ECR I-4232, with respect to former Regulation 1408/71 (now Regulation 883/2004).

<sup>15</sup> S. Peers, 'What happens to British expatriates if the UK leaves the EU?' *EU Law Analysis blog*, 9 May 2014, available from <http://eulawanalysis.blogspot.nl/2014/05/what-happens-to-british-expatriates-if.html> (last visited 3 July 2014). The examples he gives, some of which are mentioned here, equally apply to citizens of the new States.

stricter border controls in order to verify the purpose of the visit to the EU can be expected. Access to employment in the EU will be more difficult, as third country nationals are subject to possible quotas and no longer benefit from EU-preference rules in labour migration. There would be no mutual recognition of diplomas and qualifications under EU law in case nationals of the new State enter the labour market of a EU Member State. It cannot be excluded that a part of the nationals of the new States, if they become unemployed, will be obliged to return to the new states and apply for social benefits. High skilled workers might have to apply for a Blue Card. Students can no longer benefit from equal treatment with respect to tuition and admission rules. Those already residing in a EU Member State for a longer period might want to apply for long-term resident status under EU law, but will be subjected to integration and language tests in a number of Member States. Similar tests plus possible waiting periods can be applicable for family reunion with non-EU nationals (including the family members of their own new State). In case there is an option between keeping former nationality and retaining EU citizenship status on the one hand, and acquiring the nationality of the new State on the other, those residing in the EU might thus be tempted to keep their former nationality. Again, Regulation 883/2004 no longer applies to the social security rights they might have acquired in the seceding State before they moved to a EU Member State.

Crossing borders to visit family in the (new) home State equals leaving the Schengen area and would be subject to whatever requirement the new State imposes. In any case, Schengen visa would not apply to the seceding States, which could make it less attractive for tourists from outside the EU to include the seceding States in a tour through Europe – an argument that the tourist industry in Catalonia should be aware of.

#### **4. Negotiating free movement**

The most secure way for the seceding States to guarantee EU citizenship rights to their nationals would be a quick accession to the EU. The unanimity required by Article 49 TEU makes such a quick accession unlikely, as especially Spain is unwilling to acknowledge secession. A next best option would be to negotiate an agreement with the EU on free movement in reciprocal terms,<sup>16</sup> though a similar argument with respect to unanimity in the Council applies.<sup>17</sup> Nevertheless, an Agreement with the EU seems the only path to take

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<sup>16</sup> See also P. Garcia Andrade, as cited above, p. 7.

<sup>17</sup> Article 217 j° 218.8 TFEU.



because, as we have seen above, the unilateral decision of the seceding States to apply the *acquis* and follow the legislative and jurisprudential developments in the area of free movement of persons cannot guarantee the acquired EU rights of nationals of the new States. Therefore, it seems wise to try to have such an agreement as soon as possible after secession.

Some inspiration might be found in both the European Economic Area Agreement and the EU-Swiss Agreement on free movement of persons. The Free Movement of Persons Agreement with Switzerland provides in its Article 16 that 'the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European [Union] to which reference is made are applied in relations between them'. Furthermore, if the application of the Agreement involves concepts of EU law 'account shall be taken of the relevant case-law of the Court of Justice of the European [Union] prior to the date of its signature'.<sup>18</sup> Article 6 of the European Economic Area Agreement<sup>19</sup> is similar, but provides in firmer terms that provisions in the Agreement identical to those of the [EU] Treaties 'shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the [EU] given prior to the date of signature of this Agreement'. Thereby, future divergent developments are not excluded, and a similar provision in an agreement between the EU and the seceding State would at least leave some leeway for the non-EU party to regulate free movement after secession.

