

The Place of an Independent Catalonia in the European Union

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On January 23, 2013, the Parliament of the Autonomous Community of Catalonia took another decisive step towards independence of Catalonia from Spain when it issued the “Declaration on the sovereignty and right to decide of the people of Catalonia”.¹ Referring to the results of the regional elections of November 2012, the Parliament announced to initiate a process with the aim to let the people of Catalonia decide upon their common political future. The Catalanian Regional Government under President Artur Mas is determined to hold a referendum on the independence of the region before the end of 2014, even though the Spanish Government considers the referendum to be unconstitutional and is hence prepared to prevent it by all available political and legal means. In a resolution adopted on March 13, 2013, the Parliament of Catalonia urged the Catalanian Government to start a dialogue with the Government of Spain “with a view to enabling a consultation of the people of Catalonia to decide upon its future”.²

At the same time, supporters of an independence of Scotland from Great Britain could score a great success when the British Government, who had long struggled against it, agreed to hold a referendum on Scottish independence. On October 15, 2012, Prime Minister David Cameron and the First Minister of Scotland, Alex Salmond, signed in Edinburgh an “Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland”.³ According to the Scottish Independence Referendum Bill introduced by the Scottish Government the vote will be held on September 18, 2014.⁴

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¹ Resolution 5/X of the Parliament of Catalonia, Proc. 250-00059/10 and 250-00060/10, available at: <http://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions>.

² Resolution 17/X of the Parliament of Catalonia, Proc. 250-00226/10, available at: <http://www.parlament.cat/web/documentacio/altres-versions/resolucions-versions>.

³ Edinburgh Agreement of 15 October 2012, available at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

⁴ An Bill to make provision, in accordance with paragraph 5A of Part 1 of Schedule 5 to the Scotland Act 1998, for the holding of a referendum in Scotland on a question about the independence of Scotland (Scottish Independence Referendum Bill, SP Bill 25) as introduced in the Scottish Parliament

Both the Catalanian and Scottish Government favour a continued membership of Catalonia and Scotland in the European Union, with which both regions are economically closely interwoven. The sovereignty declaration of the Catalanian Parliament explicitly stresses its commitment to the EU and its fundamental values.

In Spain and Britain the opponents of an independence of Catalonia and Scotland, respectively, lately scored with a strong argument. They warned that an independent Catalonia or Scotland would “automatically” drop out of the European Union. According to the EU Treaty, they added, in order to be admitted as a new member, all present member states must agree. Hence, Catalanian accession ambitions could be blocked by Spain, and Scottish ambitions by Great Britain. The Spanish Government, the opponents say, would doubtlessly make use of this option.

This particular argument has also been adopted by the EU Commission in several statements. Most recently, in December 2012, Commission President José Manuel Barroso stated in a letter to the House of Lords Economic Affairs Committee: “The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.”⁵ In September 2012, the Commission President explained in a BBC interview that such a state would have to apply for EU membership “like every other state”.⁶ In his letter to the House of Lords, Mr. Barroso accordingly pointed to Article 49 of the Treaty on European Union according to which any European state which respects the principles set out in Article 2 of the Treaty may apply to become a member of the EU.

The opponents of Catalanian or Scottish independence also received support from the jurisprudential side. Professor Joseph H.H. Weiler of the New York University School of Law, condemned the Catalanian aspiration for independence in the

on 21 March 2013, available at:

http://www.scottish.parliament.uk/S4_Bills/Scottish%20Independence%20Referendum%20Bill/b25s4-introd.pdf.

⁵ Letter of the President of the European Commission to Lord Tugendhat, Acting Chairman of the Economic Affairs Committee of the House of Lords, 10 December 2012, File No. BARROSO (2012) 1300171, available at: http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_1012_12.pdf. The letter virtually repeats the answer Commission President Romano Prodi gave to a question of a member of the European Parliament on 1 March 2004. See Written Question P-0524/04, Official Journal of the EU C 84 E/421 et seq., available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0421:0422:EN:PDF>.

⁶ José Manuel Barroso, Interview with the BBC's World at One programme, 12 September 2012, available at: <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-19567650>.

