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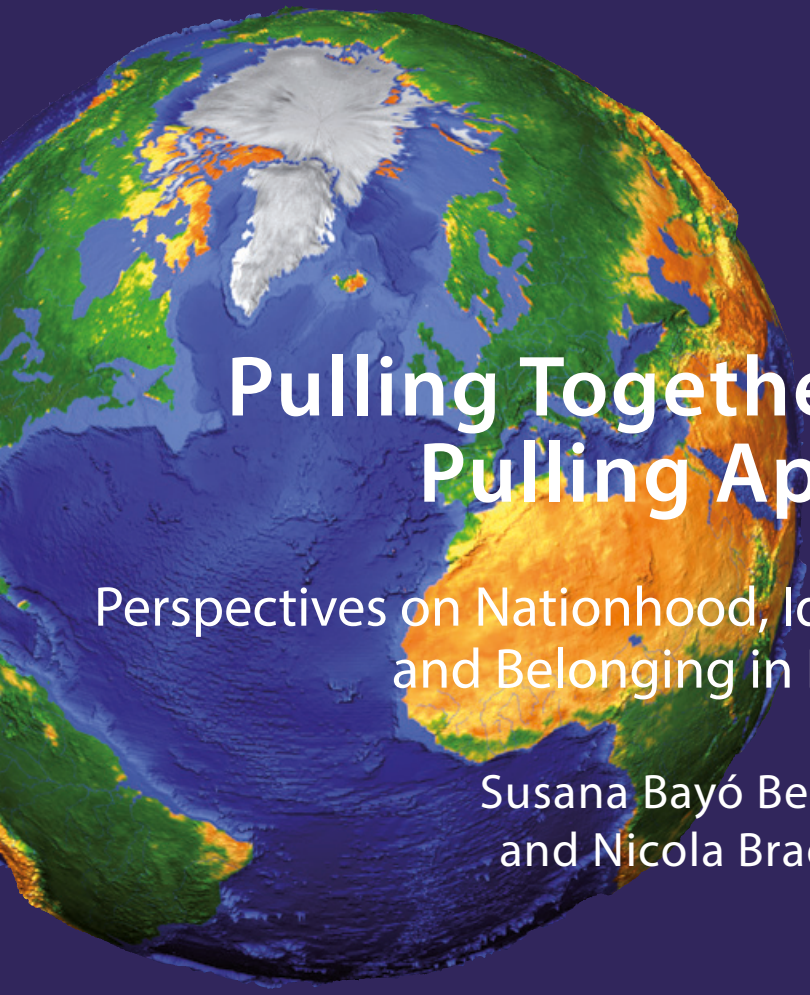

Pulling Together or Pulling Apart?

Perspectives on Nationhood, Identity, and Belonging in Europe

Susana Bayó Belenguer
and Nicola Brady (eds)

Peter Lang

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In the aftermath of the twentieth century's raging warfare, attempts were made to create an environment in which new relationships between European nations could be built around a common identity. Yet, in the twenty-first century, identity conflicts are gaining a new intensity in parts of the continent. In the analysis of some sub-state nationalist parties, the prospect of European Union membership reduces the economic and political risks of secession. Meanwhile, to the east, any moves towards expansion of EU membership are viewed by Russia not as a peace project but as acts of aggression. This volume assembles a series of comparative and single-area case studies drawn from different academic disciplines. While interrogating the history of identity conflict in the European context, an essential component of efforts to reduce such conflicts in the future, the authors bring an array of methodological approaches to analyses of the many intersecting political, cultural and economic factors that influence the formation of nationhood and identity, and the resurgence of nationalism.

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Nationalism's kingdom is frankly of this world, and its attainment involves tribal selfishness and vainglory, a particularly ignorant and tyrannical intolerance […] nationalism brings not peace but the sword.

— Carlton J. H. Hayes

Identity is revealed to us only as something to be invented rather than discovered; as a target of an effort, 'an objective'; as something one still needs to build from scratch or to choose from alternative offers and then to struggle for and then to protect through yet more struggle.

— Zigmunt Bauman

The disappearance of nations would have impoverished us no less than if all men had become alike, with one personality and one face. Nations are the wealth of mankind, its collective personalities; the very least of them wears its own special colours and bears within itself a special facet of divine intention.

— Aleksandr Solzhenitsyn

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ABSTRACT

In their recent drives for full self-determination, separatist actors in Catalonia and Scotland have taken for granted their regions' continued membership of the European Union after independence. Is such an assumption warranted? This chapter tries to provide an answer by looking at the arguments put forward by the actors involved and at the relevant literature, especially the legal arguments on the status of a territory seceding from an EU member state. It highlights the highly political nature of this situation and presents alternative scenarios concerning the two cases. It concludes that, although final outcomes will depend on the characteristics of each self-determination process, it is likely that an interim solution preserving at least some core substantive elements of the rights and duties attached to EU membership over the territory of these two regions is likely to be agreed upon pending the results of negotiations on a permanent settlement.

Introduction

In recent years Catalonia and Scotland have been in the news because of the growing strength of movements calling for independence. A self-determination referendum was held in Scotland in September 2014 and, although the No side won, 45 per cent of voters indicated their preference for an independent Scottish state. In Catalonia, a long process of confrontation with the Spanish state on the organization of an independence referendum (declared illegal by the government in Madrid and legitimate by the Catalan executive) led to an unrecognized vote on the issue being held on 1 October 2017. This saw the heavy-handed intervention of the Spanish police, a 'temporarily suspended' declaration of

independence on the part of the Catalan president Carles Puigdemont, and the Spanish government's subsequent application of article 155 of the Constitution aimed at taking control of the Catalan autonomous executive. Several Catalan pro-independence leaders were prosecuted and some jailed while others, among them Carles Puidgemont, fled abroad.

