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**Troubled Membership: Dealing with secession from a  
member state and withdrawal from the EU**

Edited by Carlos Closa



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
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EUI Working Paper **RSCAS** 2014/91

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## **Abstract**

This paper summarizes the debates held at a Round Table in the European University Institute on withdrawal from the Union and secession from an EU member state. The approach is not to look at domestic debates but to seek a European view on the topic. Four issues articulated the discussion: the normative arguments for and against secession/independence within the EU, withdrawal and its effects, the effects of secession/independence for EU member states and the impact for EU citizens of both processes of withdrawal and secession. The paper seeks no final conclusion but rather it aims at conveying different standpoints on the issues.

## **Keywords**

EU withdrawal, secession, independence, Scotland





## Presentation

The secession of a territory from an existing EU member state and the withdrawal of an existing member from the Union have become salient topics in the EU agenda. On the one hand, an increasingly assertive discourse and political demands for withdrawing from the EU have emerged in the UK and the current British government has pledged to hold a referendum on UK membership of the Union by 2017. Withdrawal appeared in the past as a purely theoretical position but it has become currently a distinctively feasible possibility.

On the other hand, claims for independence of regions from existing EU member states have emerged and found a prominent position in the political agenda in some member states. Scotland will hold a referendum on independence on 18<sup>th</sup> September 2014 and the current government of Catalonia has scheduled its own for 9<sup>th</sup> November even though Spanish authorities consider it to be illegal. Pro-independence actors in both regions have made of their future relations with the EU a crucial element in framing the process.

And yet, so far, theoretical reflections on the EU role/position on both issues have been articulated mainly in relation to these specific cases (i.e. Scotland and Catalonia for secession, UK in the case of potential withdrawal) and a general EU level reflection on the consequences of secession and withdrawal is missing. In the case of withdrawal, article 50 provides for a procedure but some thorny issues, such as the future relations of the withdrawing state with the EU are still pending. In the case of secession of a territory from a member state, no provision exists in EU treaties. Some authorities such as President Barroso or President Van Rompuy have made interpretative statements which spelt out a general position. However, a definitive EU position seems to be conditional to a specific request from any of the entitled parties involved in these processes.

The Global Governance Programme at the RSCAS convened a Round Table in order to discuss the twin issues of withdrawal and secession from an EU perspective. A number of scholars were invited to participate (the full list is provided below) and they reflected on four specific questions which framed the debates. The President of the EUI, Professor Joseph H.H. Weiler made the introductory remarks which are expanded in the annex included. The questions proposed were the following:

1. How can both processes of secession and withdrawal be interpreted from the EU point of view? Are there normative arguments for and against? Does the EU has suitable legal instruments for dealing with them?
2. What are the effects on the remaining Union/member state of withdrawal, from the point of view of existing legal instruments? Should the Union aim at placing its relation with them under existing schemes, i.e. EEA?
3. Which are the effects on existing EU member states of eventual secession of a territory from another member states?
4. What would be the position of citizens in seceding territories/withdrawing states? Do they retain rights? Can these be constructed a priori?

This Report presents the summary of the debate as compiled by Alastair Maciver and Martijn van den Brink on the basis of the interventions made during the Round Table and the supporting submissions made by the participants.

## **Contributors to the round table**

**Marina Aksenova** European University Institute, Italy

**Kenneth Armstrong** University of Cambridge, United Kingdom

**Graham Avery** Oxford University, United Kingdom; and European Policy Centre in Brussels, Belgium

**Alan Boyle** University of Edinburgh, United Kingdom

**Carlos Closa Montero** European University Institute, Italy

**Paul Craig** Oxford University, United Kingdom

**Bruno De Witte** European University Institute, Italy

**Cristina Fasone** European University Institute, Italy

**Dimitry Kochenov** University of Groningen, the Netherlands

**Brigid Laffan** European University Institute, Italy

**Adam Lazowski**, University of Westminster, United Kingdom

**Alastair Maciver** European University Institute, Italy

**Manuel Medina** Former Member of the European Parliament, Belgium

**Ignacio Molina** Universidad Autónoma de Madrid, Spain

**Andreu Olesti Rayo** University of Barcelona, Spain

**Jean Claude Piris** Former Director General of the European Council and EU Council's Legal Services, Belgium

**Richard Rose** Founder-Director Centre for the Study of Public Policy at University of Strathclyde Glasgow, United Kingdom

**Andrew Scott** University of Edinburgh, United Kingdom

**Jo Shaw** University of Edinburgh, United Kingdom

**Antonello Tancredi** University of Palermo, Italy

**Martijn Van den Brink** European University Institute, Italy

**Neil Walker** University of Edinburgh, United Kingdom

**Joseph H. H. Weiler** European University Institute, Italy

## Opening Remarks

Prof. Joseph H.H. Weiler, President, EUI\*

Joseph Weiler's opening remarks place the debate concerning the secession of a territory of a Member State on firmly normative, or moral, ground and situate his thoughts within the broader structure of his work, in particular that on constitutional tolerance<sup>1</sup> and the normative distinctions between European integration and nation building.<sup>2</sup> As regards observational standpoint, Professor Weiler defends the right of commentators outside putative seceding territories to intervene in the debates concerning the ethical and legal rights and wrongs of secession. He furthermore offers a taxonomy of the arguments for independence or secession and assesses their compatibility with the values and aspirations of European integration. In the following section, the opening remarks of Joseph Weiler will first be laid out. The tenor of the ensuing debate will then be described.

The two topics addressed by the roundtable, withdrawal from the Union and secession from a Member State, are not totally different since the later entails the former. The issue of secession is not new and has arisen in the context of the conflicts in Ukraine and Chechnya, and also before both the 1980 and 1995 referenda in Canada. The status of Kosovo remains an outstanding issue in this regard.

More specifically, Europe has progressively developed an approach to secessions. In this regard, the rush by Germany to recognise Croatia can be described as the "original sin". Indeed, the die was cast at this stage. This attitude has yielded a number of results and has provided some comic relief in the form of the debate about what name to give to Macedonia. In terms of instruments adopted by the European Union, efforts to grapple with the issue can particularly trace their roots back to the break-up of the Soviet Union when democracy was stipulated a condition of recognition by the European Union.<sup>3</sup>

At the moment, Scotland represents a more interesting case than Catalonia. In particular, the UK, unlike Spain, has resolved not to side step the question of *who is the self that can determine*. The Scottish situation is interesting since it obviates the international law problem. As such, from a public international law perspective, probably no European region qualifies for the right to self-determination. Consequently, one has to acknowledge something incredibly mature in the British solution, which says: "we are not Catholics, we need not be married if we don't want to be any more". In a sense, the question to be determined is whether the British norm should become the European norm. This requires us to reckon with the uneasy compromise between order and justice found in international instruments such as the *Declaration of Friendly Relations*.<sup>4</sup> This very profound question requires us to state that, at a certain threshold of seriousness, the people should decide. In this regard, the position on Catalonia is not that there should not be a referendum, but rather that, if there is a vote

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\* Summary of the Comments of the President prepared by the workshop secretariat. The views of Professor Weiler are personal and do not represent the view, official or otherwise, of the European University Institute. We are publishing as an annex to these opening comments the views of Professor Weiler on the Scottish Debate.

<sup>1</sup> JHH Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' (2000) *Harvard Jean Monnet Working Paper* 10/00.

<sup>2</sup> JHH Weiler, 'To be a European Citizen – Eros and Civilization' (1998) Working Paper Series in European Studies, University of Wisconsin.

<sup>3</sup> Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and Declaration on Yugoslavia, Extraordinary EPC Ministerial Meeting (Brussels), EPC Press Releases P.128/191 and P.129/191, 16 December 1991; reproduced in *EC Bulletin* 12-1991, points 1.4.5 and 1.4.6; European Community, Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union (1992) 31 *ILM* 1486.

<sup>4</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN General Assembly Resolution 2625 (XXV), 24<sup>th</sup> of October 1970.

for secession in Catalonia, Europe should say, “bon voyage”. It should not be the European Union, but the Member States to draw a line here, one that requires Member States to “solve their problems at home”.

Joseph Weiler stresses that while he believes seceding from a Member States *is* seceding from the European Union, ultimately the European Union is here confronted with a political decision. The claim made by President Barroso that it would be somehow “legally impossible” for Scotland to accede to the European Union is to be described as a bit of nonsense.<sup>5</sup> Indeed, in this respect, this kind of intervention has permitted the legal argument to obscure the normative issue. The legal issues should not be a “full proxy” for normative issues; Weiler believes that the legal and normative issues are separate and that the legal discussion of right and wrong does not exhaust the normative discussion of right and wrong.

Secession has become a European affair as the Member States encounter territorial politics of a kind that were previously external. Secession has become a European issue in three distinct ways. Firstly, this analysis is commonsensically correct, since it is easier for political groups to mobilise opinion in favour of independence in the European milieu. In this respect, the manner in which the institutions react to the putative secessions of Catalonia and Scotland represents a watershed moment for the European Union. The European Union should say no to Scotland, but this will not stop independence movements from finding the Union very inviting and very alluring.

Secessions, secondly, have become a European affair to the extent that they would have a big impact on the management of Europe in terms of the institutional arrangements of the Union.

Thirdly, the EU provides a normative framework with which to assess secessions. Europe provides a special kind of normative framework for Scotland in terms of *the way human beings relate to each other*. This is not just a matter of normative impact; the EU is a little bit like Iran, idealist at the beginning but it has now become somehow corporatist. His normative evaluation has a spill over effect on the question of observational standpoint. In circumstances of civil war there is a duty of “non-intervention” incumbent on third parties arising from the fear intervention this would compromise self-determination. In the discussion of the secession in the European Union a resentment towards outsider interventions has also manifested itself. It is asked of outsiders: “Who are you to intervene? This is our right to self-determination”. Weiler finds the position laughable. In his analysis, one has the right to express normative views about secession just as we express normative views about the domestic situations of a number of countries. The European dimension, pursuant to his normative analysis, is congruent with an observational right of intervention.