European Journal of International Law as a “form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union”. He added that “the assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened and (...) by other Member States of the Union”.⁷ Recently, Professor Weiler reacted to criticism engendered by his statement by repeating that “to insist on independence as a solution to resolving the grievances and vindicating Catalan national identity was a defeat of the very spirit and ethos which gave birth to that noble experiment which is the European Union”. “Independence?”, he pointedly wrote, “Bon Voyage. But not in the EU.”⁸

In contrast to Joseph Weiler, his colleagues Professor James Crawford (University of Cambridge) and Professor Alan Boyle (University of Edinburgh) advanced more cautious views on the consequences of an independence of Scotland for the region’s membership in the European Union. In a legal opinion rendered for the British Government, Crawford and Boyle also assumed that Scotland, being a new state, would have to apply for admission to the EU while Britain’s membership remains untouched by Scottish independence: “On the face of it, Scotland would be required to accede to the EU as a new state, which would require negotiations on the terms of its membership”.⁹ The two experts in international law nevertheless admit that the EU can adjust the EU Treaty rules about accession in accordance with the particular circumstances of a country or territory which before its independence already belonged to the European Union and was subjected to its legal order: It is not inconceivable for Scotland, they wrote, “automatically to be an EU member”,¹⁰ and further: “Scottish independence would be an event without a clear precedent in EU law and is not clearly governed by any particular provisions of the EU treaties.”¹¹ Professors Crawford and Boyle also deem it possible that the European Court of Justice in Luxemburg opposes an automatic exclusion of Scotland from the European Union if Scottish citizens would thereby lose their rights as EU citizens.¹²

However, are the threats, aiming the Catalonian and Scottish public, that an independent Catalonia or Scotland, respectively, must live outside the EU legally justified? This question must be answered on the basis of EU law. First, it is correct that Catalonia and Scotland would not “automatically” remain in the EU once they separate from Spain and Britain. There is no rule to that effect either in the international law on state succession to international treaties or in the law of the European Union. Regardless of the statehood they enjoyed until the eighteenth

⁷ Joseph H.H. Weiler, Editorial, in: *European Journal of International Law* 23 (2012), 909 et seq., at 911.

⁸ Joseph H.H. Weiler, Editorial, in: *European Journal of International Law* 24 (2013), 471 et seq., at 474.

⁹ James Crawford and Alan Boyle, Opinion: Referendum on the Independence of Scotland – International Law Aspects, 10 December 2012, para. 6.2, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

¹⁰ Crawford and Boyle, para. 164.

¹¹ Crawford and Boyle, para. 179.

¹² See Crawford and Boyle, paras. 180 et seq.

century, after a newly won independence Catalonia and Scotland would be new states in the international legal order without contractual ties to the EU. That is true notwithstanding the current EU citizenship of the Catalans and Scots as this is dependent, or contingent, on the nationality of Spain and the United Kingdom as EU member states. Secondly, despite losing a part of its territory and population, Spain and Great Britain, respectively, would continue to be EU members.

But Commission President Barroso's view that after independence Catalonia or Scotland would have to apply for EU membership just like any other third country is wrong. The rules on accession, as to be found in article 49 of the EU Treaty,¹³ were drafted with regard to 'real' third countries, that is states which in the past were not part of the European Union. Since the first enlargement of the European Economic Community in 1973, by which Great Britain, Ireland and Denmark became members of the Community, up to the accession of Bulgaria and Romania to the EU in 2007, changes in the membership of the EU only occurred this way, namely by "real" third states complementing the former circle of member states.

When in 1992 the member states of the then European Communities agreed on the predecessor of the present Article 49 of the EU treaty, namely Article O of the Treaty on European Union adopted in Maastricht,¹⁴ they did not consider the possibility of an application for membership submitted by a country which had come into existence through secession from a member state. The purpose of Article O was rather to clarify that a state could only join the EU and the three European Communities (the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community) as a whole.

¹³ Article 49 of the Treaty on European Union (consolidated version, Official Journal of the EU 2012 C 326/15) reads as follows:

"(1) Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

"(2) The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."

¹⁴ Article O of the Treaty on European Union of 7 February 1992 (the "Maastricht Treaty", Official Journal 1992, C 191/1) read as follows:

"(1) Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

"(2) The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements."

Accordingly, the provisions on accession of the treaties establishing the three European Communities¹⁵ were abolished and replaced by the common rule of Article O.