Separatist actors have predicated their drive for self-determination upon the slogan 'Independence in Europe'. In other words, they have presented the Union as a means of minimizing the disruption brought about by secession and of taking greater advantage of the opportunities offered by the single market. Yet, in doing so, they have taken for granted their region's continued membership of the European Union after independence. Is such an assumption warranted?

This chapter tries to provide an answer by looking, first, at the arguments put forward by the actors involved, that is, the political parties campaigning for independence, the governments of the states they belong to and the representatives of the European Union (EU), the European Commission in particular. Then, the chapter examines the relevant literature, especially the legal arguments on the status of a territory seceding from an EU member state. In that section, it focuses on both the domestic and international law regimes, aiming at establishing which state would be the rightful successor to EU membership and what procedure would then be engaged in to redefine its relationship with the EU. It highlights the highly political nature of this situation and deals with such political aspects in more detail. The chapter finally presents alternative scenarios concerning the specific cases of Catalonia and Scotland.

Currently, demands for full self-determination are still made by large swathes of the population in both Catalonia and Scotland. This chapter argues that, although final outcomes will depend on the characteristics of each self-determination process, it is likely that, regardless of the concrete legal procedure that might be followed, an interim solution preserving at least some core substantive elements of the rights and duties attached to EU membership over the territory of these two regions – notably with regard to the single market – is likely to be agreed upon pending the results of negotiations on a permanent settlement. While events may overtake some specifics within this chapter, the outline of the debates as well as the basic principles under discussion will remain valid.

The Debate over EU Membership of Scotland and Catalonia

The SNP's case for independence in Europe is an old propaganda argument. The point was first made by Jim Sillars (1989), influential SNP member, in his seminal pamphlet *Independence in Europe*, where he argued that, contrary to Tory thinking, Scotland would not be expelled from the EU as soon as it declared independence. Sillars pointed to the absence of precise rules about secession within the Community's legislation and, therefore, to the necessity to flexibly accommodate such a situation within the existing treaties. To reinforce his argument, he also referred to the case of Greenland – which left the EU after long negotiations while remaining part of Denmark – and the (then forthcoming) process of German reunification that, he suggested, 'could be accommodated without the need for serious disruption to the Community' (Sillars 1989: 33). Furthermore, quoting the 1978 Vienna Convention on the Succession of States in Respect of Treaties, Sillars argued that Scotland's independence would entail the dissolution of the UK and the rise of two new independent states, Scotland and the rump-UK, both successors to the UK membership of the EEC (Sillars 1989: 34).

The SNP's arguments have not changed much since. Almost every manifesto after 1989 took for granted Scotland's continued EU membership (SNP 1992, 1994, 1997b, 1999, 2005, 2009, 2011) and the observations made above were reiterated in the most complete publication on the subject, the 1997 pamphlet entitled *The Legal Basis of Independence in Europe* (SNP 1997a). The debate flared up again in the months preceding the 2014 independence referendum. In this context, the SNP's reasoning focused on two versions of the arguments already illustrated: as Scottish citizens have been members of the EU and the EEC for about forty years, it would be against the democratic principles of the EU to strip them of the rights so acquired; and, given the lack of any procedures to deal with issues of secession within the EU, Scotland's membership would be negotiated within the Treaties, notably through the application of art. 48 of

the Treaty on the European Union (TEU) (see Maddox 2012a; Scottish Government 2013: 216–24).

The position of different UK governments has not changed much since the SNP adopted the 'Independence in Europe' slogan, that is, Scotland would cease to be a member of the Union as soon as it declared independence and would need to reapply. In the run-up to the referendum, David Cameron's government stated through the Scottish Office that it had been 'consistent and clear in its view that an independent Scotland would most likely need to seek re-entry into the EU on renegotiated terms' (quoted in Maddox 2012b). This position was later confirmed in the first of a series of UK government papers supporting the case for the Union in the run-up to the referendum (Secretary of State for Scotland 2013). Nevertheless, no UK major politician assumed a confrontational stance towards Scotland's EU membership. Furthermore, nobody implied that the UK, as an EU member state (at that time), would stand in Scotland's way, either by vetoing her entry or opposing automatic membership or a kind of fast-track application procedure.

When studying Catalan nationalism one does not find, until very recently, any full-fledged arguments about the issue of Catalonia's membership of the EU and this is because the Catalanist movement has until recently been dominated by its autonomist wing, represented by *Convergència i Unió* [Convergence and Union] (CiU), rather than its separatist offspring, *Esquerra Republicana de Catalunya* [Catalan Republican Left] (ERC). Therefore, the debate is just in its infancy and the arguments in favour of an automatic entry scenario are not as developed as in the case of Scotland. In this respect, it is quite telling that, when making the case for automatic Catalan membership of the EU in a speech held in Brussels on 7 November 2012, Catalonia's former president and leader of the CiU, Artur Mas, did not use any legal arguments in favour of such automatic membership, but rather asked the EU to take into account the democratic will of the people of Catalonia and – in his words – to 'not let us down' (Mas 2012). A more complete reasoning was delivered by Oriol Junqueras, leader of ERC, in a televised debate with the Spanish Minister of Foreign Affairs Juan Maria Margallo on 23 September 2015 (Catalan TV channel 8TV). There, Junqueras based his position in favour of Catalonia's continued EU

membership on two principal arguments. First, there were no provisions in the EU Treaties for the automatic exclusion from the EU of a seceding territory of a member state. Second, after independence, and unless they explicitly rejected it, Catalan citizens would still hold Spanish citizenship and therefore EU citizenship. More than that, having enjoyed EU citizenship for about thirty years, Catalan citizens had acquired rights and duties that could not be forfeited, since EU citizenship has assumed an expansive character in the context of EU legislation and jurisprudence.[1]