The debate can be cut in two ways: an empirical analysis and a normative analysis. The empirical question asks: are Scots and Catalans the kind of self that can determine? This should be taken off the table. Scots and Catalans obviously have the right to decide on self-determination.

From the normative perspective, Weiler believes that there is virtue in liberal nationalism, there is virtue in having national feelings. It is to be regarded as a promoter of cultural and social creativity. There is a certain type of belongingness that inspires that kind of tendency. So wanting to act on this is can be entirely positive. Two strands derive from this normative standpoint. The first is an ontological or existential strand which says: if we are such a self we should have independence. It is a non-utilitarian claim. The second alternative strand argues in favour of secession from utilitarian arguments

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<sup>5</sup> Interview with José Manuel Barroso 16<sup>th</sup> of February 2014 Andrew Marr Show on Sunday BBC <https://www.youtube.com/watch?v=o86F9mxvilM>. See also the letter that Barroso addressed to Lord Tugendhat on 10.12.2012 where he states that *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.* Ref. Ares(2012)1469619 - 10/12/2012 BARROSO (2012) 1300171

(i.e. secession brings concrete material advantages and benefits). Weiler concludes that both of them are demoralising from a European perspective and contribute to a European malaise.

As to the utilitarian arguments for secession, Weiler has more respect for Eurosceptics' use of them in their quest for withdrawal from the European Union. They plainly state that, for instance, the UK has no commitment to a community of fate.<sup>6</sup> Weiler, though, considers that we should solve our problems together. From the start (of the European integration process) there has been some idea of shared destiny. This is to be conceived as a human, not a utilitarian, proposition. It is accordingly demoralising if the case for Europe is now framed in utilitarian terms. In like manner, Scottish utilitarian arguments are not helpful for the Europe of shared destiny. It should be community of fate. The case for the European Union is increasingly a utilitarian one. Merkel makes the case of it in these terms. The weakness and contingency of this thinking is apparent and has an impact on the functioning of the EU in practice. Indeed, Switzerland and Norway not better off from utilitarian point of view in EU. The ascendancy of this thinking is not helpful and runs against the fact that Europe has always been conceived as a community of fate.

In turn, Weiler expresses greater respect for the existential or ontological position. One can take that position. This too is still demoralising, because the entire European experience is exactly the opposite. The European experience, and, in particular, constitutional tolerance<sup>7</sup>, has been the very negation of argument that to realise the self, one has to be independent. Within the EU one is willing to overcome full realisation of self and voluntarily accepts constraints on the self. One suppresses the self in constitutional toleration instead of promoting the valorisation of "our" values above all others. In this regard, Britain comes as close as possible to perfection. Devolution is as perfect a model as one can imagine. The fact that is rejected as not sufficient is demoralising from a European point of view. Consequently, this ontological or existential case for secession is equally dispiriting and runs counter to what Europe is about.

### ***Responses to the Opening Remarks***

Richard Rose questioned whether ontological and utilitarian arguments might not be combined in the light of contingent facts in practice. Logically one can follow the distinction, but it overlooks contingent features: before the Eurozone crisis, Alex Salmond made a speech on the so-called "arc of prosperity", encompassing Ireland, Iceland and Norway.<sup>8</sup> This framing of the "arc of prosperity" had both utilitarian and ontological elements. In response, Weiler clarified that it was not viable to formulate either an ontological or a utilitarian "balance sheet" in assessing secession. Rather Weiler affirmed that a moral judgment must be made about the issue.

Questions were raised with respect to how prescriptive the European Union should be about the precise nature of its values, even if one accepts the analysis that secession is redundant in the European Union (Walker). Specifically, it was doubted whether the Union should proscribe secession in the future. From both the ontological and utilitarian perspective, in Europe it is a "double level" question. It is a "double level" existential question in the sense that it includes the question of European identity. Many nationalists do feel European in this broader sense and adhere to this existential sense of being European. The question is therefore whether the European Union should define what it is to be European in advance. In response to this remark, Weiler stated that, as a prudential matter, the contours of European identity should not be defined in advance. It should be clear that this is only a prudential measure, since secession represents a challenge to Europe as a

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<sup>6</sup> See Cameron rejection of the notion of an "even closer union", as expressed in his EU speech at Bloomberg 23 January 2013 <<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>>.

<sup>7</sup> For further exposition of the "principle of constitutional tolerance" see: Weiler (n 1).

<sup>8</sup> Alex Salmond Speech at Harvard University, 'Free to Prosper: Creating the Celtic Lion economy', 31<sup>st</sup> of March 2008 <<http://www.scotland.gov.uk/News/Speeches/Speeches/First-Minister/harvard-university>>.

community of values. In this sense, the Euro-chauvinism of territorial politics must be rejected as conceiving Europe as no more than a replacement for the nation-state, keeping the barbarians out.<sup>9</sup> Jean Claude Piris remarked that while the tenor of the Opening Remarks offered by Joseph Weiler had been mainly moral, it is important to recall that the function of law is to preserve order and this influences how positive law is to be interpreted. This function is especially illustrated by the severe limitation of self-determination in international law. The 1995 Canadian judgment offers the best example of how this is the case and demonstrates that such limits are also constitutional.<sup>10</sup> There is a big difference between Scotland, where everything settled as between the central government and the Scottish Government, and Catalonia, where the Spanish Constitutional Court and the Spanish Parliament have set themselves against secession.<sup>11</sup> From an EU point of view, according to Article 49 TEU, an applicant for membership of the Union must be both a European State and respect its values. One of those values is the rule of law. Piris concludes by asking how a seceding State can be admitted to the Union if its “main birth” violates the value of the rule of law, within the terms of Article 2 and 49 TEU.

A like argument asserted that the chief imperative of the European Union is to ensure stability (Molina) and, as such, falling within the exclusive purview of the Member States, there is no legal obligation to consider the consequences of secession in EU law. In reply Weiler drew a comparison with the *Individual Investor Programme* established in Malta.<sup>12</sup> As such, the grant of Maltese nationality in return for investment affects other Member States, since it entails the grant of Union citizenship. In this respect the notion of a European Union *federal fidelity* (*Bundestreue*)<sup>13</sup>, pursuant to which Member States competences need be exercised with regard to sincere cooperation, might be of relevance to secession. In this regard, the imperative of stability with no obligation to consider the consequences of secession confront other limits imposed by Union law.

Another example of a State-centric method of assessing secession, which was raised, departs from the notion that Union is to be seen principally as a Europe of States (Medina). The State is a “work of art” which sustains the Union. There are also nations, which Renan,<sup>14</sup> best defined as a feeling but this does not represent the foundation of the European Union. The European Union, like international law and constitutional law, protects the State as its foundation. Weiler, by contrast, rejects the notion of a Europe of States. It transcends States in many respects, not least that the usual rules of State responsibility do not apply as between Member States.

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<sup>9</sup> For a discussion of the differences between European integration and a “more banal notion of nation building” see: Weiler (n 2).

<sup>10</sup> *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

<sup>11</sup> The Spanish Congress rejected by 299 votes (out of 350) the proposal of the Catalan government to call a consultation on secession. The Constitutional Court also considered the proposal against Spanish constitution. See STC 042/2014 de 25 de Marzo de 2014 (BOE núm. 87, de 10 de abril de 2014).

<sup>12</sup> *Individual Investor Programme of the Republic of Malta Regulations*, 2013, Legal Notice 450 of 2013, Government of Malta No. 19,187, 24<sup>th</sup> December 2013 <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25863&l=1>>; *Individual Investor Programme of the Republic of Malta Regulations*, 2014, Legal Notice 47 of 2014, Government Gazette of Malta No. 19,205, 4<sup>th</sup> of February 2014. <<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=25921&l=1>>.

<sup>13</sup> For a recent analysis of *Bundestreue* or “federal fidelity” see: P Egli, *Bundestreue : eine rechtsvergleichende Untersuchung* (Nomos 2010). It has been suggested that its analogue in Union law, the principle of sincere cooperation in Article 4(3) TEU, may impose limits on the grant of Member State nationality. See, in particular: Opinion of Advocate General Poiares Maduro in Case C-135/09, *Janko Rottmann v. Freistaat Bayern*, [2010] ECR I-1449, paragraph 30; European Parliament resolution of 16 January 2014 on EU citizenship for sale, 2013/2995(RSP).

<sup>14</sup> E Renan, *Qu'est-ce qu'une nation?* (Presses Pocket 1992).

Alan Boyle made two points. Firstly, reflecting on Weiler's prudential concerns, whatever view one comes to on the normative question of secession, it is extremely counterproductive to express it or give it legal form, since it could lead to resentment. Secondly, addressing the question of the "self" that is capable of "determining" it is important to stress that, for the purposes of the 18<sup>th</sup> of September referendum, that "self" is not "the Scots", but the people living in Scotland. From this perspective, it is not an identity question. Weiler stated that, in this case, this is an aberration and there was simply something wrong with the voting rules. Moreover, he acknowledged the huge variation in voting rules between States which presents significant diversity regarding the definition of the self.<sup>15</sup>

Carlos Closa Montero argued that whether one attempts to justify secession on utilitarian or ontological/ideological grounds, the European Union affects justifications and calculations in both cases. Indeed, it is impossible to understand secession in Europe without considering the European Union. This may blur any clear distinction between utilitarian and ideological reasons: ontological arguments on secession have a strong utilitarian implication since the EU diminishes paradoxically the costs of independence in a globalised world. Closa denounced the contradiction implicit in the ontological argument: if the aspiration is to create a new national self, this questions explicitly the multinational character inherent to the EU project. Seceding to create a more coherent national entity at the same time as proclaiming adherence to the multinational EU seems contradictory.

Graham Avery asked if the European Union had made a mistake with respect to the seven states that seceded before joining European Union. Joseph Weiler replied that no mistakes were made with respect to Slovakia, but the secession should not have been accepted with "no questions asked". In this respect, there is "something craven" about the manner in which the European Union has seemed to encourage secession. The question should be approached as a question of consciousness. The United States of Europe would be a failure of European integration because it would be a failure of European consciousness. So even if Scots and Catalans consider themselves to be European they do so in an essentialist manner, thus taking the European idea in the wrong direction.