A second purpose of that new Article O of the EU Treaty was to invite, after the breakdown of the Soviet Union, the newly free countries of Central and Eastern Europe to apply for membership in the EU. Article O must be read in the light of the preamble of the Maastricht Treaty in which the contracting state parties, *inter alia*, recalled “the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe”. Nobody imagined in 1992, or before, the possibility that new independent states emerge within the European Community or European Union, respectively. Not one of the leading commentaries on the treaties in question or of the treatises even mentions that scenario.¹⁶

In the absence of any particular provisions of the EU treaties dealing with the question of EU membership of a country the territory of which was a part of the European Union before independence, Article 49 of the EU Treaty can only be applied *by analogy* to the case of Catalonia or Scotland, respectively. This application must take into account the particular circumstances of the case, distinguishing it from the “normal” situation envisaged by Article 49, that is an application for membership submitted by a “true” third state.

Article 49, paragraph 1, first sentence of the EU Treaty sets forth the substantive criteria to be met by a candidate for membership: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.” The values specified in Article 2 of the EU Treaty as values on which the EU is founded are: (1) respect for human dignity, (2) freedom, (3) democracy, (4) equality, (5) the rule of law, and (6) respect for human rights, including the rights of persons belonging to minorities. The second sentence links these values to “a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”, thereby effectively supplementing the six values of the first sentence with further qualities shared by the societies of member states. These substantive criteria can, and must, also be applied

¹⁵ See Article 98 of the Treaty establishing the European Coal and Steel Community (1951), Article 237 of the Treaty establishing European Economic Community (1957), and Article 205 of the Treaty establishing the European Atomic Energy Community (1957).

¹⁶ See, e.g., Hans-Joachim Cremer, Article 49, in: Christian Calliess and Matthias Ruffert (eds.), EUV/AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta. Kommentar. 4th ed., Munich: C.H. Beck, 2011, p. 457 et seq.; Christoph Ohler, Article 49, in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds.), Das Recht der Europäischen Union, vol. I, Munich: C.H. Beck (loose-leaf edition, last updated in November 2012); Damian Chalmers, Gareth Davies and Giorgio Monti, European Union Law: Cases and Materials, 2nd ed., Cambridge University Press 2010, p. 30 et seq.

to the case of an application for membership by a newly independent country the territory of which belonged to the EU before the country's independence.

According to Article 49, paragraph 1, last sentence of the EU Treaty "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account" when the Council of the EU and the European Parliament decide about the application for membership. Among those "conditions of eligibility" the so-called Copenhagen criteria of June 1993 continue to play an important role. At Copenhagen, the European Council agreed that the countries in Central and Eastern Europe associated with the EU by way of "Europe agreements" that so desire shall become members of the EU, and that accession of a particular country will take place as soon as that country "is able to assume the obligations of membership by satisfying the economic and political conditions required".¹⁷ The European Council went on to say:

"Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries."¹⁸

Compared to the criteria mentioned in Article 49, paragraph 1, first sentence, the first emphasis of these Copenhagen requirements is on the public institutions (legislative, administrative and judicial) of an applicant state which must be sufficiently stable and effective to guarantee, first, that the several mentioned values and standards (democracy, the rule of law, etc.) are actually preserved and sustained, and secondly, that EU legislation is transposed into national law and implemented effectively through appropriate administrative and judicial structures. The latter requirement was expressed in even clearer terms by the European Council in Madrid in December 1995 when it reminded applicant states of the necessity of a "adjustment of their administrative structures".¹⁹

The second emphasis of the Copenhagen criteria is on the economic conditions of an applicant state. Such state must be equipped with "a functioning market economy"

¹⁷ See European Council in Copenhagen, 21-22 June 1993. Conclusions of the Presidency. Doc. SN 180/1/93 Rev. 1 EN, at p. 13, available at:

http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf.

¹⁸ European Council in Copenhagen, at p. 13.

¹⁹ See European Council in Madrid, 15-16 December 1995. Presidency Conclusions, Part A.III.A, available at: http://www.europarl.europa.eu/summits/mad1_en.htm#enlarge.

and “the capacity to cope with competitive pressure and market forces within the Union”. It must also economically be able to adhere to the aims of an economic and monetary union as laid down in the EU treaties.