Unlike the reaction of the British government to Scotland, Madrid's response to Catalonia's call for self-determination has been deliberately confrontational. Prime Minister Mariano Rajoy called the drive for independence 'madness of colossal proportion' (quoted in Moffet 2012, see also Mateo and Diez 2017), while the People's Party member and vice-president of the European Parliament, Aleix Vidal Quadras, along with two members of the military, invoked article 8 of the Constitution whereby the Army should 'guarantee the sovereignty and independence of Spain, defend her territorial integrity and constitutional order' (Diez 2012). More recently, major Spanish parties united in their opposition to an independence referendum that they considered illegal (Diez and Mateo 2017). With regard to Catalonia's EU membership, the consistent position of the Spanish authorities has been that upon independence Catalonia would immediately be excluded from the EU and would have to reapply in the same way as any other external candidate (see Torres 2016).[2]

In 2004, in answer to a question by the Welsh MEP Eluned Morgan about the consequences of independence for a secessionist region's EU membership, the then president of the European Commission Romano Prodi affirmed that

> when part of the territory of a Member State ceases to be a part of that state, e.g. because that territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the

1 The full video of the debate is available at: <https://www.youtube.com/watch?v=5tdyg9ff1SU> accessed 27 September 2017.

2 See also Margallo's position in the televised debate (note 1).

> treaties would, from the day of its independence, not apply anymore on its territory. (European Commission 2004)

Talking to the BBC on 12 September 2012, his successor, José Manuel Durão Barroso, asserted that 'a new state, if it wants to join the European Union, has to apply to become a member like any state' (quoted in Carrell 2012). Such a scenario, later labelled by some as the 'Barroso theory', had been hinted at a day before by a Commission spokesman, Olivier Bailly, who pointed out that 'there are two different steps, there is a secession process under international law and the request for accession to EU member state under the EU treaties. In the meantime, of course, the new country is not part of the EU as he [*sic*] has to make request for accession' (quoted in Carrell 2012). Finally, the president of the European Commission, Jean-Claude Juncker stuck to this line of reasoning when quoting verbatim Prodi's citation above in a reply to a question by the liberal MEP Beatriz Becerra on 7 July 2017 (Pérez 2017).

Therefore, despite its reluctance to provide final answers and its tendency not to state its views 'on matters which, as things stand, are purely hypothetical' (European Commission 2007), the rare pronouncements of the Commission, and some other EU representatives, seem to confirm that secessionist regions will most likely have to reapply, although there probably will be room for flexibility in choosing the precise procedure to be followed. According to some EU officials, for instance, the new states could be asked to reapply, but could retain a passive membership. This means that throughout the application procedure – which might take some years – they could still enjoy the advantages of membership but without having a seat at the European Council (Fontanella-Khan, Stacey, and Buck 2012).

Legal Arguments in Favour of and against Continued Membership

In this section we will briefly review the legal arguments made by the separatist parties mentioned above and assess their validity with reference

to the existing literature. The analysis is divided into three parts. The first looks at the domestic constitutional laws of Spain and the United Kingdom in order to evaluate whether the independence of Catalonia and Scotland would represent cases of secession from or rather dissolution of the parent state and which part would be considered as the rightful successor in international law. The second section focuses on the peculiar characteristics of the European Union, which is considered to have established a new constitutional order different from general international law, and on what would be the procedure followed to deal, in general terms, with the case of a territory seceding from an EU member state. The third section leaves the domain of international law and looks at the more political aspects of the issue.

Secession and Succession in Domestic and International Law

The argument that the independence of Scotland would involve a revision of the Treaty of Union and, consequently, the dissolution of the United Kingdom of Great Britain and Northern Ireland implies that the 1707 Acts of Union, establishing the United Kingdom of Great Britain as the Union of England and Scotland, enjoys the status of fundamental law and cannot be modified by an Act of Parliament, but should follow a special procedure. This, however, is not confirmed by practice. When Ireland seceded in 1922 and formed the Irish Free State, the United Kingdom of Great Britain and Northern Ireland simply succeeded to the United Kingdom of Great Britain and Ireland. After all, English constitutional law is quite clear about it: Parliament is supreme and no Parliament can bind its successor. Furthermore, even if one does not take this principle as valid and relies on the Scottish theory of popular sovereignty – whereby the Acts of Union in fact constitute fundamental law and any amendment requires a special procedure that, being unknown in British constitutional law, could only be adopted by a democratic institution representative of

the Scottish people – the 1998 Scotland Act, establishing the Scottish Parliament as the representative institution of the Scottish people, provided that constitutional issues are matters reserved to Westminster. Hence, English constitutional theory prevails over Scottish and the independence of Scotland would not lead to the dissolution of the United Kingdom (Schieren 2000: 124).

The case of Catalonia is rather simpler in this respect. First, there is no equivalent of the Acts of Union in Spanish constitutional history, as Catalonia was absorbed under the Crown of Castile in 1716.[3] Although recognizing 'the right to autonomy of the nationalities and regions which make it up', article 2 of the Spanish Constitution declares 'the indissoluble unity of the Spanish nation' (Cortes Generales 1978: art. 2). Furthermore, the 2010 judgement of the Spanish Constitutional Court concerning the Statute of Autonomy voted by the Catalan Parliament in 2006 made it crystal clear that the Catalans may well call themselves a nation for political or cultural reasons, but this term has no legal value. Legally speaking, there is only one nation, Spain, while the Catalans are 'just' a nationality, and sovereignty lies with the Spanish people at large (Delledonne 2011: 8).