Paul Craig expressed many of the same concerns as Neil Walker. He, nevertheless, stressed that the ontological question of secession and constitutional tolerance are not on the same level. He would, accordingly, be reluctant to conclude that constitutional tolerance obviates the need for independence. Constitutional tolerance need not, in particular, trump the desire to be an independent State within a community of States. In response, Joseph Weiler contended that constitutional tolerance is regarded as seductive and as a good thing, but this should not obscure its "Freudian" nature. In this "Freudian" sense, tolerance is to have a desire and not to act on it. It is to be described as overcoming desire; voluntarily not to do what you desire. When Paul Craig's intervention made reference to the "desire to be an independent State" it was "Freudian" in that sense and therefore to give into the desire for independence is the very negation of constitutional tolerance. Constitutional tolerance means that when you have a desire there is a need to trump it.

The moral or normative context of the UK was raised (Scott). In circumstances where the UK has an equivocal commitment to European integration, it is to be doubted whether it represents a model of constitutional tolerance. The call for secession arises from the feeling that the UK has been progressively moved to place that is indefensible from a European perspective. While Joseph Weiler stated that secession represents a lack of willingness to accept democratic discipline and to live with fellow citizens as European values generalizable to all situations the withdrawal of the UK changes the normative rules of the game. Such developments are dispiriting, but might permit a "withdrawal for Europe" from a normative standpoint.

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<sup>15</sup> See on this Ruvi Ziegler, Jo Shaw and Rainer Bauböck (eds.) *Independence Referendums: Who Should Vote and Who Should be Offered Citizenship?* EUI Working Paper RSCAS 2014/90.

## 1. Interpreting secession from the EU point of view: Normative arguments for and against and available legal instruments

The first panel addressed a range of different issues: continuity and identity in public international law and the question of the appropriate legal basis for the accession to the European Union of a seceding Member State territory. Both subjects concern how a seceding territory as a new State would relate to European Union.

### 1.1 Continuity and Identity in Public International Law

Although the European Union law aspect of secession is salient in the debate, it is important that the question be approached from a public international law perspective, since this determines the identity, and possible continuity as regards the predecessor State, of the emergent State. The Scottish case under examination raises a number of questions that remain unanswered from this standpoint. There are, as such, two sides to this coin, from the perspective both of: (i) the remaining UK (the “predecessor State”); and (ii) Scotland (the “successor State”<sup>16</sup>). Moreover, in terms of considering the *creation* of the State in the narrow sense, under public international law, the referendum on Scottish independence is not to be regarded as an exercise of the right to self-determination (Boyle).

As to the question of whether the United Kingdom would continue to exist, it is to be noted that the 1922 secession of Ireland from the UK did not transform the later into a new State (Boyle). It is important to recall that the international community settles this question. For instance, Russia tried to identify itself as a new, successor State, which was not the legal continuation of the predecessor State USSR, but was prevented from doing so since the international community failed to recognise it as such (Boyle). From the domestic point of view, in the case of the UK, the fact that the secession of Scotland would require only consequential changes to the municipal constitutional law of the UK demonstrates that Scottish independence would not affect the identity of UK.

Identity, as described here, has important consequences for the treaty relations of the new State. The law of State succession suggests that the new State would not remain in the EU. In this connection, one can contemplate that a method for the United Kingdom to leave the European Union, on the hypothesis of Scottish independence, would be simply to declare itself a new State that is not the legal continuation of the United Kingdom as constituted before Scotland seceded (Boyle). While an interesting provocation, in the case at hand, it was cautioned that it would be unthinkable for the UK to declare itself a new State after Scottish independence because it would lose its position in a number of other important international fora, not least its permanent seat on the UN Security Council (Jean-Claude Piriis).

A related public international law question was with respect to the wording of referendum question (Tancredi).<sup>17</sup> In this respect the *Western Sahara*<sup>18</sup> case law on the wording of referendum question should be heeded. In particular, clarity as to the consequences of the vote is required, which might mean that the Scottish referendum question make reference to the giving up Union citizenship.

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<sup>16</sup> For this nomenclature see: Article 2(c) and (d) of the *Vienna Convention on Succession of States in Respect of Treaties* 17 ILM 1488 (1978).

<sup>17</sup> The wording of the Scottish independence referendum questions is set out here: Section 1(2), Scottish Independence Referendum Act 2013. “The question is- ‘Should Scotland be an independent country?’”

<sup>18</sup> *Western Sahara Advisory Opinion*, I.C.J. Reports 1975, p. 12.



## **1.2 Secession and Legal Basis**

As a preliminary point, the question of whether the ethical and practical arguments for or against independence that had been aired were commensurable was raised (Shaw). This was by specific reference to how the normative thesis presented by Weiler is to inform the practical analysis of legal basis. It was suggested that the normative and practical problems were distinguishable. Indeed, while a number of discussants expressed their agreement with Weiler's normative analysis, they nonetheless held that simplified accession to the Union would be possible as a question of positive law (De Witte)

The debate on legal basis chiefly concerns whether Article 48 TEU or Article 49 TEU would be more appropriate for a newly independent seceding territory to accede to the European Union. The question is whether an independent Scotland should stay in the European Union or rather would be obliged to join it *de novo* (De Witte). Numerous different accounts have been presented by the political actors. Thus, while the Scottish Government talks of a "seamless transition to independent EU membership"<sup>19</sup> (so-called *internal enlargement*), there would necessarily be a temporal gap, since Scotland must first become an independent State (De Witte). Equally, while this "seamless" process would, involve, in their analysis, simply adding Scotland to the list of Member States, in point of fact, there is simply no such list, with the possible exception of Article 52 TEU (De Witte). The provisions of Article 49 TEU are designed to receive applications from States that are outside the Union. To adopt such an approach to seceding territories that have a long history in the European Union could lead to some unusual results. In the case of the dismemberment of Belgium, for instance, both States, Flanders and Wallonia, would be new, successor States and the predecessor State, Belgium, would itself cease to exist. If new States must apply through Article 49 TEU, they must first become third States and the European Union would have Brussels as an "extraterritorial" capital while negotiations were taking place. From this perspective, Article 48 TEU is an attractive option since it avoids such a temporal gap.

No matter which legal basis was deemed most appropriate, the amended Treaties would need to be approved (signed and ratified) immediately *after* independence, since only an independent State can become a Member State (De Witte). Timing becomes then a key issue. The risk that Article 48 TEU could take longer than Article 49 TEU, since a number of other amendments would inevitably be proposed by the Member States was aired (Piris). Loyalty would allow accelerated Article 49 TEU admission, but admission it would nonetheless be by Article 49 TEU. The distinction between the two positions is that the Article 48 TEU holds that secession would result simply in the rearranging of the Member States not the admission of a new State.

Article 49 TEU accession would be longer (Łazowski) as the example of Iceland, as a member of EFTA and the EEA that, accordingly, already complies with the *acquis*, illustrates. The accession process nonetheless may take years to complete under Article 49 TEU. In such a scenario, secession presents a problem for both sides, Scotland and the EU, and that the EU is obliged to secure rights of citizenship (Łazowski). De Witte concluded that for all the difficulties of Article 48 TEU, Article 49 TEU is "even worse".

Participants disputed whether Scotland would need to be independent in order to apply to join under Article 49 TEU (Avery). Since it was argued that this would be required, Article 48 TEU was argued to be preferable. The some doubt emerges from the fact that Scotland could ratify a Treaty that does not exist whether Article 48 or Article 49 TEU applies (De Witte). By contrast, some participants wondered whether accession to the EU might not be prepared before independence (Weiler). Independence and accession could take place in the same ceremony of not more than one hour. It would be surreal for Scotland to engage in lengthy discussions regarding leaving the EU before immediately starting negotiations as to joining (Weiler). Scotland could wait until the last Member

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<sup>19</sup> *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government White Paper, 26<sup>th</sup> of November 2013, p 220.

State has agreed to the Treaty, at that point Scotland should become independent, sign the Treaty and ratify it within an hour (Weiler).

Indeed, there was some discussion regarding whether a Treaty of Accession could be signed and ratified before a seceding territory became an independent State (Boyle). Scotland need not be an independent State to ratify such a Treaty, from the standpoint of public international law (Boyle). In any case, there was, in his view, no reason why discussions could take place before anyway, if that is what the Member States desire. Under both Article 48 and 49 TEU, London would need to negotiate on Edinburgh's behalf, but no real difficulty exists in getting Scotland involved (Avery).

Discussion focussed on whether it would be possible for Scotland to retain the current British opt-outs. The principle obstacle to this was that the opt-outs mention the UK by name (De Witte). Since amendment has no relevant substantive limits, Article 48 TEU presents the better choice if the object of the exercise is to secure the same opt-outs as the UK (Łazowski). Under both Article 48 and 49 TEU, the question of the application of the present UK opt-outs to Scotland arises, which the Scottish Government may not really expect to obtain (Avery). Moreover, the policy of the Scottish Government presents further problems regarding the terms of membership. In particular, a derogation would be needed to require higher tuition fees for English students (De Witte). In such a case Pandora's Box would be opened and other Member States, including the UK, would then seek to renegotiate over provisions (De Witte).

The argument was put forward that Europe is not a Union of Peoples, but of States and, accordingly, pursuant to Article 4(2) TEU the national constitutional identities of Member States are also protected (Medina). The national constitutional identity of Spain is expressed in its Constitution that is consecrated to the "indivisible fatherland of all the Spaniards" (Medina). Moreover, Article 8.1 of the Spanish Constitution allows the armed forces to be deployed if the territorial integrity of the State is in danger (Medina). In response to these remarks, it was stressed that national constitutional identity within the terms of Article 4(2) TEU is not to be interpreted as the absolute protection of the norms of Member State constitutions. Indeed, Article 4(2) TEU is to be read in the light of the values of the Union in Article 2 TEU (Closa Montero). In this particular respect, Article 8.1 of the Spanish Constitution runs deeply against the European values expressed in Article 2 TEU. Article 4(2) TEU should not be read in absolute terms but as qualified by Article 2 TEU.

