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The Right to National Self-determination within the EU: a Legal Investigation

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Abstract

Contrary to contemporary international society which is based on the principle of equal rights and self-determination of peoples (UN Charter, Art. 1), European Law seems to ignore the issue. This paper will nevertheless try to identify, within EU law whether a right, or elements of a right, to self-determination for those European peoples without a state within the EU do exist. We first examine whether EU law makes references to self-determination. We also identify references that are made to "peoples" within EU law, before concluding that if no express provision recognizing the right to self-determination to European "peoples who have not yet achieved independence" exist, there is no provision allowing current member states to rely on EU law to protect their current situation either. In the second part, we look at the possible building of a democratic right to self-determination, based either on EU citizenship or on individual human rights, or both. The third part examines the practice of EU member states and institutions as regards the exercise of the right to self-determination in Europe and the organization of self-determination referenda within the EU. As a conclusion, we underline the paradoxical relationship between the principle of self-determination and the European integration process.

Keywords: Self-determination, EU, Law, Secession, a Right to Self-determination.

The Right to National Self-determination within the EU: a Legal Investigation

On 21 December 2016, the European Court of Justice recognized that,

> "the customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its *Advisory Opinion on Western Sahara*, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence. It is, moreover, a legally enforceable right *erga omnes* and one of the essential principles of international law."[1]

As case law of the ECJ consistently shows, the EU has to respect general international law[2] which, as such, is binding for EU institutions and member states (De Burca 2010). Has the ECJ, through its 21 December 2016 decision, recognized a right to self-determination within EU law to Basques, Bavarians, Catalans, Flemings or Scots, among many others?

Such a conclusion would undoubtedly be hasty, since the case under examination by the ECJ in its December 2016 decision was clearly related to a frozen decolonization process (Western Sahara), and not to the European context. However, the judges sitting in Luxembourg did not refer expressly to the decolonization context in their decision—as they could have by referring themselves to one of the numerous UN General Assembly resolutions dealing with the right to self-determination of peoples under colonization (such as UNGA Resolution 1514[3]). They quoted article 1 of the UN Charter, which clearly recognizes the right of self-determination to all people, without distinction between peoples under colonial rule, other peoples who have not yet achieved independence, or peoples living in their own national state.

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[1] ECJ, 21 December 2016, *Council of the European Union v. Front Polisario*, case C-104/16 P, § 88.
[2] ECJ, 16 June 1998, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, case C-162/96 § 45.
[3] UN General Assembly Resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples," adopted on 14 December 1960. Security Council Resolutions dealing with Western Sahara, at least one every year since 1971, always refer to UNGA Resolution 1514, not to article 1 of the UN Charter.

The ECJ was undoubtedly aware that the International Court of Justice, in its 2010 Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Advisory Opinion) had taken good notice that,

> "[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation […]. A great many new states have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of states in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases."[4]

The exercise of a right to self-determination within the EU as "one of the essential principles of international law," leading to a declaration of independence and the emergence of a new state is, at the least, not forbidden by international law, therefore not by EU law either, which abides to this principle of international law. Could self-determination, beyond its non-interdiction, even be recognized as a right belonging to those European peoples within the EU that do not have their own state, such as Basques, Bavarians, Catalans, Flemings, or Scots? This is the question the present paper tries to address.

It should be emphasized that the ICJ, in its Kosovo Advisory Opinion, did not expressly pronounce itself on the scope and legal consequences of the right to self-determination[5], neither confining it to the decolonization process, nor extending it beyond it as, for example, the Badinter Commission had been envisaging for the dissolution of the SFR of Yugoslavia in the early 1990s (Pellet 1992). One of the major difficulties with the implementation of the international legal principle of self-determination is that the

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[4] ICJ, 22 July 2010, *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Advisory Opinion)*, § 79.

[5] ICJ 2010 *Kosovo Advisory Opinion*, §§ 82 and 83; in the latter, the court states: "The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999)."

potential beneficiaries of this right—peoples—have no commonly accepted legal definition in international law (Moore 1998; Buchanan 2007; Hannum 2011). Furthermore, several underlying concepts of national destinies coexist in national self-determination—a people when exercising its right to self-determination through accession to independence becomes the nation of a new national state[6] —, leading to divergent requirements to fulfil the national criteria (Greenfeld 2011).