These considerations lead us to conclude that, from a domestic constitutional law perspective, Catalan and Scottish independence would represent cases of secession. But what about international law? Before looking at the issue in detail, there are two premises to be made. First, as confirmed by the International Court of Justice in its advisory opinion in regard to the accordance with international law of the unilateral declaration of independence of Kosovo, there is no general prohibition, in international law, of an act of declaration of independence (ICJ 2010). Most of the literature agrees that 'secession is neither legal nor illegal in international law, but a legally neutral act' (Crawford 1979: 268; see also Cassese 1995; Christakis 1999; and Higgins 1994). Second, there is no right to external

3 More precisely, Catalonia was under the Crown of Castile from the marriage of Ferdinand II of Aragon, of which Catalonia was part, and Queen Isabella I of Castile in 1469, but retained its autonomy until 1716. For a detailed history of Catalonia see Balcells, 1996.

self-determination either, except for former colonies and peoples subjected to foreign occupation (Buchheit 1978: 73–4).

Before looking at the practice of the UN in order to see how it dealt with similar cases, we need to examine another argument concerning the international law regime at large. The SNP has often suggested that the Vienna Convention on the Succession of States in respect of Treaties would confirm the claim that upon independence both Scotland and the rump United Kingdom would be treated equally – in this case both as successor states of the UK (UN 1978: art. 34.1). Yet, besides the fact that the SNP's reading could be questioned, the Convention, albeit in force, has been ratified only by twenty-two countries and, more fundamentally, not by the United Kingdom and most other EU member states. Therefore, it cannot be considered as being legally binding (Borgen 2010: 1027).

In 1947, confronted with the India–Pakistan split, the United Nations General Assembly's Sixth Legal Committee stated that in the case of secession the successor state automatically keeps its UN membership, while the new state has to apply (UNGA 1947). The difficulty lies in establishing who is the successor. Practice since then suggests that succession to membership occurs if the country claiming to be the successor state 'can establish sufficient legal identity with the former member' (Scharf 1995: 67). When in 1992 the Federal Republic of Yugoslavia (FRY) (made up of Serbia and Montenegro) claimed to be the rightful successor to the former Socialist Federal Republic of Yugoslavia (SFRY), the General Assembly, at the request of the Security Council, turned the claim down and asked the FRY to apply. The decision was justified on the grounds that the FRY was made up of only two out of six of the former constituent republics and represented only 40 per cent of the territory and 45 per cent of the population of the SFRY, which was therefore considered as dissolved. Earlier the same year, the UN had come to exactly the opposite conclusion when dealing with the dissolution of the Union of Socialist Soviet Republics (USSR). The Russian Federation's bid for succession to Soviet membership, involving a permanent seat on the Security Council, was secured on account of its considerable continuing coincidence with the territory, population, resources and administrative apparatus of the former Soviet Union (Scharf 1995: 43–66). The above cases thus show that

> in determining whether a potential successor is the continuation of a member or whether the member's international personality has been extinguished, the relevant factors include 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. (Scharf 1995: 67)

All of the above considerations seem to suggest that, in the case of Catalan and Scottish secession, the rump Spain and UK, accounting for most of the population, territory, resources and including the seat of government as well as the headquarters of the armed forces, would be considered the rightful successors to Spanish and UK membership of the EU.

Secession within the Legal Order of the EU

As many authors have pointed out, general international law is only of partial use with regard to issues of fragmentation within the EU. This is because the EU Treaties have given birth to a new legal order that has created rights and obligations for its member states as well as for the citizens inhabiting them (Tierney 2013: 383). Legal commentators have formulated two main positions concerning the EU membership of a territory seceding from a member state.

The first, probably formulated best by Happold (2000) and, more recently, by Crawford and Boyle (2013), consists in the conclusion that, upon independence, such territory will find itself automatically out of the EU and will need to reapply through the procedure set out by art. 49 TEU. In other words, the seceding territory will be treated like any other external country seeking accession, which will have to be ratified by all EU member states. The second, argued best by former judge of the European Court of Justice (ECJ) Sir David Edward (2013), outlines a different procedure whereby the secession of a territory of an EU member state will be dealt with as a case of

internal enlargement by means of a modification of the Treaties in accordance with art. 48 TEU. Let us take a look at both positions in more detail.

According to Happold, international treaties – those establishing the EEC/EU included – follow the moving treaty boundaries rule, that is, they are personal and not territorial, they apply to the members of the treaties and not to their territories. Hence, if a territory leaves a member state, the treaties no longer apply there. In his opinion, this would be shown by the case of Greenland, which, curiously enough, is often cited by separatist actors to prove that political expediency tends to prevail over the moving treaty boundaries rule. Greenland's departure from the Union – Happold asserts – had to be negotiated precisely because Greenland remained part of a member state (Denmark). Had it seceded from Denmark, negotiations would not have been necessary. Happold also cites the precedent of German reunification, which required no formal consent by the other member states, but was simply treated as a case of absorption of the German Democratic Republic by the Federal Republic, whereby, according to the moving treaty boundaries principle, the Treaties automatically applied to the new territory (Happold 2000: 32–3).[4] Along similar lines, in their analysis of the Scottish case, Crawford and Boyle (2013: 100) point to the fact that 'Scotland's position within the EU will depend on the EU's own legal order. But there are no legal rules within the EU that specifically govern whether it can automatically succeed to membership'. Hence, they conclude, 'on the face of the EU treaties and other indications, it seems likely that Scotland would be required to join the EU as a new Member State'. This conclusion mainly stems from the acknowledgement that the definition of the internal territory of EU member states derives from their own domestic constitution and not from the treaties making up the EU's legal order: '[N]o treaty amendment is therefore required simply as a result of a change to the borders of a state's territory' (Crawford and Boyle 2013: 101). Being automatically excluded from the jurisdiction of the EU, the seceding

4 Happold also mentions the case of Algeria, arguing that when this became independent in 1962 nobody dared argue that it should be granted EEC membership (Happold 2000: 33). Yet its peculiar context suggests not considering it as a precedent (Schieren 2000: 125).

territory would have to reapply like any other third party through the procedure detailed by art. 49 TEU. Yet they also add that

> all this is not to suggest that it is *inconceivable* for Scotland automatically to be an EU member. The relevant EU organs or Member States might be willing to adjust the usual requirements for membership in the circumstances of Scotland's case. But that would be a decision for them, probably made on the basis of negotiations; it is not required as a matter of international law, nor, at least on its face, by the EU legal order. (Crawford and Boyle 2013: 103)

In other words, the EU can still act flexibly according to political expediency, but this is not a legal requirement.