The EEA agreement also contains a provision to protect acquired rights in case developments within the EU are not followed and application of acts affected by the divergent development is suspended under the Agreement.<sup>20</sup> According to the Agreed Minutes annexed to the Final Act, the Contracting Parties agreed that in such a case acquired rights, but not expectations only, would be protected.<sup>21</sup> Seceding States might want to negotiate a similar approach to free movement of persons and acquired rights within as short a time limit as possible. Meanwhile, protection of acquired rights will depend on how

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<sup>18</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, OJEC L114/6 of 30.4.2002.

<sup>19</sup> Agreement on the European Economic Area, OJEC L 1/3 of 3.1.1994.

<sup>20</sup> Article 102.6 EEA Agreement.

<sup>21</sup> OJEC L1/556 of 3.1.1994.

European and national judges apply principles of good administration such as equality, fairness, and legal certainty.<sup>22</sup>

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<sup>22</sup> In his Conclusion on *Belboubab* (as cited), AG Capotorti argued for interpretation of European social security law in light of the general principle of non-discrimination, [1978] ECR 1915 at 1931.

# The Frisians as an Indigenous Minority Group within a Unified Europe

Jan Willem Sap\*

## 1. Introduction

In September 2013, following years of preparation and competition, an international jury awarded the title of 'European Capital of Culture 2018' to Leeuwarden-Friesland (Ljouwert-Fryslân). The people of Leeuwarden, the capital of the Dutch province of Friesland, were elated. This would be their opportunity to present the unique Frisian culture to the world, and to play their part in demonstrating Europe's rich cultural diversity. In what sense can the Frisians claim greater autonomy for themselves and their region?

## 2. The Europe of the regions

It is not the politicians and bureaucrats in The Hague who know most about the region's language, culture and its finely meshed structure of eleven small cities and hundreds of villages: it is the Frisians themselves. Any claim to greater autonomy is, of course, not based on the 'purity' of the Frisians as a Germanic tribe. That would imply a questionable form of racism. Criteria such as race, bloodlines or any other biological characteristics should play no part in policy. Rather, the key factor is opposition to the idea of the 'cultural melting pot' and the mass culture of the major cities. Needless to say, cities such as Amsterdam do have a culture. In an organic sense, however, the strength of that culture is diluted because it seeks to be cosmopolitan in nature. The large cities are becoming ever more similar, their people, markets, shops virtually indistinguishable. In this respect, it is fitting that Leeuwarden-Friesland has been named European Capital of

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Culture. We might ask whether the title is an appropriate way to promote a *regional* culture. No previous holder has attempted to do so, and yet it was by virtue of its deliberate regional focus that Friesland's bid emerged victorious.

As the importance of national borders wanes and the opportunities for cultural individuality increase, there is a risk that nationalist factions will attempt to exploit separatist sentiments. It is not so very long ago that 'ethnic cleansing' was seen in Europe. In the light of the lowering of economic borders and the increasing mobility of European citizens, we must ask whether separatism is in keeping with the desire to foster stronger ties between the nations and people of Europe. Has adequate thought been given to the consequences for the member states which remain after a region has gone its own way? If Scotland wishes to declare independence, the entire British nation could fall apart, its constitutional stability destroyed along with the solidarity of the British people. Belgium is also at risk from the negative consequences of confederalization. The Belgian nation state is a unique marriage between the Flemish and the Walloons. It is, and should remain, the responsibility of both.

The development of the internal market has greatly diminished the significance of national borders. At the same time, a democratic juridification of power has taken place across those borders, with common legislation enacted by the European Commission, the Council of the European Union and the directly-elected European Parliament. The process has been bolstered by the concept of European citizenship, established in 1993 by Article 20 TFEU. This ongoing transnationalization at the expense of individual sovereignty does not chime with the concept of a 'Free State of Friesland', in which the Frisians themselves would take all decisions affecting their territory. Such an arrangement reflects a desire for a simple unity which has never actually existed and, given the increased individualization of society, now appears undesirable. Fortunately, one heart can have many loves. Prominent national politicians such as Jelle Zijlstra and Wim Duisenberg were proud Frisians, but they also regarded themselves as Dutch and as European. Moreover, the majority of Frisians recognize that the nation state of the Netherlands, as a member state of the Union, serves to uphold the ideals of rule of law. The Frisians are aware that the Union respects the territorial integrity of its member states, the 'masters of the treaties' (Article 4 (2) TEU). If a newly independent Scotland wishes to accede to the Union in its own right, all other member states must approve a change to their number.