## **2. Effects on the remaining Member States of withdrawal and the role of the Union**

The precise effects of withdrawal on the withdrawing state are difficult to spell out. Numerous reports have been written, all coming to different conclusions. What can be discussed with more certainty is the different options that are open to the withdrawing state. Withdrawal will, in addition, undoubtedly have consequences for the remaining Member States as well as the Union as a whole. The withdrawal of a state will also raise the question how the Union and Member States should shape the future relations with the withdrawing state. This section will discuss these issues. It is divided in four parts. The first section presents a theoretical interpretation of article 50, the second discusses the available options for the withdrawing state, the third part will discuss the possible consequences for the EU, and the fourth will discuss how the EU and Member States can/should react and which role they should play.

## **2.1 Withdrawal from the Union and the interpretation of article 50**

Carlos Closa Montero's contribution examined Article 50 TEU and elaborated on Weiler's *Transformation of Europe*<sup>20</sup> thesis. The Transformation of Europe is based on the pre-Lisbon world; Closa Montero's thesis is that the explicit withdrawal provision of Article 50 TEU changes the balance between "exit" and "voice" described by Weiler. Indeed, the Lisbon Treaty and its Article 50 TEU has changed everything from the perspective of the analysis of European integration deploying Hirschmann's categories of "exit" and "voice".

Article 50 TEU enshrines the following: a unilateral, unconditional and non-immediate right of the State to withdraw. Why Member States sought to make a right to withdraw explicit, when there existed a substantial academic and political consensus as to its existence, in any case?.

The key to understanding the place of Article 50 TEU is Hirschmann's construction of loyalty. The concept of loyalty is defined as the extent to which customer/members are willing to trade off the certainty of exit against the uncertainties of an improvement in the deteriorated product. Loyalty therefore offers a utilitarian, rather than moral, foundation for action: it provides reasoned expectations which dissuade the most quality-conscious customers or members from being the first to exit. Such a reasoned expectation consists in the *hope that reform can be achieved "from within"*. Loyalty is the key mediating force between voice and exit, since it encourages members to use voice rather than exit. In this respect, the relationship between voice and loyalty is mutually reinforcing (Closa Montero). Conversely, the relationship between loyalty and exit is one-way: loyalty is particularly evident when exit is available yet not feasible and voice requires social inventiveness. Specifically applying this analysis to the provisions of the Treaty, "available yet not feasible" perfectly describes the pre-Lisbon position on withdrawal (Closa Montero).

Making exit both available and more feasible, quite simply, undermines loyalty. Article 50 TEU enhances exit feasibility in two ways: (1) the legal certainty it provides reduces the costs of exit; and (2) legal certainty also the discursive construction of "product deterioration" aiming at exit. The first way seems self-evident. For the second way, denouncing "product deterioration" does not serve automatically to describe the situation and propose reform but, rather, it serves to justify an exit option. Debate from the Eurosceptic perspective has all the hallmarks of the disloyal discursive construction of "product deterioration". As such, the criticism of EU red tape and free movement of workers, for instance, is designed to make the case for exit rather than to suggest improvements. The view of creeping EU competence is a further example. The UK Government's review of "balance of competences"<sup>21</sup> confirmed that there is no case for repatriation,<sup>22</sup> but creeping competence is nonetheless used as a blanket term to substantiate the case for exit. Since this view of competence is not prompted by empirical reality, as the UK Government's report confirms, it is likely that such a discursive construction of "product deterioration", as to competences, relates more to an essentialist (i.e. not so instrumental) desire to withdraw rather than to an objective identification of an agenda for reform (Closa Montero).

Other than eroding loyalty, a consequence of insertion of Article 50 TEU has been to change the voice mechanism so that it principally equates to demands for renegotiation (Closa Montero). Whereas voice was conceived by Weiler as the consolidation of EU secondary legislation and its attached

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<sup>20</sup> JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2419–2423.

<sup>21</sup> Review of the Balance of Competences between the United Kingdom and the European Union Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty July 2012 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/35431/eu-balance-of-competences-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35431/eu-balance-of-competences-review.pdf)>.

<sup>22</sup> See the assessment in Michael Emerson, Steven Blockmans, Steve Peers and Michael Wriglesworth, 'British Balance of Competence Reviews, Part II: Again, a huge contradiction between the evidence and Eurosceptic populism' (2014) EPIN Paper No. 40.

principles in exchange for an increased participation of the Member States in decision making, voice has now come to mean the renegotiation of the terms of membership. A further demonstration of this dynamic is that Article 48(2) TEU explicitly recognises the possibility of renegotiation of this kind. This new voice strategy is unlikely to be successful since the threat of exit must be both credible and impose costs on the other members (so that they may yield to re-negotiating with the withdrawing state) (Closa Montero). On these terms, the exit of the UK is unlikely to do either (Closa Montero).

As Sunstein's analysis of the relationship between secession and constitutionalism seemed to warn, an explicit withdrawal provision introduces strategic behaviour on the part of the Member States that makes it cheaper to level disloyal criticism against the EU as a polity and to articulate voice in terms of renegotiation (Closa Montero).

## ***2.2 The options for the withdrawing state***

Jean-Claude Piris presented seven different options available to the withdrawing state for articulating its relations with the Union although he believes none of them to be very feasible or desirable.

The first option is to develop custom-made agreements. This would be a very complex process and would make the withdrawing state pick and choose the policies it is interested in. It would try to minimise the costs of withdrawal and maximise the benefits. It might be difficult for the withdrawing state to demonstrate that the outcome guarantees the state's full sovereignty, while also protecting the quality of the economy and the citizens' way of life. This is particularly so because the EU is likely to resist such a sectoral approach. The EU has an interest in preserving its decision-making autonomy and its institutional capacity to exercise a strict control over the respect of the contractual obligations of the Member State. Perhaps a sectoral approach is unavoidable, but the EU would want something in return. The withdrawing state will not be able to influence the legislation it is obliged to follow, and will not escape an obligation to financially contribute to the EU. An additional difficulty is that each Member State will pursue its own interests in the Council and that the consent of the European Parliament is also needed. For the policies not covered by a sectoral agreement, the withdrawing state would have to develop its own policies, which might result in an additional burden if that state has the intention to exercise individual control over many policies.

The second option would be to join the EEA. This might be the simplest option, but there are nonetheless many complicating factors. The EEA is first of all not functioning optimally. The Commission has expressed their dissatisfaction about the increasing backlog of the three EEA States in implementing EU legal acts.<sup>23</sup> Because of the simplicity, the EU might consider this option nonetheless,<sup>24</sup> but, considering those difficulties, the EU might request the EEA to change its institutional architecture in the future. The main objections might arise from the withdrawing state, however. If it is the withdrawing state's aim to become more independent from the EU it would be difficult for that state to accept that it would have to implement new EU legislation in very substantial

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<sup>23</sup> European Commission, 'A Review of the Functioning of the European Economic Area (SWD(2012) SWD final) 5-9 <[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/swd/2012/0425/COM\\_SWD\(2012\)0425\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2012/0425/COM_SWD(2012)0425_EN.pdf)>.

<sup>24</sup> The EU, after all, also suggested that European micro-states – Andorra, Monaco, and San Marino – should join the EEA. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, EU Relations with the Principality of Andorra, the Principality of Monaco, the Republic of San Marino: Options for Closer Integration with the EU (COM/2012/680/final). Later, the Commission partially changed its opinion, as it did not deem EEA membership for those micro-states feasible at the moment: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, EU Relations with the Principality of Andorra, the Principality of Monaco, the Republic of San Marino: Options for their participation in the internal market (COM/2013/793/final).

areas without having any say about it,<sup>25</sup> to have to speak with one voice with other EEA members in the Joint Committee,<sup>26</sup> to be subjected to the jurisdiction of the EFTA Surveillance Authority and the EFTA Court,<sup>27</sup> and to pay a considerable financial contribution to the EU.<sup>28</sup>

The third option for the withdrawing state would be to join EFTA without joining the EEA, like Switzerland. EFTA, however, doesn't cover many policies – only trade for fish and some agricultural products - and would not give the withdrawing state sufficient access to the internal market. One may assume that a withdrawing state is interested in having such access. EFTA does not have a link with the EEA or the 1972 Agreement between the EC and Switzerland and membership would not give the right to become a party to the Free Trade Agreements between the EFTA States and a number of third countries.

The fourth option would be to follow the Swiss way, which would be to conclude as many bilateral sectoral agreements as needed (there are currently between 120 and 130 bilateral agreements between the EU and Switzerland). Even though the framework is one of classical international law, the reality is that Switzerland is following many EU legal acts without participating in their making. More problematically, it is highly certain that the EU will reject this option. The EU is, after all, rather displeased with its current relation with Switzerland, which is, according to the Council 'creating legal uncertainty and has become unwieldy to manage and has clearly reached its limits'.<sup>29</sup> The current situation, after the Swiss referendum on migration, moreover, demonstrates how fragile the relations are.<sup>30</sup>

The fifth option is the conclusion of a free trade agreement or association agreement. According to Piris, there is no existing EU free trade agreement or Association agreement which scope is close to what a former EU Member State would need, and which provides for the surveillance and judicial instruments that the EU might insist on. Moreover, the EU would demand a good part of the *acquis* to be adopted, such as labour market rules, health and safety standards, competition policy, product standards and technical specifications. Without such conditions, the acceptance of the agreement by all EU Member State would be highly uncertain. Finally, it would be difficult for the withdrawing state to negotiate free trade agreements with third countries that are as beneficial as the existing free trade agreements negotiated by the EU.