A different view is defended by Sir David Edward. Starting from the ECJ's assertion in *Van Gend en Loos vs. Nederlandse Administratie der Belastingen* (ECJ 1963), that 'to ascertain whether the provisions of an international Treaty extend so far in their effects, it is necessary to consider the spirit, the general scheme and the wording of those provisions' and noting that there is no provision dealing with the secession of an EU territory in the Treaties, Edward concludes that 'we must look to the spirit and general scheme of the Treaties' (Edward 2013: 1163). Here, four articles are key, that is, 2, 4 and 50 TEU, as well as article 20 of the Treaty on the Functioning of the European Union (TFEU) – with which we will deal in more detail below. Article 2 stipulates that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities', while article 4 provides that 'pursuant to the principle of sincere co-operation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties' and 'shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives'. Article 50, on the other hand, details the procedure that should be followed in the case of withdrawal of a member state from the EU and foresees the conclusion of a negotiated agreement between the Union and the state to disentangle the complex set of rights and obligations uniting these two entities. Given these premises, Sir David Edward dismisses the 'Barroso theory' already referred to whereby upon

independence a seceding region will find itself automatically out of the Union, and argues that there would be a legal obligation to follow a negotiated procedure akin to that described in article 50 (Edward 2013: 1165–7; for a similar position on the application of art. 50 see Chamon and Van der Loo 2014). This conclusion is further grounded on the following two points. First, it would be unreasonable to believe that the drafters of the Treaty thought it necessary to hold negotiations in the case of withdrawal of a member state and not in the case of separation of one of its territories. Second, Edward questions the plausibility of the Barroso theory in relation to its concrete application:

> [I]t seems to be assumed that – at the moment of separation or on some other unspecified date – the 'separating State', its citizens and its land and sea area would find themselves in some form of legal limbo vis-à-vis the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated. Until the moment of separation, they would remain an integral part of the EU; all EU citizens living in the separating State would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with that State. Then, at the midnight hour, all these relationships would come abruptly to an end. (Edward 2013: 1165–6)

Arguing that this is an absurd scenario, he concludes that before independence comes into force all the parties involved would have a legal duty to negotiate the new status of the seceding territory in accordance with the principle of 'sincere co-operation, full mutual respect and solidarity' enshrined in the Treaties (for a similar position see also MacCormick 2000: 735; Schieren 2000: 131–3) and this because 'maintaining the territorial and political integrity of the EU and the vested rights of its citizens is surely of greater importance than blind acceptance of the contestable doctrines of public international law' (Edward 2013: 1167).

The concept of European citizenship, introduced by art. 20 TFEU, plays a momentous role in the arguments of those scholars in favour of the internal enlargement scenario. As mentioned above, the EU legal order has established rights and duties not only for member states but also for citizens. The ECJ made clear already in 1963 that such rights and duties constitute a 'legal heritage' for EU citizens. Recent ECJ jurisprudence (see in particular *Ruiz Zambrano v Office national de l'emploi*, ECJ 2011), relying

on the notion of EU citizenship, has expanded such legal heritage so as to constrain national legislation when this might jeopardize the enjoyment of rights deriving from the status of individuals as EU citizens (Douglas-Scott 2014a: 16–18). Hence, although it is certainly not the case that automatic EU membership for a seceding territory would directly descend from EU citizenship rules, O'Neill (2011) argues that in the context of Scotland's independence, 'the question to ask is whether the CJEU [Court of Justice of the European Union] would consider that the fact that Scotland became independent required that all (or any portion) of the previous UK citizenry thereby be deprived of their acquired rights as EU citizens?' He, along with other jurists (see for instance Douglas-Scott 2014a: 19), concludes that the Court would most likely intervene to defend the acquired rights of EU citizens. Such a position has been criticized by Crawford and Boyle (2013: 104–8). Pointing out that EU citizenship is additional to citizenship of a member state and, relying on public international law rules, they have argued that upon secession, the successor state will withdraw its nationality (British or Spanish in our cases) from the inhabitants of the seceding territory, who will therefore be left solely with the nationality of the new state and, as a consequence, will lose EU citizenship. Yet, as argued by Barber, this is likely to trigger challenges in court which could eventually come before the ECJ, which could then 'conclude that the removal of European citizenship from such a large number of people runs contrary to European Law' (Barber 2014). Most notably, as argued by Tierney and Boyle (2014: 21) with regard to Scotland's case, 'the CJEU could intervene to declare a duty on both the institutions of the EU and the Member States to negotiate, in a spirit of sincere co-operation, to secure Scotland's full accession and to protect the interests of European citizens in the interim period prior to this formal accession'.

An Essentially Political Question?