In that delicate issue, let us underline that the current attempts at national projects in Europe—such as Scotland which organized a referendum on self-determination on 18 September 2014, or Catalonia whose government will attempt to organize, against the will of the Spanish government, a self-determination referendum for 1 October 2017—are not primarily based on an ethnic or cultural concept of nationalism, but rather on a civic or democratic perspective of nationalism (Guibernau 2004; Jackson 2014), which does not necessitate the definition of a people as a preexisting collective entity (Smith 2010), but will materialize a nation in the process of exerting its self-determination (Wellman 2005; Williams and Jannotti Pecci 2012).

In that debate about the nature of national projects in which the critics of civic nationalism are much more numerous and vociferous than its supporters (Young 2000), please take note that the past exercises of self-determination, especially in the process of decolonization, were based on preexisting territorial delimitations (administrative borders) rather than on the precise definition of a given ethnic or linguistic group, that is a people (Corten 1999), giving very little practical evidence that the exercise of the right to self-determination relies concretely on the preexistence of a defined people. Therefore, and as a matter of fact, most, if not all, states appeared through the decolonization process are still constituted of several peoples or ethnic, religious, or linguistic groups, be they recognized as such or not.

The present paper will try to identify within EU law whether a right, or elements of a right, to self-determination for those European peoples without a state within the EU do exist. We shall first examine whether EU law (1) makes references to self-determination (1.1), then identify the references that are made to "peoples" within EU law (1.2), before concluding that if no express provision recognizing the right to self-determination to European "peoples who have not yet achieved independence," there is no provision allowing current member states to rely on EU law to protect their current situation either (1.3). In the second part, we shall look at the possible building of a democratic right to self-determination, based either on EU citizenship (2.1) or on individual human rights

[6] ICJ 2010 Kosovo Advisory Opinion, § 79, quoted above, note 4.

(2.2), or both. We shall in the third part examine the practice of EU member states and institutions as regards the exercise of the right to self-determination in Europe (3.1) and the organization of self-determination referenda within the EU (3.2). As a conclusion, we shall underline the paradoxical relationship between the principle of self-determination and the European integration process.

1. The right to self-determination in EU law

In contrast to international law which embedded the right to self-determination of peoples as a cornerstone of positive contemporary international law, as the ECJ recognized in its 21 December decision, European law did not put any explicit emphasis on the right of peoples to self-determination. Neither the Council of Europe nor the EU specifically recognize the right to self-determination. CSCE in the mid-seventies (Helsinki principles of 1975) and early 1990s (Paris Charter of 21 November 1990 for a New Europe) does refer to the right of peoples to self-determination. However, neither the Helsinki principles nor the Paris Charter are considered legally enforceable documents (they are not international treaties), and therefore do not constitute positive European law. This absence of any explicit provision in European law has led to conjectures and divergent opinions among scholars (Keating 2004; Weiler 2012; Crawford and Boyle 2013; Edward 2013) and authorities on the possibilities to ground the right to self-determination in European law.

1.1 EU law recognizes self-determination to peoples constituted as European states

Within the framework of the EU, states (through their authorities) act on behalf of "their peoples" as is mentioned five times in the two Treaties (paragraphs 6, 9, and 12 of the TEU, and paragraphs 3 and 9 of the Preamble of the TFEU).

Arts. 49 and 50 TEU (and, to some extent, Art. 48) may be considered to recognize a right to self-determination for European states, that is, to their peoples. According to Art. 49 § 1, "any European States which respects the values referred to in Article 2 [TEU] and is committed to promoting them may apply to become a member of the Union." In the same way, each member state is free to decide whether it accepts sharing membership with a new European state (Art. 49 *in fine*). Finally, every member state of the EU retains the right to decide, according to its own constitutional requirements, whether to withdraw from the Union (Art. 50 § 1).

Note that article 50 is the only one to genuinely allow for self-determination—it is a unilateral decision, despite the fact that it does not have immediate full legal consequences and only produces effect two years after formal notification to the European Council (Art. 50 § 3 TEU). For the cases dealt with by Article 48 (modification of the Treaties) or 49 (membership of a new state), the legal effect of the exercise of the right of the peoples of member states according to their constitutional requirements are actually subordinated to the equivalent positive choice of other European peoples. If the voters in one member state refuse to validate the collective choice, all the positive votes of other European states remain without legal effect. In other words, the power to modify the treaties—*kompetenz kompetenz* so present in the German-inspired literature (Weiler 1996; Pernice 2002)—or to accept new member states has not been transposed to the EU as such. EU citizens, even in the realm of the treaties, are not constituted as a new European nation which would have the capacity to exert self-determination. At the same time, no member state may decide unilaterally—except for Article 50 which has the precise purpose of withdrawing from the EU, allowing for the recovery of self-determination capacity—about its political future within the EU. Within this "new legal order" that is EU law[7], the concept of self-determination is obsolete and being replaced by an emerging concept of co-determination. European states that decide to join the EU renounce their right to self-determination, which is immediately replaced by a right to co-determination, since even the decision to join the EU is subordinated to acceptance by all other EU member states. Naturally, such restrictions only apply to matters covered by the Treaties, but the development of European integration covers almost any substantial political decision for member states (Levrat forthcoming). Thus, even this rare case in which a right to self-determination by applying for EU membership seems to be recognized by the TEU it is, in fact, already an act of co-determination, since every EU member state has to agree to the choice of the applicant state for its membership to become effective. The paradox for European peoples without a state who would like to fully participate to the European integration process (as is explicitly stated by Catalan and Scottish nationalist parties), and therefore accept co-determination is that to be allowed to do so, they first have to exercise their right to self-determination in order to become a European state (Cuadras Morato 2016). It is only then that they may renounce self-determination and their recently earned full statehood to join the EU in a co-determination process (Avery 2014). This is what I call the paradoxical relationship between the principle of self-determination and the European integration process; I shall come back to it in a post-scriptum.