Sixthly, the withdrawing state could conclude a customs union like Turkey. The question is whether this is satisfactory for the withdrawing state. It would have to abide by part of the EU *acquis*, follow EU decisions as regards customs tariff duties, and to accept the preferential agreements concluded between the EU and third countries. Perhaps most problematically, such a customs union would only provide for limited access to the internal market. The EU Member States would then be in the position to control the access of workers and their families of the withdrawing state.<sup>31</sup> Also the

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<sup>25</sup> Article 102 EEA Agreement. See to this also Adam Łazowski, 'Withdrawal from the European Union and alternatives to membership' (2012) 37 *ELRev* 523, 535.

<sup>26</sup> Article 93 EEA Agreement.

<sup>27</sup> Article 108 EEA Agreement.

<sup>28</sup> The financial contribution of the three EEA States is € 1,79 billion for the 2009-2014 period. The Norwegian contribution per head is comparable to the British net contribution per head to the EU budget

<sup>29</sup> Council of the European Union, Council Conclusions on EU relations with EFTA Countries, 3060<sup>th</sup> GENERAL AFFAIRS Council Meeting (Brussels, 14 December 2010) para 6.

<sup>30</sup> Adam Łazowski, 'The end of chocolate box-style integration? EU-Swiss relations after the referendum' (2014) CEPS Commentary.

<sup>31</sup> See for the situation of Turkey: Case C-36/96 *Günaydin* [1997] *ECR I-5143*, para 23; Case C-1/97, *Birden* [1998] *ECR I-7747*, paras 37 & 38.

scope of the freedom to provide services would be considerably narrower in scope.<sup>32</sup> It is, thus, uncertain whether such a customs union would offer what the withdrawing state needs.

The withdrawing state could, of course, also decide to become a third country *vis-à-vis* the EU. The withdrawing member state would then be liberated from EU obligations, but borders will be re-erected, the Member State have to adopt much legislation to fill the legal void created by the withdrawal, and it would lose the benefits from EU membership.<sup>33</sup> Of course, the withdrawing state would benefit from WTO rules. The mixed agreements, concluded with third countries, would also no longer bind the third countries *vis-à-vis* the withdrawing state. Those agreements are, after all, concluded solely by the EU.<sup>34</sup>

Many options are potentially available. Much will ultimately depend on the desires of both the withdrawing state as well as the EU. The EEA appears to be the easiest as well as obvious option but would depend to a great deal on whether the EFTA-members are willing to accept the UK as EFTA-member. One thing is certain, the withdrawal from the EU would raise many delicate questions and will have serious consequences for the withdrawing state.

### **2.3 The consequences for the EU and for the remaining Member States**

The withdrawal of a state not only has consequences for that state, but also for the remaining Member States and the EU as a whole. Laffan gave three reasons for why the UK will be missed if it decides to leave the EU.

A UK exit will, first of all, have a significant impact on power balances within the EU, as well as externally. A UK exit will be a blow to the EU's position in the world. It would also shake up the internal power balances. Berlin relies on the balancing which the UK provides. And while France might be pleased to end up with De Gaulle's Europe, it needs the UK to balance against Germany.

A new power balance will have an impact on the policy priorities of the Union. The UK has always found itself on the market side, pushing for economic cooperation and trade liberalism. A UK exit is likely to change the policy balance towards more protection. As such, the exit of the UK might be in the interest of the French. Without the UK, there won't be a serious CFSP either.

A UK exit will also have an impact on the institutional balance. There will be one less Commissioner, one less veto power, less judges, etc. Those are not necessarily negative – think of a smaller Commission. The withdrawal of a state from the Union also requires the Union to adopt or amend relevant provisions, such as provisions and protocols in the Treaties mentioning the departing country, as well as provisions in secondary legislation.<sup>35</sup>

What might be most important is the effects a UK withdrawal or the exit of another Member State will have on other Member States. If one Member State can leave Union, this raises question for all Member States. The anti-European parties will see it as a victory. Other Member States might, more importantly, use the exit option to threaten and strike down policies. If UK withdraws, Scottish question is also back on the agenda (if it votes to stay in UK in next referendum). A possible Scottish secession will have other implications, predominantly for Member States with territories that are also seeking secession.

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<sup>32</sup> See Case C-221/11, *Demirkan* (nyr).

<sup>33</sup> See for this argument also Łazowski (n 25) 533.

<sup>34</sup> On the basis of Article 207 TFEU.

<sup>35</sup> Łazowski (n 25) 529-530.

## **2.4 The role of the Union and Member States after withdrawal**

A last issue is which position the EU and the Member States should adopt *vis-à-vis* the withdrawing state. According to Piris, ‘the duty of the EU and of its Member States would be to try and reach a swift agreement with the new State, in order to avoid complex legal situations and negative economic effects, as well as disrupting the lives of many individuals. The delay between the date of the political decision on independence and its entry into force could be used in order to try and reach such an agreement, at least on provisional arrangements during a period of transition’ (Piris, p 6). However, the interim period could also have negative consequences. Łazowski<sup>36</sup> has argued that a withdrawing state may show defiance even before effectively terminating EU membership. He argues that the withdrawing country would still participate in on-going decision making and he raises the question on whether it should be allowed to shape secondary legislation which, in a very near future, would not bound it. Furthermore, participation in daily decision-making offers an additional bargaining instrument for negotiating more beneficial terms for withdrawal. Łazowski further argues that the withdrawing state may also apply “selective exit” (using Weiler’s terminology): i.e. it may decide not applying EU secondary legislation. Whilst article 4(8) on loyal cooperation will continue to apply, it is clear to me that its coerciveness will be greatly diminished for the withdrawing state.

## **3. Effects on Existing EU Member States of Eventual Secession of a Territory from another Member States**

The salience of the European Union in the debate concerning the secession of a territory from another Member State has been evident for some time. The discussion here focussed on three issues that cut to the heart of the European Union question for seceding territories: the instrumentalisation of the question of European Union membership; the interests of the Union and Member States in facilitating accession to the Union; and the proposed approach of the Scottish Government during negotiations following a vote for secession.

### **3.1 The Place of European Union Legal Argument**

The instrumentalisation of the European Union, by both the UK Government and the Scottish Government, can be described respectively as a “Weapon of Mass Dissuasion” (Avery) or a “Weapon of Mass Persuasion”, pursuant to which problems are obviated by a “smoothing effect” or legal obstacles are emphasised. European legal discourse has come to occupy this position because the binary nature of a referendum on secession promotes Panglossian (Scott) approaches to the legal questions of secession (Armstrong).

Two examples of this sort of instrumentalisation were offered by the discussants. The three principal visions of how seceding territories might accede to the European Union were identified as corresponding with the outcome desired by its advocates. Of particular note, in this respect, is the “wishful thinking” which concludes that membership of the Union would be automatic for seceding territories (Molina). The “mainstream” invocation of Article 49 TEU and a flexible interpretation of Article 48 TEU likewise reflect different desired outcomes.

Another example of the place and nature legal argument in the discussion of seceding territories is the attribution of the character of legal principle to political negotiating positions. In particular, there is, at the very least, considerable ambiguity as to whether the statement “negotiations would be based

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<sup>36</sup> Łazowski, Adam (forthcoming, 2015) Inside but out? United Kingdom and the EU, in Jakab, András and Dimitry Kochenov (eds.) *The enforcement of EU law. Methods against member states’ defiance* (OUP); Adam Łazowski, ‘How to Withdraw from the European Union? Confronting Hard Reality’ (2013) CEPS Commentary; Łazowski (n 25) 530.

on the principle of the continuity of effect” is making a claim about the law.<sup>37</sup> It was suggested that “the principle of the continuity of effect” can only be seen as a “pretendy” legal principle, which seems to adopt the pedigree and language of a norm of Union law, but operates only as an opening negotiating position (Walker).

### 3.2 *The Respective Interests of the Union and the Member States*

The emergent consensus was that the decision as to whether Scotland is to accede to the Union is a political one which will require to be facilitated by the law (Avery and Molina). As such, while the accession of Scotland might be smoother than the putative negotiations started with Iceland,<sup>38</sup> the speed and complexity of the accession process are questions of political will and not of legal duty (Molina). In attempting to identify the nature of that political will, the discussants concentrated on constructing the respective interests of the EU and the Member States (Molina, Avery, Piriš).

In this respect, Neil Walker’s criticism of the failure to respect the principle of publicity in the identification of the interests of the Union and the Member States is of great importance. Contrary to the Rawlsian principle of publicity,<sup>39</sup> which holds that good reasons are public reasons, on the question of secession many interventions are not motivated by publically expressed reasons. In this respect, the fear of one’s own State splitting up, through a domino effect, is not a good reason in this Rawlsian sense, since it is seldom publically expressed.

#### 3.2.1 Member State Interests

Firstly, as to the interests of the Member States, it was argued that no Member State has an interest in ensuring Scotland is outside the EU, however briefly (Avery). It would be a “legal nightmare” for economic operators in the territory of Scotland. In this respect, the predecessor State, the United Kingdom, would have the clearest interest in ensuring the expeditious accession of Scotland. In social and economic terms, the UK has most to gain from seamless accession. Spain equally has a political interest here (Avery). It would not be in Spanish interests to exclude Scotland. In particular, it was suggested that Spain and other Member States with concerns about secessionist movements would, in any case, be satisfied with the refusal to recognise “*any future illegitimate and illegal ‘referenda’*” from Foreign Affairs Council in May.<sup>40</sup> It was argued stated it was not the role of the European Commission, to judge the interests of the Member States, and to become involved in national politics in the partisan manner in which President Barroso has appeared to behave.

This assessment of the Member States’ interest was not shared unanimously. In this connection, as a matter of political will, there is substantial evidence that the EU tends to reject secession, whether it be external (Bosnia, Kosovo and Crimea) and internal (North Cyprus and South Tyrol) (Molina). While is imperative to secure that the EU should be neutral on seceding territories, there is a countervailing interest in making sure that this does not promote more separatism. Scotland could, as such, represent the model of a smooth secession and secure further smooth re-accessions to the EU.

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<sup>37</sup> *Scotland’s Future: Your Guide to an Independent Scotland*, Scottish Government White Paper, 26<sup>th</sup> of November 2013, p 221.