The two views expressed above differ in that the first foresees the immediate egression of a seceding territory from the EU and a subsequent

procedure of reapplication, while the second argues that there is a legal obligation to negotiate the new status of a seceding territory with a view to minimizing disruption, both in terms of EU territorial integrity and the enjoyment of acquired rights by EU citizens. While the former envisages the application of art. 49 TEU regulating the admission of new members, the latter suggests that negotiations will follow the procedure outlined by art. 50 and art. 48 TEU, thus following an internal enlargement procedure through modification of the existing treaties.[5]

Yet the difference between these two views might not be so great in practice. Even Crawford and Boyle (2013: 98), who have otherwise expressed clear-cut and assertive opinions about a seceding territory's need to reapply for EU membership, have concluded that 'in practice, to an even greater extent than questions of state continuity or membership of the UN, the consequences of Scottish independence within the EU will depend on the attitude of other EU Member States and organs, and on negotiations'. To put it more bluntly, 'a purely legal view of the matter is of little use' (Gratius and Kai, quoted in Guirao 2016: 196).

In this connection, there is a growing consensus in the legal literature that after a pro-independence vote in a legal referendum – agreed by both the seceding entity and the central government of the successor state – the best interest of all actors would be to find a swift agreement that minimizes disruption (see Armstrong 2014: para. 39, Avery 2014, Douglas-Scott 2014b, Tierney and Boyle 2014: 11–12). Hence, even in the case in which a seceding territory would need to reapply for membership in accordance with art. 49, an interim status preserving 'core substantive aspects of the accession treaties' would most likely be agreed upon (Armstrong 2014: para. 39). Hence, regardless of the specific legal route that might be followed – either through art. 48 or art. 49 TEU – there seems to be a consensus that, while automatic EU membership of a seceding territory is likely to be ruled out, negotiations with a view to ensuring an interim status preserving key rights and duties associated with EU membership

5 For a halfway view, whereby the application of art. 50 will be followed by that of art. 49, see Chamon and Van der Loo (2014).

should be pursued, pending the results of negotiations aimed at obtaining a permanent outcome.

But what are these substantive elements? Guirao (2016) convincingly distinguishes between the three areas of: membership of the single market, membership of the Eurozone and EU citizenship.

The single market is probably the most rosy area for seceding regions, meaning that it is probably the area in which, even if the Barroso view should prevail from a legal perspective, it is most likely that a political solution will be found to preserve the integrity of the common market and thus guarantee the continuation, after independence, of the rights and obligations enjoyed by the citizens of the seceding unit before separation. This is because the integrity of the single market is one of the key goals of the EU, hence its members have not only an interest in trying to preserve it, but also an obligation to do so (Douglas-Scott 2014a: 12). Furthermore, past EU and EEC practice is in line with this privileged furtherance of the single market, even in the presence of political turbulence (see Guirao 2016: 206). Concretely speaking, the integrity of the single market could also be preserved by swiftly granting the seceding territory membership of the European Economic Area (EEA), as an interim solution pending negotiations concerning its internal or external procedure for full membership (Chamon and Van der Loo 2014: 627).

Continued membership of the Eurozone might be more complicated. As a matter of fact, euro currency membership requires EU membership. Hence, if a seceding territory, where the euro is already in use, were among those still awaiting accession according to art. 49, it might also have to switch to a different currency. Yet this would not necessarily be the case. The seceding territory and the EU could come to an agreement similar to that in force between the latter and Monaco, San Marino and Vatican City (Chamon and Van der Loo 2014: 628) or it could keep using the euro unilaterally, as does Montenegro, and even get liquidity from the European Central Bank (ECB) if its banks have subsidiaries in Eurozone countries (Galì 2014: 88). In this latter case, the greatest problem would be that the ECB would not act as a lender of last resort, which might entail huge risks in moments of economic and financial distress and increase the costs of borrowing in normal times.

The final question concerns the rights and duties acquired by the citizens of the seceding territory as a consequence of their status as EU citizens. Although, as we have seen above, such status is additional to citizenship of a member state, ECJ jurisdiction has ruled that even with regard to decisions pertaining to nationality the negative consequences for EU citizens should be diminished (see *Rottmann v Freistaat Bayern*, ECJ 2010). For instance, in the case of the bilateral agreement concerning the free circulation of people between the EU and Switzerland, it is asserted that 'rights acquired by private individuals shall not be affected. The Contracting Parties shall settle by mutual agreement what action is to be taken with respect to rights in the process of being acquired' (cited in Guirao 2016: 213). This does not mean that EU citizenship will be guaranteed in full no matter what, but rather that it is likely that both political negotiators and, possibly, the ECJ, will try to limit the upheaval caused by the secession of the concerned territory by guaranteeing continuity of some rights, most probably those linked to the single market.

Yet the specific procedure that would be followed and the agreement that would be hammered out would depend very much on the concrete circumstances of each secession process, which is why we look now, in more detail, at the cases we are concerned with here, that is, Scotland and Catalonia.

Scotland and Catalonia: Some Scenarios

Scotland and Catalonia are very different cases when it comes to secession. While the former region has seen its right to self-determination recognized by the UK government and a negotiated independence referendum has already been held – which allows us to think that any future popular vote on the matter will also be the result of an agreed procedure – the latter has faced the persistent opposition of the Spanish government, which has defined any independence referendums as illegal and taken concrete measures to prosecute the organizers of any such events.

Furthermore, the outcome of the vote held in June 2016 on UK membership of the EU complicated things further by initiating the Brexit process, which was initially supposed to end in March 2019, and during which most EU rights and obligations would remain in place (Asthana and Mason 2017; BBC 2018).