[7] ECJ, 5 February 1963, Van Gend & Loos, case 26-62 and ECJ, 15 July 1964, Costa, case 6/64.

1.2 EU Treaties do make relevant references to other categories of "peoples"

In addition to the abovementioned references to peoples of member states who are represented by the heads of their respective states (whose names appear at the beginning of the preamble), there are also other references to "peoples" in the founding Treaties. Reference is made to: "peoples of Europe" (§ 1 of the Preamble and Art. 1 § 2 of the TEU, as well as § 1 of the Preamble of the TFUE); the "European peoples" (Art. 167 TFEU); the "peoples of the EU" (Art. 3 § 1 TEU); or, in EU relations to the wider world, to the broadest meaning of the term according to which the EU undertakes to promote "mutual respect among peoples" (Art. 3 § 5 TEU). However, the most interesting reference for our investigation to a specific category of peoples in EU law is to be found in the preamble of the TFEU, where one can read that the states united within the EU are "calling upon the other peoples of Europe who share their ideal to join in their efforts." (§ 8 of the Preamble of TFEU).

This wording dates from the 1957 Rome Treaty establishing the EEC and has not been changed since. Alas, the legal doctrine did not comment on this paragraph of the preamble. One may easily imagine that in 1957 it may have referred either to peoples in the western European states that were not yet in the Communities (the UK, Scandinavian countries, etc.), to peoples from southern Europe that were still under military rulers (Portugal and Spain), or to peoples from eastern Europe. Today, however, most of these peoples have joined the EU and despite numerous rewriting of the Treaties, the paragraph remains. Whose peoples is it aiming at? The Icelanders, the Norwegians, and the Swiss? Or could it be European peoples that do not have their own state, and are thus unable to join the EU process since Art. 49 TEU clearly limits the capacity to postulate for membership to "European States," which are being encouraged to create their own national state to be able to join the peoples of EU in their efforts to unite?

It would most likely be far-fetched to defend that interpretation as positive law. Even so, EU practice as regards European peoples deprived of their own state outside the EU has been, if not to encourage secession, at least to quickly reward independence through granting EU membership (think about Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Slovakia, and Slovenia). And it would not be surprising that the Scots would be supported in their bid to join the EU, were they to become a European State as referred to in Art. 49 TEU, after Brexit is completed.

This raises an interesting question. If a nation without a state outside of EU could be called to join the efforts of unification—and Scots would certainly qualify as such a European people after Brexit, as the Lithuanians did under USSR or the Slovenians under Yugoslavia—would the fact that other European peoples exist within a member

state disqualify them from being one of the "other European peoples"? Such a situation would be qualified as reverse discrimination, which is the appellation for situations in which the legal subject that enjoys the best status ends up being treated less favourably than other legal subjects with a lesser status. Within EU law, the topic has mostly been studied as regards to discrimination between nationals and EU citizens, whereas the latter may, through their rights derived from the EU law after they have exerted their right to establish themselves in a third country, benefit from a better treatment than nationals (Tryfonidou 2009). If formally plausible under positive law, such situations are always difficult to legitimize in a democracy-based legal order.

1.3 No provision in EU treaties prevents the exercise of the right to self-determination

It may also be necessary to underline the capacity of "other European peoples" to exercise their right to self-determination while they are under the jurisdiction of an EU member state is constrained by no provision of EU law that would allow any member state to justify its policy to deny that a right. Despite Article 4 § 2 TEU, which states that

> "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,"

EU law does not protect existing "national identities" or the "territorial integrity" of current member states.