<sup>38</sup> In this regard see: Commission Opinion on Iceland’s application for membership of the European Union, COM (2010) 62, p 7 noting: “Iceland is well prepared to take on the obligations of membership in the medium term, particularly in the fields covered by the EEA [...]”

<sup>39</sup> See generally: J Rawls, *Political Liberalism* (New York: Columbia University Press); C Lamore, “Public Reason” in S Freeman (ed), *The Cambridge Companion to John Rawls* (CUP 2003).

<sup>40</sup> See Council Conclusions on Ukraine, Foreign Affairs Council, 12<sup>th</sup> of May 2014, paragraph 1 <[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/142561.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142561.pdf)>.



On this question, Catalonia might have the opposite experience since the constitutional legality of secession is in greater doubt. Pursuant to Article 4(2) TEU other Member States should not recognise a seceding territory as a State. In any case, there is no case for remedial succession and Member States are not obliged to facilitate flexible interpretation. The comparison between Kosovo and Scotland is subject to doubt.<sup>41</sup> It can be argued, because a process has been agreed with the central government, Scotland is more like Montenegro. Carlos Closa Montero spoke as the former Rapporteur on Montenegro at the Venice Commission<sup>42</sup> on the comparison with Scotland, concluding that Montenegro was quite different from Scotland since Montenegro and Serbia were designed as a Union of States which contemplated its possible future dissolution. Montenegro enacted the *constitutional* provisions for dissolution of the Union of States which is different to secession from a state lacking these kind of provisions.

Crucially, Jo Shaw pointed out that the concept of national constitutional identity is dynamic in the United Kingdom. Devolution is a dynamic process and subject to change which has led even to a consented referendum. Accordingly, it has not been static. Considering the dynamic nature of the constitutional identity of the United Kingdom, the problem is not that the European Union facilitates secession, but that Cameron, respecting the nature of the British constitution, has permitted a referendum to take place. While the crisis precipitated by the Scottish Question has its origins in domestic politics (Scott), the nature of the British constitution may create a precedent, even if the referendum result is no (Avery).

### 3.2.2 Union Interest

Some participants argued that the effects on the Union of a territory's secession would be small. Graham Avery has articulated this view around four factors that define Union's interest.<sup>43</sup> Firstly, while this would mean more Member States, this would be a difficulty that is not impossible to overcome, as evidenced by the ordinary enlargement process and the absorption of the DDR by Germany. Secondly, as regards population, the Union would be unaffected. Thirdly, it would enhance the influence of the European Union by, in effect, adding another UN Member State. Fourthly, the EU has no preference for either smaller or large States and, indeed, all Member States are formally equal pursuant to Article 4(2) TEU. In summary, the accession of seceding territories cannot be regarded to be against the principles or interests of the European Union.

On the other hand, Jean-Claude Piris articulated a less positive view of the effects arguing that the institutional difficulties posed by the secession would disrupt the EU. This refers, firstly, to the composition of the institutions: the EU would be required to have 29 Commissioners and 29 Members of the Court of Justice, among other things. More broadly, it would inevitably affect the institutional balance of the EU. The Union might have legitimate reasons to oppose: it would alter the geographical balance within the EU. On the other hand, it was warned that it is very unlikely if not impossible for the new state to retain privileges linked to previous membership (opt outs, rebates, etc.).

### 3.2.3 Approach to be adopted by the Union and the Member States

The manner in which the Union and the Member States should address themselves to the question of secession also emerged as a topic of interest. A number of options were thought to present themselves:

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<sup>41</sup> See the distinction between "devolution" and "secession" in J. Crawford, *The Creation of States* (CUP 2006) 300.

<sup>42</sup> *Opinion on the compatibility of the existing legislation in Montenegro concerning the organisation of referendums with applicable international standards*. Adopted by the Venice Commission at its 65th Plenary Session, (Venice, 16-17 December 2005) on the basis of comments by Mr Anthony Bradely (Substitute Member, United Kingdom), Mr Carlos Closa Montero (Member, Spain), Mr Kaarlo Tuori (Member, Finland) Opinion no. 343 / 2005 Opinion no. 343 / 2005

<sup>43</sup> G Avery, 'Independentism and the European Union' (2014) European Policy Centre, 7 May 2014.

a constructive ambiguity can be maintained (Olesti) or the question of seceding territories can be addressed comprehensively.

The approach from constructive ambiguity proceeds from a comparison between position of seceding territories in the Union and Kosovo (Olesti). As such, as with Kosovo, the recognition of a seceding territory by the Member States is unlikely to be unanimous. This need not prevent the EU from entering into relations with the seceding territory as the Union's instrumental role in reconstruction and political and legal stabilisation in Kosovo demonstrates. In particular, it has been possible to sign a Stabilisation and Association Agreement<sup>44</sup> with Kosovo, despite the concerns of some Member States with respect to recognition.

An alternative to the *ad hoc* facilitation of the accession of seceding territories or continuing relations in constructive ambiguity is for the European Union to consider regions *as such* and to consider whether we can conceive such secessions as foreshadowing a reinvention of the EU as a Union of a growing number of *de facto* microstates (Kochenov). If the European Union avoids taking a decision it will create complexities on the ground. For instance, after Spain joined the Union, it caused a great many difficulties for Gibraltar (Kochenov). It follows from such incongruities that the Union address secession as a generalised phenomenon that fits into its broader architecture (Molina). To give an example of how a temporal gap might be bridged, the *Declaration of Independence*<sup>45</sup> of Crimea may provide an unlikely model for independence processes in the EU. The *Declaration* states that Crimea will only become sovereign if it becomes a new constituent entity of the Russian Federation (Kochenov).<sup>46</sup>

### 3.3 Approach of the Scottish Government to Negotiations

Andrew Scott offered insight from the perspective of legal expert seconded to the Scottish Government. On the question of accession to the European Union, the Scottish Government sought advice from the Commission, but the later refused to pronounce itself arguing that it would do so only if a Member State presented a precise legal. The UK government has refused invitation to present the Commission with such a precise legal scenario.<sup>47</sup>

The Scottish Government's White Paper<sup>48</sup> favours the use of Article 48 TEU. Article 49 TEU requires that an applicant must achieve statehood before the actual application is made. Much of the discussion with respect to this issue was said to overlook the question of how Scotland is to leave the EU. Correspondingly, Scott concludes that only Article 48 TEU is consistent with the law, as the Scottish Government has been advised, and the best way to proceed.

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<sup>44</sup> According to the website of the Commission, on the 25<sup>th</sup> of July 2014 Chief Negotiators for EU and Kosovo initialled the Stabilisation and Association Agreement between the EU and Kosovo <[http://ec.europa.eu/enlargement/countries/detailed-country-information/kosovo/index\\_en.htm](http://ec.europa.eu/enlargement/countries/detailed-country-information/kosovo/index_en.htm)>.

<sup>45</sup> Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol by the Supreme Council of Crimea and the Sevastopol City Council, 11<sup>th</sup> of March 2014 <<http://www.rada.crimea.ua/app/2988>>.

<sup>46</sup> For a meticulous analysis, see, Christian Walter, 'Postscript: Self-Determination, Secession, and the Crimean Crisis 2014', in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.), *Self-Determination and Secession in International Law*, Oxford: OUP, 2014

<sup>47</sup> The invitation to present a precise scenario was extended by Letter from the Vice-President of the Commission, Maroš Šefčovič, to Nicola Sturgeon MSP, Deputy First Minister of Scotland, 22<sup>nd</sup> of January 2013, Ares (2013) 76187 <[http://www.scotreferendum.com/bathar/uploads/2013/01/CAB08\\_0122142752\\_001.pdf](http://www.scotreferendum.com/bathar/uploads/2013/01/CAB08_0122142752_001.pdf)>. This invitation was in turn extended by the Scottish Government to the UK Government, most notably in Nicola Sturgeon MSP, Speech to European Policy Centre in Brussels, 26<sup>th</sup> of February 2013 <<http://scotreferendum.com/2013/02/speech-to-european-policy-centre-in-brussels-26-february-2013/>> The UK Government has not approached the Commission in this connection.

<sup>48</sup> *Scotland's Future: Your Guide to an Independent Scotland*, Scottish Government White Paper, 26<sup>th</sup> of November 2013.

Continuity of effect, pursuant to which European Union law would continue to apply to Scotland as it does now to the United Kingdom as a whole, is a core argument advanced by the Scottish Government. This is the principle with which the Scottish Government would approach negotiations.<sup>49</sup> While the legal pedigree of the principle is uncertain, its objective is to prevent the detrimental effect of EU withdrawal on Scottish citizens and companies and other Member States and their nationals. In maintaining the same arrangements, it might also speed up negotiations. The core submission of the Scottish Government is that independence should not result in renegotiation of the rights of citizens living in Scotland. The question is whether this is also so for British opt-outs and their effect upon such rights. In this context, Scottish government holds that Scotland does not need an opt-out from the Euro because of the voluntary nature of the “fourth” convergence criterion.

As to the time-frame of 18 months proposed by the Scottish Government,<sup>50</sup> Scott conceded that while it is quite narrow, it is technically and legally feasible. He then addressed the question of who will negotiate and whether Scottish negotiators would be excluded.

Andrew Scott acknowledged the force of some of the criticisms of the Scottish Government’s proposal. Article 49 might appear convincing to many since it would allow Member States to determine when secession is permitted and acceptable. However, practically speaking, the timetable would be clogged up by Member States deliberating as to what precedent accession sets.

One significant risk with Article 48 TEU is that it could lead to a convention. Whichever legal basis is deemed appropriate, the secondary law issues are likely to prove the most complex. In this regard, the Scottish Government is content to keep budgetary rules until 2020, because otherwise plenty of secondary legislation needs to be changed. While there is considerable body of practice in international law upon which to draw (Tancredi), what might happen if there was a temporal gap or interregnum between independence and accession to the European Union is very unclear (Scott).