After the British elections held in May 2017, the Scottish National Party, which leads the Scottish regional executive, seemed to have put on hold the possibility of organizing a second independence referendum, which had been strongly demanded immediately after the results of the Brexit referendum (*The Economist* 2017). Although it is unlikely that a new independence referendum will be organized in Scotland, that could still be an option within the 2020 deadline recently agreed by the UK and the EU. Hence, we will take here two scenarios into account: that of a Yes victory in an independence referendum held while the UK is still officially enjoying, to the extent agreed to, the equivalent of EU membership rights; and that of a Yes victory in a referendum held after that date, that is, when (without unlikely but not impossible about-turns) the UK will definitively be out of the EU.

On the face of it, the first scenario might look similar to that which would have been realized had the Yes vote won in the 2014 Scottish referendum. It would have indeed been a case of fragmentation (Chamon and Van der Loo 2014: 614). The crucial difference is that now such a fragmentation would be negotiated as part of a wider process of EU contraction, which was not the case in 2014. Hence, there would be an additional interest and, according to the considerations made above, even a legal duty, on the part of EU member states and the Commission to conduct negotiation with the Scottish government with a view to preserving the integrity of the single market. The downside of this scenario is that the parallel process of Brexit, Scottish independence and redefinition of Scotland's position towards the EU would greatly increase the complexity of these concurrent processes, delay the achievement of any final agreement and amplify uncertainties. In this connection, the specific procedure followed can make a substantial difference and even lead to what Chamon and Van der Loo (2014) have called a 'temporal paradox'. If, after the application of art. 50, the procedure outlined by art. 49 is followed, that is, Scotland would have

to reapply as an external candidate, the region might find itself unable to initiate accession talks before having finalized its independence negotiations with the UK government, while in order to ensure a smooth transition to independence it would need precisely to begin such negotiations over its future status with regard to the EU. To avoid such a paradox, EU member states might decide to opt for the procedure outlined by art. 48, or internal enlargement, but this could be opposed by countries such as Spain which are having to deal with secessionist threats within their own borders (see for instance Rajoy's declarations in Torres and McTague 2017).

The argument whereby Spain or other EU countries could oppose Scotland's membership has often been made in public debates. In this context, whether the procedure described by art. 48 or art. 49 TEU is followed is not really relevant, since the final outcome would have to be agreed by all member states and thus Spain, or other countries, would be able to exercise their veto in both cases. However, a total opposition to Scottish membership is unlikely. In this connection, reference has often been made to the fact that five EU countries have not recognized Kosovo – Cyprus, Greece, Romania, Slovakia and Spain – because of their own internal minorities problems, and are therefore unlikely to accept any secession within the EU. Yet the comparison with Kosovo does not hold, since the problem with this latter case is the unilateral nature of the independence process there, rather than secession per se. Scotland's independence will be most likely agreed with the UK and therefore constitutes a very different case. Even a former Spanish Minister of Foreign Affairs (José García-Margallo y Marfil) stated that 'the constitutional arrangement in Britain is one and in Spain another, and [it] is up to them whether to separate' adding that 'no one would object to a consented independence of Scotland' (Murray 2012).[6] Hence, there is no reason why Spain should oppose Scotland's EU membership, provided that secession happens with the agreement of London (Ker-Lindsay 2012).

6 It is highly unlikely that the UK and/or Spain would oppose the application of their own regions if separation occurs consensually. If, on the other hand, the declaration of independence is unilateral, then opposition is almost certain.

What Spain and other countries can do, however, is to make it harder for Scotland to obtain membership. This means pushing for the procedure outlined by art. 49 instead of that engaged by art. 48, as well as hampering negotiations, notably with regard to the opt-outs currently enjoyed by Scotland as part of the UK. The result would probably come down to the sum of two opposite interests: on the one hand, that of most EU states to minimize the disruption brought about by the secession process (notably to the integrity of the common market) and to reduce, as much as possible, the contraction of the EU following Brexit; on the other, that of countries threatened by separatist movements to show these latter that independence is a risky affair and EU membership hard to win. Unfortunately for Scotland, the complexities of her application would offer Spain the opportunity to easily make the process more difficult without appearing uncooperative. As part of the United Kingdom, Scotland enjoys a number of opt-out options that would need to be renegotiated and would be hard to preserve. Furthermore, the Scottish government would face a true dilemma: the more substantive the derogations it would try to ensure, the longer the application process (Furby 2010: 5). There are six main problematic areas: the Schengen agreement, the euro, the UK budget rebate, the structural funds, fisheries and co-operation in the fields of justice and home affairs. The first seems to be the most complicated, as it threatens to force Scotland to impose customs controls at the border with England. In contrast, the euro might prove to be less troublesome than it seems at first glance, as Scotland could simply put off the adoption of the common currency indefinitely, as Sweden has done so far.[7] However, Scotland would almost certainly have to pay more for its membership and would get less back in terms of structural funds (Thorp and Thompson 2011: 10), but probably, given the importance of the fishing sector for its economy, it would be able to negotiate a better deal concerning rights in its territorial waters (Furby 2010: 5). Finally, it would likely have to agree to a full endorsement of the Union's legislation in terms of justice and home affairs, but this does not seem to be a major concern for the Scottish executive.

7 We do not deal here with the difficulties entailed by the necessity of adopting its own currency, or the limitations imposed by any decision to continue using sterling.

The second Scottish scenario we mentioned above seems not to be problematic. If Scotland secedes from the UK after the Brexit process is completed, it will already be a third party, hence, there seems to be little doubt that there would not be any negotiations to redefine its position towards the EU (since this would already be redefined by the Brexit negotiations) and the region would simply have to apply as an external candidate. After more than forty years in the EU club, it would certainly have a strong case and, one might believe, the process would be quite swift. But again, countries threatened by separatist movements could exploit the many complexities normally involved in these kinds of negotiations to slow down the process.