As clearly stated by Art. 5 TEU, the competencies of EU are bound by the principle of conferral, which means that "the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the member states" (Art. 5 § 2 TEU). Therefore, the EU founding Treaties may not recognize additional competencies to member states, only confer competences to the EU and its institutions, and Art. 4 TEU does not confer any additional competence or legal protection to member states. Art. 4 TEU explicitly specifies that the issues of national identity and of territorial integrity of the state are fully outside of the EU range of competence and remain "the sole responsibility of each Member State" (Art. 4 § 2 TEU *in fine*). These remain matters outside the scope of EU law, as such. In a letter on 7 January 2014 to the President of the Catalan government, the President of the

European Commission, José Manuel Barroso, considered that Catalonia's attempt at self-determination was "a question of internal organization related to the constitutional arrangements in the member state" (Kochenov and van des Brink 2016). It doesn't, however, mean that EU member states are free to exert their own competencies regarding their national identity or territorial integrity as they wish; they remain bound by their membership to the EU, and notably by the duty to respect "European values" as they are explicitly enunciated in Article 2 TEU.

As an example to be kept in mind, Austria in 2000 was subject to EU sanctions for not respecting European values when the leader of the Austrian conservative party, Wolfgang Schüssel, formed a national government—following general elections that were held in November 1999 and that were clearly meeting the democratic standards for European states—through coalition with a political party (Jörg Haider's FPÖ) whose discourse and positions regarding European history (specifically the Nazi legacy) were contrary to European values. At the time, nobody claimed that the right and political motivations to form a national government fell within EU competences, nor that Austria had violated any specific treaty provision. No one pretended that the November 1999 parliamentary elections in Austria had violated democratic standards or any legal provisions. Nevertheless, this did not prevent all the other EU member states from adopting sanctions against the Austrian government for a breach of European values for its illegal behaviour within its own sphere of competence (Levrat 2004).

EU membership does not provide any additional "protection" to member states' national identity or territorial integrity. As we have shown with the ICJ in its Kosovo Advisory Opinion, "the scope of the principle of territorial integrity is confined to the sphere of relations between States."[8] The protection of the state's territorial integrity only applies in relationships between states, and does not deter the right of a people to decide on its national future, even if this people is situated within an existing state. EU membership binds EU member states to the duty to respect European values as stated in Article 2 TEU, even in the exercise of their own competences. EU law, even in the absence of specific provisions on the right to self-termination, provides a legal framework within which the issue of self-determination has to be dealt.

We may end this section by concluding that inside EU member states there may be "other European peoples," which cannot join the efforts of European unification as such (as a European people according to Art 1 § 2 TEU), except by becoming a European state, that is, by seceding from the existing European state in which this "other

[8] ICJ, 22 July 2010, *Kosovo Advisory Opinion*, § 80.

European people" is encompassed. This is what the former European Commission's President Jacques Delors implied when he famously declared that the EU had to become a "Federation of Nation-States" (Ricard-Nihoul and Delors 2012), meaning that the genuine and full participation to the EU project for citizens belonging to European peoples without a state includes the right for these peoples to constitute themselves as European nation-states to fully participate in the EU as members, under the terms of Art. 49 TEU (Levrat 1997).

As we see, EU is not indifferent to the rights of European peoples even though no clear provision in positive law—and even less so in procedural considerations for the materialization of such a peoples' right—is to be found in EU law. No more than in international law will a precise definition of those peoples who could claim the right to self-determination be found in European law, making it difficult to effectively implement the right. However, as we have shown in our introduction, the exercise of the right to self-determination based on a civic conception of national self-determination—which is not limited to members of a preexisting ethnic or cultural group, but is grounded in the democratic rights of citizens to freely decide their own political and socioeconomic future—may be based on EU law, since in this perspective the constitution as a European people is consubstantial to the exercise by citizens of the right to decide on their own political future within the EU. That is actually what self-determination is all about.

2. Elements for grounding a right to democratic self-determination for EU citizens

EU law is not classical international law, which mainly deals with relationships between states and international organizations. Quite the opposite, it constitutes

> "a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, 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."[9]

As stated by the court, it is not only states and institutions which derive rights from the treaties: other legal subjects, such as individuals, and also local or regional governments, non-profit organizations, and businesses do too (Edward 2013). In that perspective, the

[9] ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

EU founding treaties, by conferring and recognizing democratic rights to all member states' citizens through EU citizenship, may constitute a European legal base for the democratic exercise of the right to self-determination (2.1). This right is built on an individual human right exercised collectively (a political, social, cultural, and economic right) whose exercise must be respected by EU member states and protected by EU institutions (2.2).