#### **4. The position of citizens in seceding territories or in withdrawing States**

Both the withdrawal of a state from the EU as well as the secession of a territory from an EU Member State have consequences for the position of citizens. Both the citizens of the withdrawing or seceding state as well as citizens from other Member States residing in the withdrawing or seceding state will feel them. The first group obviously faces the loss of the status of Union citizenship and the rights attached to this status. Since ‘every person holding the nationality of a Member State shall be a citizen of the Union’, citizens of withdrawing or seceding states who do not possess the citizenship of another Member State are likely to lose their EU citizenship rights. Those citizens from other Member States can in all likelihood no longer benefit from the right to non-discrimination when residing in a withdrawing or seceding Member State, as well as the right to vote in municipal elections.

The withdrawal of a state from the EU as well as the secession of a territory from an EU Member State might therefore be costly for the citizens of those states/territories as well as for other Union citizens residing there. One might conceive this situation as normatively problematic. Some (eg: Piris, Manuel Ortega) believe that new territories would not have any legitimate claim to retain their EU citizenship under the EU treaties and sometimes even that ‘there is also no basis for the construction of a differentiated citizenship regime’ (Manuel Ortega). Piris, however, considers the conclusion of an agreement between the EU and the seceding state to be an option. Such an agreement could confer rights on both the citizens of the seceding state living within the EU as well as on EU citizens living within the seceding state. Others have suggested that the citizens of seceding states could be helped by the development of a particular citizenship regime, by which they keep their Union citizenship status.

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<sup>49</sup> Ibid p 221.

<sup>50</sup> For the timetable for negotiations setting the 24<sup>th</sup> of March 2016 as the proposed date of independence (the date of succession of States) see: Ibid p 51.

Several of the options will be set out below. A distinction is made between withdrawing states and seceding territories.

#### ***4.1 The position of citizens in withdrawing states***

In case a state decides to withdraw from the EU, the citizens of that state lose their EU citizenship status and the rights attaching thereto. This would follow logically from Article 20 TFEU, which holds that ‘every person holding the nationality of a Member State shall be a citizen of the Union’. There do not seem to be any arguments which can convincingly be brought against such an interpretation. The consequences for the citizens of a withdrawing state could be costly. This is particularly so for those who made extensive use of the rights granted to EU citizens. Since the withdrawal from the EU, however, is the result of the express decision of the citizens of the withdrawing state to do so (for example through a referendum, as in the UK), the citizens of that withdrawing state will have to face the consequences of their state losing EU membership; that is, they will lose their status as Union citizen. Since the withdrawal, at least of the UK, would follow the express consent of the citizens of the withdrawing state, this could be considered to be a strong indication that the majority of the citizens of that state favours the loss of their status as Union citizens over the old situation.

This does not change the fact that the withdrawal of a state from the EU and the subsequent loss of the status of Union citizenship as well as the Union citizenship rights are likely to have negative consequences for a particular group of citizens of the withdrawing state. Also the Union citizens residing in the withdrawing state are likely to be negatively affected by the decision of a state to withdraw from the EU. The options to remedy or reduce the negative consequences appear to be limited. The citizens of the withdrawing state could, of course, try to obtain the citizenship of an EU Member State, but this is an option that is not easily available to most. Union citizens residing in a withdrawing state would also not be helped by this.

The only feasible option would seem to be the conclusion of an agreement between the EU and the withdrawing state. In addition, the withdrawing state could guarantee some of the rights of its citizens by becoming an EFTA or EEA member. As already discussed above, it is not certain that a withdrawing state is accepted as EFTA and EEA member. In addition, even if a withdrawing state is allowed to join the EFTA and the EEA, there might be a period of uncertainty. To become an EFTA member, the UK would first have to leave the EU. There might, thus, be a period during which the UK is neither an EU nor an EFTA member, leaving the UK citizens and other Union citizens residing within the UK with limited protection. In any case, the EEA does not offer all rights and benefits granted to Union citizens.

An alternative is the conclusion of an agreement between the EU and the withdrawing state, specifying the rights given to the citizens of the withdrawing state as well as the Union citizens residing in the territory of the withdrawing state. The advantage of such an agreement is that it could enter into force on the withdrawal date, thereby ensuring a continuous protection of rights. Also an agreement does not necessarily grant the protection of the rights currently given to Union citizens. It is also possible to give the citizens of the withdrawing state some of the rights given to Union citizens but not all.

#### ***4.2 The position of citizens in seceding territories***

The position of the citizens of the territories that decide to secede from an EU Member State is more complicated. The Scottish and Catalan governments have indicated that they want to remain part of the EU in case of secession. The referendums in those territories are about leaving a Member State, not about leaving the EU although the second seems to be an unintended consequence linked to the former. Whether these citizens have the moral right to remain in the EU or to accede after applying for membership is an issue which is discussed elsewhere. What is of interest here is which different

consequences the citizens of a seceding territory could face and what kind of legal arrangements are possible.

The main difference between withdrawal and secession is that the citizens of a seceding territory in all likelihood do *not* want to leave the EU. In case the other EU Member States do not object, the situation that is likely to arise is one in which the citizens of the seceding territory lose their Union citizenship on the day of secession and re-obtain this status on the day the new state accedes to the EU. Such a situation could also be detrimental to Union citizens residing in the seceding territories, since they can no longer benefit from, amongst others, the right to non-discrimination. This, of course, assumes that ‘seamless transition’<sup>51</sup> is a route that is found to be infeasible or deemed undesirable.

The temporal loss of the status of Union citizenship and the rights attaching thereto as well as the temporal inapplicability of the right to non-discrimination and the right to vote in municipal elections will result in legal uncertainty and have adverse effect for individuals. In case the seceding territory has indicated its desire to stay within the EU and the EU and other Member States are willing to accept the seceding territory as a new Member State, it might be desirable to ensure that no gap in the legal protection arises. The question is whether this is possible.

It is useful to clarify straight away that the problem could be smaller than would appear at first glance. ‘It would seem that existing UK citizens in Scotland would be likely to continue to hold [UK] citizenship, perhaps alongside Scottish citizenship, unless the [UK] government changed the rules on holding [UK] citizenship and in so doing broke the link to the historic traditions of UK citizenship which appear to be tolerant of dual or multiple citizenship’ (Shaw). The solution adopted for Northern-Ireland could be used as a guide. This is certainly what the Scottish government wants (Shaw). Scotland envisages the adoption of inclusive citizenship laws, which allows the possession of dual Scottish/British citizenship.<sup>52</sup> Scottish citizens would then presumably be given the right to opt for Scottish and/or British citizenship and would, thus, not lose their status as EU citizens upon becoming independent. Whether the UK would accept this remains to be seen. While ‘it has not hitherto been the UK’s practice to deprive people of citizenship because they leave the UK territory or because they acquire another citizenship; the question is whether it is different because it would be the UK territory that, in a sense, has left them’ (Shaw). Considering the strong and close ties between Scotland and the rest of the UK, it would be pragmatic not to deprive all Scottish citizens of their British nationality (Shaw). However, Barber argues that there are serious reasons why the UK could consider doing so anyway. About 6 to 7 million people would obtain dual Scottish/British nationality, which would be rather unusual and would raise delicate questions about who is entitled to vote in UK elections.<sup>53</sup> Generally, no one seems to have an interest in depriving the Scots from their Union citizenship. It is neither in the interest of Scotland, nor in those of the UK’s or EU’s. The position of Spanish authorities with respect to an eventual secession of Catalonia has not been made explicit so far. Granting dual nationality is also legally permissible from the perspective of Union citizenship.<sup>54</sup>

Unfortunately, such solutions are not full solutions to the problem. It might help the citizens of the seceding territories, but does not guarantee the rights of other Union citizens residing in those territories. This also seems to be the case for the other suggestion offered by Kochenov, who has taken inspiration from other citizenship regimes world-wide. The Kingdom of the Netherlands offers a common nationality. Although this option would give the Scottish or Catalans access to the status of Union citizenship, the Scottish and Catalans might not be so keen on sharing a citizenship with the rest

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<sup>51</sup> *Scotland’s Future: Your Guide to an Independent Scotland*, Scottish Government White Paper, 26<sup>th</sup> of November 2013, p.220.

<sup>52</sup> *Ibid* p 271-272.

<sup>53</sup> Nick Barber, ‘After the Vote: The Citizenship Question’ (2014) <<http://ukconstitutionallaw.org/2014/08/04/nick-barber-after-the-vote-the-citizenship-question/>>.

<sup>54</sup> Dimitry Kochenov, ‘Double Nationality in the EU: An Argument for Tolerance’ (2011) 17 *ELJ* 323.

of the UK or Spain, respectively. This solution also does not help the Union citizens from other Member States residing within the seceding territories. This is also the case for the option for the full mutual recognition of citizenship among associated states.<sup>55</sup>

The only solution which would help the citizens of both the seceding territories as well as the Union citizens residing there is an agreement which would cover the period from secession of an EU Member State to EU membership. Such an agreement cannot give EU citizenship to the citizens of the seceding territories. Such would seem to be in conflict with Article 20 TFEU, which reserves EU citizenship to the nationals of a Member State only (Craig). What would be possible is to draft an agreement which grants and protects the rights attached to the status of Union citizenship, both for the citizens of the withdrawing territories as well as the Union citizens from other Member States residing in those territories.