In the Catalan case we can discern two scenarios, although these are not linked to any process of EU exit initiated by the successor state, but rather to the way in which secession could be achieved. While the Spanish state has sternly opposed any attempt by the Catalan authorities to assert the region's self-determination by means of an independence referendum, the determination of local actors to go on with the independence process despite central opposition means that the possibility of a successful unilateral secession, although still remote, cannot be ruled out entirely. Therefore, the true question in the Catalan case is whether the attempt to obtain EU membership by an independent Catalan state would follow a consensual or unilateral path.

The first Catalan scenario is certainly the easier to deal with. If the Spanish state were ever to accept Catalonia's self-determination and recognize an eventual pro-independence vote, there is no reason to believe that it would oppose the region's bid for EU membership. In this case, the wider EU's interest in minimizing disruption might prevail and either the internal enlargement procedure would be engaged or some kind of interim agreement – or alternatively, accession to the EEA pending EU accession negotiations – would be sought. Things could be a little more complicated if the Spanish government's acceptance of Catalonia's secession were to occur only after a prolonged period of institutional conflict of the kind already seen. In this case, Spain might not be the only country unco-operative at EU level – other countries threatened by secessionist movements might also prove to be so, if only to show that a hard-line

secessionist policy does not pay. Once again, the result would depend on whether the EU members' interest in minimizing the disruption brought about by the secession process prevailed over the threatened countries' will to teach their own domestic separatist movements a lesson.

The scenario of Catalonia's unilateral independence is probably the less rosy in terms of avoiding disruption. Leaving aside all questions concerning the domestic consequences of such an event, there is no reason to believe that EU member states and institutions would have an interest in implicitly validating such a process by either recognizing an independent Catalan state or facilitating its accession to the EU. This is because territorial integrity is a key norm in international relations and international law, so much so that it generally prevails over self-determination, except in cases of colonization, foreign occupation or serious violations of human rights, none of which seems likely to apply to the Catalan case (see Cassese 1995: 317–23; Buccheit 1978: 73–4; Christakis 1999: 152–3; Higgins 1994: 111–28).[8] In other words, a unilateral secession does risk giving birth to a pariah state living in a juridical limbo.

Conclusion

In the last few decades, separatist movements in Catalonia and Scotland have campaigned to the sound of the slogan 'Independence in Europe', thus portraying separation as a smooth process that will not negatively affect the economic life of their regions and the welfare of their populations. The governments of the parent states and the central institutions of the EU, notably the European Commission, have generally replied by arguing that any secessionist territories will automatically be expelled from the EU upon independence, with obvious detrimental consequences for business activities and the welfare of the local populations.

8 Here, we do not take into account the scenario of a possible violent confrontation between the Spanish and Catalan governments, which might also entail such human rights violations.

This chapter has tried to assess the validity of both claims by looking at the existing international law literature as well as by examining the political aspects of this hypothetical fragmentation of the EU space. The principal conclusion is that, although nobody can foresee with a sufficient degree of certainty what would happen if and when one of these two regions declared independence, the scenario whereby all EU rights and obligations previously held by the citizens of these two territories will come abruptly to an end is unlikely at least for political, if not legal reasons. In our opinion, even if article 49 were to be preferred over article 48 as the guiding principle of the new redefinition of the relationship between the seceding territory and the EU (i.e. an external application will take precedence over an internal enlargement), an interim agreement preserving at least some substantive elements of the rights and duties currently enjoyed as EU citizens by residents of Catalonia and Scotland would be maintained, notably with regard to the integrity of the single market.

However, the process would not be at all as smooth and straightforward as depicted by separatist actors, but would rather be fraught with obstacles and uncertainties. Furthermore, it would decisively depend on the domestic peculiarities of each process of separation. On the basis of this consideration, we have proposed two scenarios for each case.

In the Scottish case, we have distinguished between two options: an independence process begun before the completion of Brexit and one initiated after it. While the latter is quite straightforward, since at that point Scotland would already be outside the EU and therefore with no reasonable alternative to an external application,[9] in the former scenario Scotland would enjoy the advantage of arguing its case at a time of 'contraction' of the EU territory, thus offering member states a possibility of reducing the disruption brought about to the integrity of the EU by Brexit. At the same time, the simultaneity of negotiations on Brexit, Scottish independence and redefinition of Scotland's status with regard to the EU would certainly increase the complexity and uncertainty of the process and might even lead to the temporal paradox highlighted by Chamon and Van der Loo (2014). Also, the

9 Whether this might be facilitated by Scotland's forty years of EEC/EU membership is an all too different question.

process of redefinition of Scotland's relationship with the EU might be made harder by EU countries facing domestic separatist threats, above all by Spain.

In the Catalan case, the dividing line lies in whether separation would be consensual or unilateral. If the former, the prospects of Catalonia facing a smooth accession procedure would seem to be higher, since Spain has been the most vocal country in calling for a rigid application of the external application procedure; but if the Spanish government comes to accept the independence of the region and negotiate it at the domestic level, it seems reasonable to believe that it would assume a more co-operative stance at the European level. In contrast, a unilateral declaration is likely to generate stern opposition not only on the part of Spain, but also on the part of most EU member states, since territorial integrity is a key norm in international relations and no country will have an interest in creating a precedent in this respect. One might argue that the fact that Kosovo has been recognized by most EU member states runs counter to such a conclusion. Yet one must bear in mind that the Kosovo case was accompanied by ethnic cleansing and other serious violations of human rights on the part of the Serbian government, which has not so far been the case in Spain – and hopefully it will not be for the foreseeable future. As argued by Guirao (2016: 215), 'pioneering voyages, as we all know, can end in glory or catastrophe' and as in the short term it seems highly unlikely that the Catalan government would manage to build up enough peaceful political legitimacy to get its independence claim recognized, a unilateral secession would probably lead to the latter.

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