2.1 The right to self-determination for EU citizens of European nations without a state

European citizenship is acquired (derived) through the nationality of a member state, but is distinct from it[10] . It implies specific and new political rights, such as the right to participate in electoral processes at the local level in the member states in which you reside notwithstanding your nationality, the right to participate to the EP elections in the country where you live, the right to initiate and sign European Citizens' Initiative, and the more general rights to participate in democratic life within the EU, as stated in Title II of the TEU (Bellamy 2008).

Based on this European citizenship as a political right, a strong trend in European studies literature defends the idea that the EU constitutes a demoicracy, meaning that several demoi (peoples in Greek) coexist within a single EU polity (Nicolaïdis 2004; Cheneval and Schimmelfenning 2013). All these theories are built on the idea that these European peoples are the people of each nation-state; there is, however, no theoretical argument to consider that among the peoples constituting this EU demoicracy, Basques, Bavarians, Catalans, Flemings, Scots, or others, are to be excluded as constitutive peoples. They could also be considered part of the national people(s) of Spain, Germany, Belgium, or UK living in a multi-people or multinational state (Pierre-Caps 1995; Kymlicka 2011).

Art. 1 of the Treaty on the European Union, as it reads after Lisbon's modification, recognizes the right of the "peoples of Europe" to participate to the process of "creating an ever closer union between the peoples of Europe" (Art. 1 al. 2 TEU). In this first article of the treaty on the EU—a very fundamental one as a systematic analysis of the treaty evidences—, "peoples of Europe" are clearly considered distinct from European states, who are referred to in the 1st paragraph of this article as the high contracting parties (Van Gerven 2005).

[10] ECJ, 2 March 2010, *Janko Rottmann v. Freisaat Bayern*, case C-135/08.

As a matter of fact, paragraph 2 deals with the "peoples of Europe" and European citizens, whereas paragraph 3 deals with the legal foundation of the EU. This article 1 is clearly referring to the fundamental rights of legal subjects within the EU, and peoples and citizens are treated separately from member states and the EU as such, and do have specific rights. In article 1 § 2 TEU the right to have decisions "taken as openly as possible and as closely as possible" are recognized for the citizens, while for European peoples is proclaimed the right to be part of the "process creating and ever closer union between the peoples of Europe". So the right of European peoples within the EU are systematically linked to citizen's right, not to member states' rights. In that respect, it is worth noting that in its 1963 *Van Gend and Loos* ruling, the ECJ did not only recognize rights directly stemming from EU law for individuals and other non-state actors, but even specified that "[t]hese rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community."[11]

One has to acknowledge that the participation in the European demoicracy is not satisfactorily materialized for EU citizens of a European people (living within the EU) without a nation, since these EU citizens would only be directly represented in the EP (Art. 10 § 2 TEU), but not, as expressly required by the TEU, indirectly through their national government within the Council and European Council (Art. 10 § 2 al 2 TEU). As illustrated more and more clearly through the ongoing and developing political conflict between the Catalan government and the Madrid government, the majority of EU citizens that elected the current Catalan authorities could legitimately claim that they are no longer represented in the EU Council by Madrid government as their "national government." The same is certainly true for Scots with the Downing Street government in the era of Brexit. This situation violates their right as EU citizens, "to participate in the democratic life of the Union" (Art. 10 § 3 TEU), and their right to an equal treatment, as EU citizens, by EU institutions (Art. 9 TEU). This means that the EU's current institutional arrangement in which these EU citizens—part of a European people without a state—do not enjoy full participation in the democratic life of the Union (Art. 12 § 3 TEU), is in violation of the value of democracy on which the EU is founded (Art. 2 TEU) and by which it is bound.

This legal analysis demonstrates that democratic rights do not belong to any European people as such as the logic of self-determination of peoples as commonly understood in international law implies. In the European legal framework, each people will be self-determined and self-constituted by the democratic exercise of the individual right of

[11] ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

its members to decide on their own common political future, their own national project. A European people cannot be defined from the outside (which is quite coherent with the concept of self-determination), or by ethnic, linguistic, historic, or other "objective" factors. Being anchored on a citizen's right to participate in the democratic life of the Union, which would be violated by denying the European people to which s/he belongs the expression of self-determination within the EU—especially representation in the EU's Council of Ministers (according to Art. 10 § 2 TEU)—the right to self-determination within the EU has to be understood as a collectively exercised individual human right.