### **3. The right of self-determination**

A community is made up of people with a common history. It becomes a 'nation' when its members are aware of their specific individual characteristics and wish to preserve them. This ideal can be pursued at several levels: an exclusive national community within a larger constitutional whole, a nation state, a national community made up of the majority of citizens of that state, or a national group representing a minority of citizens. In each case, the constitutional system (and hence the government) must create conditions whereby the characteristics of the national identity, such as religion, language and culture, can be freely expressed and practised within the constraints of law, order and public safety. Within the nation state, there must be room and opportunity for the national communities to develop and prosper. However, this does not necessarily entail devolution or independence. After all, people are not tied to the state by virtue of common characteristics or national sentiments, but by the legal concept of citizenship.

The right of self-determination can be justly claimed where the state itself is oppressive, or there is an oppressive majority within the state. However, this right can never transcend or supersede the human rights of the people. Opportunities to exert the right of self-determination can be created in various ways.

-If the members of a minority live together as a group, as in the case of the Roma for example, the obvious course of action is to allow them to take responsibility for matters of religion, education, language and culture by means of their own non-governmental organizations, based on common interests and solidarity.

-Where there is a clear concentration, as in the case of Frisians in the province of Friesland, the right of self-determination can prompt greater autonomy for the region as a whole. It may be appropriate to give the Frisians primary decision-making responsibility in areas such as religion, education, language and culture, again based on common interests and solidarity. Given the open nature of today's Europe, however, this should be subject to the proviso that pluriformity must be preserved at the regional and local levels. Not everyone who lives in Friesland is a Frisian. Even among those who are, there are differences in dialect which must be respected. The way in which autochthonous minorities are allowed to preserve their culture can be seen as an important measure of the democratic character of Europe.

-If a community forms part of a larger society in which it is oppressed by the majority, whereby it is impossible for its members to express their own identity, the right of self-determination may

indeed give just cause for independence and liberation, provided the due democratic process is observed. That process should be undertaken under the auspices of an international organization such as the Council of Europe.

That the Frisians do indeed have a national identity has been apparent for some two thousand years. A version of the *Lex Frisionum*, the Law Code of the Frisians, is purported to have been produced on the orders of the emperor Charlemagne. There is some dispute regarding the exact provenance; some scholars date the Code to 793 AD, others to 802, while some contend that it actually dates from the twelfth century.

Based on the principle of self-determination, and in the context of a 'Europe of the regions', it is understandable that the identity of the Frisians calls for some definition if it is to be duly acknowledged. The same applies to their territory, the 'Frisian Lands by the Sea'. Frisians are not 'Hollanders' and they are not (only) Dutch. The Frisians form a national minority in the sense intended by the Framework Convention on National Minorities. They are entitled to describe themselves as Frisian in official documents, a right conferred by Article 15 of the United Nations Universal Declaration of Human Rights. Despite the dominance of the far more prosperous and densely-populated Holland to the west and south, Friesland has always devoted attention to its regional culture. It has steadfastly resisted being subsumed by the mass culture. With regard to the role of the European Union, Article 3 TEU states: "[The Union] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced". Similarly, Article 22 of the Charter of Fundamental Rights of the European Union states: "The Union shall respect cultural, religious and linguistic diversity." Minority languages within the Union will become a matter of increasing importance in the years ahead, not least for NGOs.<sup>1</sup>

The idea of regarding the state and the nation as a single, inseparable entity gained prominence in the nineteenth century. Efforts were made to introduce a standard 'civilized' Dutch language. Minority languages were seen as irrational, part of an obsolescent tradition which should be consigned to history. The European Charter for Regional or Minority Languages now establishes the position and rights of their speakers. The Dutch government is obliged to respect and protect the use of the Frisian language in the province of Friesland. It

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<sup>1</sup> <http://epthinktank.eu/2013/05/25/eu-minority-languages-in-danger> (accessed 11 June 2014).

appears on road signs and is taught in schools. Pop groups who sing in the Frisian language have achieved nationwide success.