While there is no good reason for deviating from these substantial criteria of the EU Treaty, as specified and complemented by the declarations of the European Council, in the case of a country the territory of which belonged to the EU before independence, the legal situation is different with respect to the procedure provided for in Article 49 of the EU Treaty. That procedure is characterized by two fundamental requirements: a unanimous decision taken by the Council (paragraph 1), and a ratification of the agreement on accession by all EU member states (paragraph 2). Each of these requirements would enable the country from which the applicant seceded to obstruct an accession, even if the substantial criteria are all met by an applicant and all the other member states do admit this fact.

However, such an obstruction would amount to an abuse of law if the underlying motive was to “punish” the respective population for its decision in favour of an independent status. EU law does not provide a judicial basis for such a “sanction” because it does not prohibit secession. EU law is silent on the issue of a separation of a particular region from a member state, in the same way as it says nothing about a merger of two member states. According to the EU Treaty, it is true, the Union “shall respect” the “essential State functions” of its member states, “including ensuring the territorial integrity of the State”.²⁰ Further, the EU’s external policy is pursuing the objective, among others, to safeguard the “integrity” of the Union against foreign states.²¹ But the Union does not defend the existing borders of its member states within the EU. In other words, the EU was not founded to petrify the borders between its member states as they presently exist. The EU rather provides a legal frame in which peaceful change can occur even relating to questions of self-determination and territory. If a people strives for self-determination, this certainly does not “contradict the deep values” of the Union²² – a community committed to the rules and principles of international law (see Article 3, para. 5, and Article 21, para. 1, of the EU Treaty) among which the right of peoples to self-determination occupies a prominent place.²³

²⁰ Article 4, paragraph 2 of the EU Treaty reads as follows: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. *It shall respect their essential State functions, including ensuring the territorial integrity of the State*, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” (Emphasis added.)

²¹ Article 21, paragraph 2(a), as one of the “general provisions on the Union’s external action”, reads as follows: “The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) *safeguard its values, fundamental interests, security, independence and integrity*” (emphasis added).

²² See text accompanying note 7 above.

²³ See, in particular, common Article 1 of the two International Covenants on Human Rights of 1966.

Furthermore, as already stated, EU citizenship, which was established by the Treaty of Maastricht of 1992, must be taken into account.²⁴ Citizens of the Union have, *inter alia*, the right to move and reside freely within the territory of all EU member states, the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member state of residence, and, under certain conditions, the right to enjoy in a third country diplomatic and consular protection by the authorities of a member state other than their own (see Article 20, para. 2, and Article 21 on the Treaty of the Functioning of the EU).

EU citizenship, the long-standing individual rights concerning the free movement of workers, services and establishment, and the rights guaranteed by the Charter of Fundamental Rights of the EU also speak against a member state's unilateral "right to obstruct" an accession as a form of "punishment". For the EU constitutes, as the European Court of Justice already emphasized in its judgment in the case of *Van Gend & Loos* of 1963, "a new legal order of international law (...) the subjects of which comprise not only member states *but also their nationals*". "Independently of the legislation of member states", the Court went on to say, "community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights *which become part of their legal heritage*."²⁵ Thus, the law of the Union is geared towards maintaining the European rights of individuals who at some point of time have become subjects of the EU legal order.

In sum, an independent Catalonia or Scotland would not "automatically" become a member of the European Union but would have to apply for membership. However, participating in the decision-making process of the Council, and when invited to ratify an agreement on accession, Spain and Great Britain, respectively, would be required to act in good faith. Their rejection of a membership application alone could not hinder accession. They would act against the spirit of the EU Treaty if they denied the population of their former region the benefits of EU membership (including EU citizenship) in order to "punish" them for their striving for independence as a form of self-determination. In the preamble of the EU Treaty, the contracting states have resolved "to continue the process of creating an ever closer union among the peoples of Europe". An exclusion of a people who opted for independence in a democratic procedure as a form of sanction is incompatible with that process. When, in the preamble of the Treaty on the Functioning of the EU, member states are "calling upon the other peoples of Europe who share their ideal to

²⁴ For the present scope of the individual rights conferred on the nationals of EU member states by EU citizenship, see Articles 20 – 25 of the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union.

²⁵ Judgment of the European Court of Justice of 5 February 1963, Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1. Emphasis added.

join in their efforts”, that call is also, and particularly, addressed to such a people wishing to retain its allegiance to the European Union.

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