2.2 The right to self-determination as a collectively exercised individual human rights

EU law, until very recently, did not incorporate provisions for the protection of human rights. In a form of "division of labour," the protection of human rights was left to the Council of Europe[12]. The European Convention for the Protection of Human Rights and Fundamental Freedom was adopted in November 1950 in Rome within the framework of this organization, which not only guarantees a series of human rights, but also institutes a European Court of Human Rights based in Strasbourg.

In the late 1960s and early 70s, the European Court of Justice (of the EU, based in Luxembourg), recognized that the EU legal order included human rights, as general principles enshrined in European Community Law[13], or as "constitutional traditions common to the Member States"[14]. It is only in 1992, however, with the Maastricht Treaty, that a requirement for member states of the EU to respect fundamental human rights, the rule of law, etc. (more or less the values listed in today's Art. 2 TEU) was explicitly included in EU law (Treaty of Maastricht, Art. F). It wasn't until 2000 that the Charter of Fundamental Rights of the European Union was adopted, which is "recognized by the European Union […] and shall have the same legal value as the Treaties" (Art. 6 § 1 TEU) when the Lisbon Treaty came into force.

As we've seen above, the right for a European nation without a state to decide about its political future is not expressly guaranteed as a human right in European law. This is a strong contrast with international human rights law which, through both 1966

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[12] A European organization based on a statute adopted in London on 5 May 1948. Based in Strasbourg, it today has 47 member states.

[13] AECJ, 12 November 1969, *Erich Stauder v. City of Ulm*, case 29/69.

[14] ECJ, 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr Vorattstelle für Getreide und Futtermittel*, case 11/70. The formula is nowadays written in art. 6 TEU.

UN Covenants, on economic, social, and cultural rights on the one hand, and on civil and political rights on the other, have a common first article guaranteeing the right of all peoples to self-determination. European Human Rights law remains silent on this issue. However, all the 28 EU member states have ratified both 1966 UN Covenants, therefore recognizing as a binding rule of positive international law the right of all peoples to self-determination as a fundamental human right.

The EU and its member states being "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights" (Art. 2 TEU), it means that any restriction of individual rights, and even more so of fundamental human rights, may not be exercised arbitrarily, but only if there is a clear legal basis. Any limitation on the individual democratic right to exercise self-determination collectively through a democratic process would have to be grounded in law. I do not have sufficient space in the present paper to examine the possible limitations stemming from international or national law, and shall therefore remain focused on European law. As we have seen above (1.3), in the absence of any specific provision in European law, no right may be claimed by a state under European law to limit the collectively exercised human right to self-determination of individuals belonging to a European people without a state within the EU.

EU citizenship rights and, more general, the political rights of Europeans are recognized and protected by European law. These include freedom of expression (Art. 10 ECHR) and freedom of assembly and association (Art. 11 ECHR), which gave rise to interesting case law. Both these freedoms may be, according to the ECHR, limited by state authorities, however, "no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" (Art. 11 § 2 ECHR). Would then the prohibition of the exercise of the democratic right to self-determination by an existing EU member state meet the requirements set by the ECHR?

In a 2001 decision revising the legality of the interdiction of a political party in Bulgaria that was openly calling in its program for the secession of part of Bulgaria to join Macedonia, the European Court of Human Rights stated that, "the fact that a group of persons calls for autonomy or even requests secession of part of the country's territory—thus demanding fundamental constitutional and territorial changes—cannot automatically

justify a prohibition"[15]. This European Court of Human Rights ruling means that the call for secession is not contrary to national security or public safety per se—as the ICJ also seemed to acknowledge in its 2010 Kosovo Advisory opinion—and therefore may not be invoked in a democratic society to prevent the expression of that goal nor to prevent the assembly of peoples to exercise that right. ECHR's Arts. 10 (freedom of expression) and 11 (freedom of association) protect the right—within limits—of individuals to democratically and collectively decide on their political future through a national project, based on collectively exercised individual freedoms (Corretja Torrens 2016; Tudela Aranda 2016). If a secessionist agenda constitutes a legally acceptable political proposal in a democratic society, as the ECtHR says, it means that secession, as an outcome of the regular political process, is a legitimate outcome and upholds European values.

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There is both a remedial and individual dimension to the recognition of the right to national self-determination within the EU for citizens of all European peoples without a state. The remedial dimension is based on European values and EU citizens' rights (non-discrimination, full democratic participation in the EU) of members of these other European peoples that do not already have their own national state. The individual dimension stands on the free collective exercise of individual rights as guaranteed by European human rights law. However, and as in conclusion of the first section, one may wonder whether leaving it to each European nation without a state to constitute itself as a Europe a state through the perilous collective exercise of individual human rights before formally acknowledging the legitimacy of its national claim (Art. 49 TEU), is wiser than envisaging a specific procedure, within EU law, to deal with the legitimate claim of European peoples within the EU that do not yet have their own European state. It may well be an issue to be envisaged in a future treaty revision.