In the quest for a definition or description of the Frisian minority, the *Groep fan Auwerk*, invited to an expert meeting with the Council of Europe on 25 February 2009, proposed the following: 'An autochthonous, national minority (ethnic group or minority) with its own cultural characteristics (nature, history and language[s]), living in two countries on the south-eastern coasts of the North Sea.' The *Groep fan Auwerk* is a movement which champions an independent state of Friesland and supports federalism because it brings people closer to each other and to their region.<sup>2</sup> An interesting feature of the Frisian culture is that it is not confined to the province of Friesland. While the province is its main focus in the Netherlands, the Frisian nationalists lay claim to parts of the provinces of Groningen and Drenthe, and perhaps even part of Noord-Holland, originally extending as far as Dunkirk to the west. Eastern Friesland is a coastal region in the northwest of the German federal state of Lower Saxony, while there is also a Northern Friesland in Schleswig-Holstein. It can be argued that the Frisian territory extends into southern Denmark.

Historic claims or arguments of a geographic nature are no justification for redrawing the borders. One factor which may be of significance, however, is the manner in which the Dutch government has responded to the Province of Groningen's legal claim for compensation further to gas exploration in the region. The Dutch state profits from Northern gas but invests primarily in the west and south: the Randstad conurbation. The Dutch state is being accused of creating its own poor regions. The *Groep fan Auwerk* contends that the Frisian regions do not enjoy equal opportunity for growth and development.<sup>3</sup>

Will the Frisians make independence an electoral issue as the Scots and Catalans have done? Ever since the signing of the Union of Utrecht in 1579, the Frisians have been citizens of the state of the Netherlands and, as such, are important bearers of both the Dutch national identity and that of Friesland. Even the Dutch royal family is descended from the Frisian 'stadthouders'. The Eleven City Tour, a skating race held whenever conditions permit, has become a key

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<sup>2</sup> See Article 1 of the European Charter for Regional and Minority Languages: "[the term] 'regional or minority languages' means languages that are: 1) traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and 2) different from the official language(s) of that State. It does not include either dialects of the official language(s) of the State or the languages of migrants."

<sup>3</sup> Groep fan Auwerk, 'Frisian National Unity', 25 February 2009, Expert meeting Council of Europe, [www.groepfanauwerk.com/homelharksitting.html](http://www.groepfanauwerk.com/homelharksitting.html) (accessed 30 May 2014).

element of the national culture. Nevertheless, the Frisian identity should be better described in official documents and the national Constitution. This is something that the Provincial Authority of Friesland might usefully pursue, supported by a referendum among all residents of the province. It also seems appropriate for representatives of Friesland and the Frisians to take a more prominent role at all levels of government: local, regional, national and European.

Efforts to establish the regional identity are necessary because the position of national minorities has been seriously eroded. There has been an ongoing process of centralization, driven in part by the development of the welfare state. That state leaves no one to their own devices, not even the cultural minorities. The preservation and transfer of cultural values has, if anything, become even more difficult as families and villages are dispersed. The Dutch state has a duty to ensure that the unique Frisian culture is preserved

#### **4. Free Frisians within the Kingdom**

In principle, each member state is free to organize its own constitutional matters as it sees fit. If part of a member state becomes independent and the resultant new state seeks accession to the Union, it must accept and observe all the fundamental treaties agreed and ratified by the member states in the past. A newly independent Friesland would not be bound by the terms of those treaties until it becomes a member state in its own right. Rather, it would be what is termed a 'third country'. Following independence, the Frisians would lose their European citizenship and the rights it confers, unless the Netherlands allows them to retain Dutch citizenship.