What was unanimously dismissed during the conference was the ‘*Rottmann* on steroids’ option.<sup>56</sup> This would entail such an extensive interpretation of *Rottmann*, so as to prohibit stripping Scottish citizens of their Union citizenship. There does not seem to be an obligation under EU law to ensure that the Scots remain Union citizens. Not everyone agrees with this. David Edward believes that ‘maintaining the (...) vested rights of its citizens is surely of greater importance than blind acceptance of the contestable doctrines of public international law’.<sup>57</sup> No matter how desirable it might be to protect the rights once given to the citizens of the withdrawing territories, the fact that only nationals of a Member State are citizens of the Union implicates that the citizens of withdrawing states do not have a legal right to maintain their EU citizenship status and their ‘vested rights’. Rieder has pushed the argument even further than Edwards and has explicitly invoked *Rottmann* to demonstrate that ‘that citizenship cannot simply be taken away through a majority decision, especially against the will of the individual, must apply unless the entity of the Union would cease to exist’.<sup>58</sup> To this, Armstrong has replied that it would be wrong to view EU citizenship ‘as trumping all other legal considerations’.<sup>59</sup> So, ‘whatever may be the desirability of preserving and protecting citizenship rights and whatever may be the force of the duty of sincere cooperation, these cannot, it is suggested, serve to defeat the rights of other interested and affected parties from vetoing Scottish membership of the EU, if they believe that it is in their interests so to do’.<sup>60</sup>

Neil Walker has drawn an analogy with other federal states. If a part of Texas decides to secede but to stay as a state of the US, the citizens of that seceding state would not be stripped of their US citizenship, so goes the argument. This analogy, as Closa demonstrated, suffers from the same flaws as some of the ‘*Rottmann* on Steroids arguments’. Differently to the USA, the EU is not a federal state and it cannot grant ‘EU federal citizenship’ to individuals lacking nationality of a member state. The defining characteristic of EU citizenship is that it is derivative citizenship: nationality of a member state gives the citizenship of the Union (not the other way round). In contrary sense, in the USA, federal citizenship is needed to obtaining any state citizenship. The analogy between Scotland/Catalonia and Texas, therefore, has limited strength.

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<sup>55</sup> Micronesia-USA relationship provides a vivid example of such an arrangement: T Lam Dang, ‘Relation associative: les États Fédérés de Micronésie: les spécificités de l’association’, in Jean-Yves Faberon et al. (eds.), *Destins des collectivités politiques d’Océanie*, Vol 1, Marseille: Presses Universitaires d’Aix-Marseille, 2011.

<sup>56</sup> For an analysis, see, Dimitry Kochenov, ‘Annotation of *Rottmann*’, 47 CMLRev, 2010, 1831 For an analysis, see, Dimitry Kochenov, ‘Annotation of *Rottmann*’, 47 CMLRev, 2010, 1831

<sup>57</sup> David Edward, ‘EU Law and the Separation of Member States’ (2013) 36 Fordhm Int L J 1151, 1167.

<sup>58</sup> Clemens M Rieder, ‘The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship: Between Integration and Disintegration (2014) 37 Fordham Int L J 147, 172.

<sup>59</sup> Kenneth A Armstrong, ‘After “Ever Closer Union”: Negotiating Withdrawal, Secession, and Accession’ (2014) 37 Fordham Int L J Online 119, 125.

<sup>60</sup> Ibid 126.

Legally there does not seem to be an obligation on the Member States to extend EU citizenship and/or the rights attaching thereto to the citizens of a withdrawing territory. Simultaneously, however, no one seems to have a strong interest in creating legal uncertainty and imposing additional burdens on their citizens by allowing a period to exist in which the citizens of the withdrawing state as well as the Union citizens of other Member States residing in the withdrawing states cannot benefit from the rights they used to possess. There might thus be strong grounds for preventing such a situation from arising. There are several options by which the citizens of withdrawing territories can be protected. Only some form of an agreement, however, would also protect the citizens of other Member States residing within the territories of the withdrawing states.

## Annex

### Scotland and Europe

JHH Weiler

The Scottish referendum on independence is upon us. At some levels it is an easier and ‘cleaner’ case than that of Catalonia: The United Kingdom, in a mature political decision, has allowed this referendum thus removing any objection from either a British constitutional perspective or from public international law.

The people of Scotland, many of them at least, resent ‘outside interference’ in what they consider their internal business – the exercise of a right to self-determination. It is indeed their business; but this does not mean that outsiders cannot, or should not, have a view and express that view driven by both prudential and normative considerations.

The issue of greatest concern outside Scotland and the United Kingdom concerns the future, or otherwise, of an independent Scotland within the European Union. Membership would not be automatic – I find the argument for automaticity based, as it has been by some, on the fact that the people of Scotland are citizens of the Union unpersuasive. Citizenship of the Union is predicated on being nationals of a Member State. And if Scotland becomes independent, her people, by their own sovereign decision, would no longer be nationals of a Member State. They are becoming independent from the United Kingdom. (Let me open a first parenthesis. In part the matter is one of framing: If, say, Belgium were to decide to split, it would not be nearly as clear which, if any, of the two – Wallonia, Flanders – would “remain” a Member State and which would have to accede. Perhaps neither.) Be that as it may, there should be no legal impediment for Scotland to become a Member State if she satisfies the condition for Membership, political and legal, one of which is a unanimous decision of all Member States. On the technical side it should be a relatively easy accession, since the European legal *acquis* is part of the political and legal fabric of Scotland. The adjustments necessary will be, for the most part, of a technical nature. (A second parenthesis: It is said that for Scotland to accede she would first have to be an independent State i.e. forcing her into an interregnum of non-membership. That is why some lawyers suggest Scottish “accession” through Treaty amendment rather than through Accession. I think Treaty amendment is a circuitous way, and normal Accession is the correct route; but I do not think a real interregnum would be necessary. The would-be independent Scotland could negotiate her accession in her current status, go through all the European constitutional hoops save the final signature of the Act of Accession. That can be planned to take place, literally on the very same day that Scotland becomes formally an independent State. One would first complete the last formal act of independence – some piece of paper will be signed by, presumably the British Monarch and the Scottish authorities and immediately the Act of Accession could be signed. Scotland would be a non-Member State for the duration of it takes to sign those two pieces of paper. This is of course a short-hand for a fairly complex procedure but it could be done.)

The issue, therefore, is not legal but political. Should the Member States of the European Union embrace an independent Scotland? In an Editorial in EJIL some time ago I took a dim view of plans for Catalan independence – which earned me the ire of many. I do not think that any editorial I wrote provoked so much hate mail. I take a similarly dim view of the Scotland case. Make no mistake: I harbor great affection for Scotland and its people. My father admired them, as he did any small people living in the shadow of a giant and yet managing to preserve a keen and rich sense of distinct national identity. I also do not doubt their distinctiveness as a nation.

Why then this dim view? One consideration, not trivial, is prudential: I am convinced that Scottish independence coupled with simultaneous, or close to simultaneous, membership of the Union will provoke a domino effect among many nations and regions in Europe. Independence pure and simple is in many cases threatening and unattractive. There is a long list of candidates, in Spain, France, Italy and elsewhere who would be emboldened by the Scottish example. Feeding this frenzy for secession



and independence in Europe is the premise that all these new States will somehow find a safe haven as Member States of the European Union. Absent that assumption, appetite for independence would be significantly muted the rough seas of "going it alone" far more threatening.

I do not believe that given the decisional structure of the Union, even on the most optimistic ideas for reform, it would be helpful for Europe to have a growing number of Member States. Saying Yes to Scotland would require saying yes at least to all other constitutionally lawful secessions.

But the main consideration is not prudential. I do not take the view, normatively speaking, that having a distinct national identity within a democratic State in and of itself justifies independence. It is simply ethically demoralizing to see the likes of Scotland and Catalonia reverting to an early 20<sup>th</sup> Century post World War I mentality, when the notion that a single state could encompass more than one nationality seemed impossible – hence the special treaties on minorities which abounded in the breakup of the Ottoman and the Austro-Hungarian Empires. These arrangements were well intentioned but lacking in political imagination and eventually, let us not hide the ugly facts, feeding and leading to that poisonous logic of national purity and ethnic cleansing. Again, make no mistake: I am not suggesting for one minute that anyone in Scotland or Catalonia is an ethnic cleanser. But I am suggesting, that the “go it alone” mentality is associated with that kind of mindset.

More than any other country with which I am familiar, the current constitutional arrangements in the UK allow a full vindication of a Scottish cultural and distinct political identity. Scotland is not a Chechnya. So what is the case for independence? It is precisely that notion that having a distinct national identity justifies secession, a notion fueled in my view by a seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians.

But the reality is more mundane than this. I watched the televised debates. Most of the sparring was utilitarian: Will we be better off, especially economically. More employment, yes or no. Better social network, yes or no et cetera et cetera. So this is what will ultimately decide things.

This runs diametrically contrary to the historical ethos of European integration. The commanding moral authority of the Founding Fathers of European integration -- Schumann, Adenauer, de Gaspari and Jean Monnet himself -- was a result of their rootedness in the Christian ethic of forgiveness coupled with an enlightened political wisdom which understood that it is better to look forward to a future of reconciliation and integration rather than wallow in past historical rights and identity. There were, of course, utilitarian considerations, but they were not at the normative core. The European Union is struggling today with a decisional structure which is already overloaded with 28 Member States but more importantly with a socio-political reality which makes it difficult to persuade a Dutch or a Finn or a German, that they have a human and economic stake in the welfare of a Greek or a Portuguese, or a Spaniard. Why would there be an interest to take into the Union a polity such as an independent Scotland predicated on a regressive and outmoded nationalist ethos which apparently cannot stomach the discipline of a multinational nation? The very demand for independence from the UK, an independence from the need to work out political, social, cultural and economic differences within the UK, independence from the need to work through and transcend whatever gripes there might be, disqualifies morally and politically Scotland and the likes as future Member States of the European Union. Do we really need yet another Member State whose decisional criterion for Europe's fateful decisions in the future would be “what's in it for us”?

Europe should not seem as a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. Thus, the assumption of Membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons lack the courage so to say, by other Member States of the Union.

It would be hugely ironic if the prospect of Membership in the Union ended up providing an incentive for an ethos of political disintegration. There really is a fundamental difference to the welcoming into the Union of a Spain or a Portugal or a Greece or the former Communist countries

emerging from ugly and repressive dictatorships and a Scotland, which is part of a functioning democracy which recognizes in word and deed the distinctiveness and wide and deep autonomy of Scotland and its people. In seeking separation Scotland would be betraying the very ideals of solidarity and human integration for which Europe stands.

I hope the people of Scotland will reject the seduction of separatism and tribalism. And if they do not – well, let us wish them, as I wished the Catalans, a Bon Voyage in their separatist destiny.

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