3. Recognition of the right to self-determination through EU practice

In international, as in EU, law, states and international organizations may be bound by legal norms which emerge out of their practice (customary law). One may ask two questions: first, whether the threshold for creating an EU or an international law customary

[15] ECtHR, 2 October 2001, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (application numbers 29225/95 & 29221/95).

norm has been reached by the past practice of EU member states and institutions; and, second, if the answer to this first question is potentially positive, whether the current situation of European nations without a state within the EU is similar enough to these precedents from which a customary rule emerged. To identify the emergence of a customary norm, international law requires two elements: a practice and an *opinio iuris*. The practice is consistent as we shall see below. Relevant *opinio iuris* in such cases is both the one of the EU institutions (Council, European Parliament and Commission), who according to article 49 TEU decide to accept candidacy for membership, and the one of EU member states, since each state ratifies the new member state adhesion according to its "respective constitutional requirements." EU member states' practice in the present case is all the more relevant since it is not only the government that expresses the state's *opinio iuris*, but all the state bodies and components which, according to the national constitutional requirements, have to ratify the accession treaties (Art. 49 TEU). Examination of the arguments put forward during the national debates on accepting new member states did not reveal any significant position against national self-determination as had been exerted by these European peoples or nations.

The result of this investigation may amount to identifying a common constitutional tradition of member states recognizing the emergence of new European states through the exercise of self-determination. The ECJ has been known to complete EU law by incorporating legal rights "as they result from the constitutional traditions common to the member states,"[16] especially in the field of human rights. If the constitutional practice in member states in the recognition of the results of national self-determination processes within the EU context is sufficient to establish a constitutional practice common to the member states, the ECJ may consider that this common practice has given birth to a proper EU right, as a general principle of EU law.

It appears that EU member states may well have already recognized a right to national self-determination to European peoples through their practice.

3.1 Recognizing the result of exercised self-determination by European peoples

If no formal right to democratic self-determination in Europe can be identified in EU law, the practice of recognizing the results of self-determination referenda has been continuous and consistent, at least for peoples outside the EU that have been allowed

[16] ECJ, 12 November 1969, *Stauder v. Ulm-Sozialamt*, case 29/69; 28 October 1975, *Rutili v. Ministre de l'Intérieur*, case 36/75; 19 November 1990, *Francovich et al. v. Republic of Italy*, case C-6/90 & C-9/90. Also Art. 6 § 3 TEU.

to join shortly after their democratic self-determination process led them to become states under international law. The adhesion to the EU in 2004 of the Czech Republic, Estonia, Latvia, Lithuania, Slovakia, and Slovenia—none of which was a European state before 1990, but all emerged as such after self-determination referendums organized in the nineties[17], before being admitted as EU member states—are all examples of self-determination practices of European people or nations, unanimously approved by EU member states. Even though the independence referenda were held in the early 1990s, the relevant practice from EU institutions and member states dates from the early 2000s in these six states and was expressly repeated in 2013 when Croatia was allowed to join the EU[18], displaying the continuity of EU practice.

There is a longlasting and consistent practice in EU member states to recognise self-determination processes, notably outside the context of decolonization and within Europe, that binds EU and its member states, which shall be called to act consistently with their past practice. One may argue that the situation of a national self-determination process within the territory of an EU member state is different from those on which the examined practice is based. We shall show in the next paragraph that self-determination referenda within the EU (or EEC) have already taken place, and neither their organization nor their results have been challenged as illegal.

3.2 A consistent practice of self-determination referenda within EU member states

A consistent European state practice is to accept self-determination referendum for infrastate territorial units within the EU's territory (Saarland 1955 and Greenland 1982; Scotland 2014) and to then accept their outcome.

The 1955, 1982, and 2014 referenda held in EU member state territory did not give rise to any legal dispute on their conformity to EU law. The 1955 Saarland referendum, which was clearly linked to the European integration process even though without a legal base within the EEC Treaty, recognized Saarlander's right to determine its own political status within the EEC (Patterson 1958). The fact that Saarlanders chose to

[17] Referendums on independence were organized: on the 23 December 1990 in Slovenia, on 9 February 1991 in Lithuania, and on 3 March 1991, both in Estonia and in Latvia. The case of the Czech Republic and Slovakia is technically different since these two new European States came to life through a constitutional arrangement within Czechoslovakia, which may not be formally considered a self-determination referendum process.