As a third country, independent Friesland would be eligible to apply for EU membership under the procedure established by Article 49 TEU, provided it respects the values set out in Article 2 TEU. The application must be approved by all members of the European Council, including the recently 'decapitated' Netherlands. The resulting agreement must then be ratified by each individual member state and by the prospective member state itself. In short, it is a lengthy process beset by many uncertainties, including those of an economic nature. Scotland intends to pursue a different route, invoking Article 48 TEU which allows the original treaties to be amended. However, this approach takes insufficient account of the overall objectives of the treaties and the vision of the European Council.

The Frisians form a national minority and are sometimes subject to discrimination. A shop assistant was compelled to speak Dutch even though she was working in a 90% Frisian speaking area.



Parents are advised not to speak Frisian to their children as it may 'damage' them. Some children are 'losing' the language because they feel that it's not useful or that they will be seen as impolite if they do not speak Dutch.<sup>4</sup> In this respect, it will be appropriate for the Netherlands to extend the decentralization process to allow the Frisians greater autonomy. In view of the potential problems, however, and in order to counter any undue influence on the part of nationalists, populists and Eurosceptics, an interesting option may be to consider a form of autonomy which allows the people of Friesland to retain their Dutch citizenship. There is a precedent in the form of the relationship established between Aruba and the Kingdom of the Netherlands following the former's secession from the Netherlands Antilles on 1 January 1986. Aruba then became 'a free state within the Kingdom'. In time, Friesland might opt to develop its own constitution, whereby the degree of independence will be determined by the people themselves through a series of referenda. However, because the region would remain part of the Kingdom, and its people protected by the Statute for the Kingdom of the Netherlands of 1954, the citizens of Friesland would remain full citizens of the Netherlands, entitled to consular protection. As such they will also be citizens of the European Union, with all the rights and privileges that entails in terms of equal treatment, free movement and the right of representation at the European level.<sup>5</sup> Based on this concept of 'special status' within the Kingdom of the Netherlands, the Dutch government will be obliged to do more to protect the Frisian culture. Central government might, for example, opt to reinstate the ancient University of Franeker, founded in 1585 and in existence until 1811, to replace the Leeuwarden campus of the University of Groningen.

## 5. Conclusions

Centuries of cooperation have established a very close bond between Friesland and the Netherlands. Within a unified Europe, Friesland is in a position to pursue further development as a cultural region in its own right. Regionalization must not be viewed from the perspective of a 'people' in the ethnic sense, but more in terms of public justice, respect for democracy, human rights, solidarity and shared responsibility. In

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<sup>4</sup> Kinga Gál, Davyth Hicks and Kata Eplényi, *Traditional Minorities, National Communities and Languages. The issues raised in the European Parliament's Intergroup, 2009-2011*. Brussels-Budapest: Kinga Gál, 2011, p. 37. See <http://www.poliglotti4.eu/docs/Publis/2255.pdf> (accessed 11 June 2014).

<sup>5</sup> That Brussels does allow changes is demonstrated by those enacted by the Kingdom of the Netherlands on 10 October 2010.

the international context, this entails the ongoing pursuit of peaceful relationships between states and regions, cooperation, collaboration, interdependence and integration. Solidarity implies an attitude of openness rather than isolation, respect rather than rejection. Solidarity and respect must weigh more heavily than separatism *unless* a national minority is subject to actual oppression. The Frisians, as well as their language and culture, are entitled to greater respect and protection. Central government should support Frisians in their communication with public authorities. It should promote the use of the regional language in the media, in education and in the courtroom. Separatism will then be entirely unnecessary. In the forthcoming referenda in Scotland and Catalonia, the electorate must look beyond the immediate regional interests. They must also think in terms of greater unity between all the member states, peoples, communities and citizens of the European Union.