[18] Croatia organized an independence referendum on 19 May 1991; it joined the EU on 1 July 2013.

join Germany has no influence on the fact that they effectively did exert a right to self-determination[19]. In 1982, Greenlanders were also recognized the right to self-determine their belonging to the EEC and allowed to hold a referendum on the issue. The result of their referendum was recognized by the EEC member states through a subsequent modification of the EEC Treaty recognizing the choice of Greenlanders to withdraw from the full EEC regime[20].

In the exact same way, the Scotland's 2014 self-determination referendum did not raise concerns about its legality under EU law. This referendum was based on a political agreement between the UK and Scottish governments, formally embedded in legal acts of the legislative institutions both at the UK and the Scottish levels. It was indisputably legal from the domestic point of view (Tierney 2013). And although discussions arose about the future status of Scotland in the EU after the referendum, neither theorists (Crawford and Boyle 2013; Edward 2013; Tierney 2013; Avery 2014) nor the European Commission as "guardian of the Treaties" raised the issue of the legality under EU law. There is no possible doubt that self-determination referenda within the EU is not forbidden by EU law and a practice accepted by EU member states.

The question of whether a European people without a state may organize democratic self-determination process without the consent of the state on whose territory it lives is obviously a different issue. None of the three mentioned referenda inside the EU was organized with the opposition of the home state. On the other hand, all of the new European states that became members of the EU, with the exception of the Czech and Slovak Republics, emerged through a self-determination process carried out with the opposition of the home state. The question has therefore no clear legal answer based on the EU's past practice. Without being able to answer it thoroughly in such a short paper, a quick survey of international practice surrounding self-determination referenda organized in the past 20 years (Lineira and Cetrà 2015; Mendez and Germann 2016) may be informative. Twenty-six out of 55 independence referenda have been held without the consent of the parent state. More than half of them (18 out of 26) led to the emergence of a new state, which were all later recognized by all EU member states. As the ICJ stated in 2010 in its Kosovo Advisory Opinion, there is no rule of international law forbidding, in any context—except a specific interdiction by a Security Council Resolution—, the exercise of the right to self-determination (Anderson 2016).

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[19] See UN General Assembly Resolution 2625 (XXV) of 24 October 1970 clearly states: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people."

[20] "Brussels Treaty on Greenland" of 13 February 1984, *JOCE* n° L 29 of 1 February 1985.

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To conclude this paper, let us observe that in the absence of a clear legal answer in positive EU law to the existence of a right to national self-determination within the EU, a substantial beam of practices, legal provisions, and judicial decisions nevertheless points to the recognition of that right, even if the precise conditions to exercise it remain unclear.

Post-Scriptum

This conclusion is not entirely satisfactory, however, because it does not take into account the specific nature of the European integration process, in which the right to national self-determination appears to be a paradox.

The European project was initially imagined as an anti-national endeavour (Rougemont and Girardet 1971), or a supranational or post-national one (Scharpf 1996; Habermas 1998; Bellamy 2003), even though a minority in EU studies literature explains EU integration as a strategy for national governments to reinforce their power to the detriment of other national institutions (especially parliaments) (Moravscik 1998). Requesting the right for European peoples without a state to achieve a national project and to become a state through self-determination to be later able to join in this post-self-determination process that is the EU—of which they already were, albeit incompletely, part—is an unstainable paradox (Chamon and Van der Loo 2014). The EU, as a revolutionary post-national polity, is based on—contrary to coexistence and minimal interference between sovereign national states under international law—a co-determination process based on pooled sovereignties. EU member states have renounced their sovereign rights to join this new type of polity, not based on national self-determination of each European people, but on a co-determination process through "an ever closer union among the peoples of Europe." No single European people exert self-determination anymore within the EU, but all European peoples—or at least those who had the historical opportunity to constitute themselves as a nation-state—co-determine their common future, not as a new European nation, but as an original polity, in which national projects constrained by co-determination co-exist within the EU. Looking to EU law for a right to self-determination in the classical sense for peoples who do not yet have their own national state is historical nonsense. What European people without a state are calling for—at least Catalonia and Scotland for the time being—is the possibility of fully participating in this co-determination of our common European future. Asking them to first become nation states in order to achieve this goal is absurd.

I nevertheless realize that this fundamental leap into post-national Europe is not yet possible, as political leaders are not ready to grasp the genuine nature of the already existing EU. Political leaders and peoples still believe they can develop their own national project in Europe, as the pathetic attempts at Brexit shows. Short of current EU member states being able to imagine procedures for all European peoples to participate to the ever closer union of the peoples of Europe without first establishing their own national state, national self-determination projects will continue to flourish within the EU.

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