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Democracy and Borders: External and Internal Secession in the EU

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SOVEREIGNTY & SELF-DETERMINATION



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Abstract

In the absence of a constitutional right to secede or title of international law, secessionists usually look at current democratic theories of external secession. It is usual to classify these theories as remedial right or primary right theories. Each has its particular advantages and problems. However, if European collectivities go for “independence in Europe”, they may also look to precedent cases of internal secession in federations. In this case, secessionists carve out a new member state without leaving the federal system. These two secession “tracks” entail different logics and different practical possibilities. There is not much literature on normative aspects of internal secession. In this chapter we look at federal practice, particularly Switzerland, Canada and India. Federal governments owe loyalty to the member states and to secessionists as citizens of the federation. The population of the seceding area, as well as the involved member state and the federation are relevant actors in this process. All parties are bound by the federal constitution –the Treaties in the case of the EU-. The general conclusion is that at this present stage of the evolution of the EU, internal secessions may be easier to claim, but more difficult to achieve than external secession.

Keywords: Secession, internal secession, European Union, internal enlargement, federations, secession theories.

Democracy and Borders: External and Internal Secession in the EU¹

1. The new salience of independence in Europe

Plurinationality of states has usually been a difficult challenge to liberal-democratic theories and to institutional practices in liberal democracies. Federalism, consociationalism, and secession are three classical institutional democratic responses to claims for political recognition and constitutional accommodation of national minorities. In this chapter we will deal with secession in states and in the European Union (EU). In the absence of a constitutional right to secede or an undisputed title under international law, secessionists try to legitimize their claim by current theories of secession. Inside the EU, they may also look to precedent cases of “internal secession” in federations.² We will show that these two “tracks” entail very different logics.

Practical insufficiency of recognition and accommodation may trigger secession demands. And where these demands are presented in a liberal-democratic way, like in Catalonia, Scotland, Quebec, and Flanders, they put the question of legitimacy of both the existing and the would-be state on the table. Political actors have accepted constitutional liberal and democratic essentials (rights and freedoms, parliamentary democracy, rule of law). Such independence movements abstain from any recurring to violence in the process towards independence. They conceive of their respective national identities as civic and their nation as a *demos*, while rejecting ethnic exclusivism to a similar degree as their respective concurrent states.³ These new potential states cannot be easily rejected for destabilizing international relations. Their main political actors do not challenge existing treaty systems (EU, NATO, WTO, etc.) and they even feature their current host state as a future partner in economic and international relations.

¹ Previous versions of this paper have been presented at the 11th ECPR General Conference, Oslo, September 8th, 2017 and the 11th Pan-European Conference on International Relations, Barcelona, September 16, 2017. We are thankful for all comments.

² New states are carved out of existing ones but do not leave the federal system.

³ Here we do not discuss whether state and non-state nationalisms without any ethnic reference or practice are possible. See W. Connor, *Ethnonationalism. The Quest for Understanding*, Princeton 1994; Ph. Spencer-H. Wollman, Good and Bad Nationalisms, in Ph. Spencer-H. Wollman (eds.), *Nations and Nationalism. A Reader*, Edinburgh University Press 2005, p. 197-217.

Regarding their own European states, current real world secessionists often combine elements coming from the three “classical” types of secession theories (remedial right or primary right theories -ascriptive and plebiscitary). A second potential track is to claim “independence in Europe.” In this case, central institutions must adopt a more neutral but actively intermediating position. Assessing federal practices of “internal secession,” federal governments owe loyalty to the member states but also to the secessionists as citizens of the federation. In cases of internal secession in Switzerland, Canada, and India, it has not been easy to gain independence. Internal secessions can never be unilateral, as the other members of the pact are also actors in the process.

Secessionist movements in plurinational polities may well have to decide for one of these. In this chapter we are tackling two questions: a) What are the weak points of current “external” secession theories in European liberal democracies? (section 2); b) If the EU claims to be more than just an international treaty, can federal “internal secession” solutions apply to EU territories?; Has the EU anything to offer –and should it offer it? (section 3). Finally, we highlight the main conclusions of these two legitimizing tracks to secession in the context of the European Union (section 4).

2. First track. External secession in plurinational states.

In the debate that began in the 1980s between the liberal and communitarian perspectives and, from the beginning of the 1990s onwards, between so-called Liberalism 1 and Liberalism 2, the importance that cultural and national collectivities have for the self-understanding and self-esteem of individuals has been highlighted⁴. These groups do not always coincide with the one that comprises the polity which defines citizenship. The construction of increasingly refined liberal democracies in terms of *national pluralism* is one of the biggest challenges of the normative and institutional revision of contemporary democratic systems.

In this case, the main challenge is not to establish how the *demos* becomes *kratos* but how the different national *demosi* which coexist within the same democracy are politically and constitutionally recognised and accommodated in terms of equality in the *kratos* of the polity. This involves dealing with both a “democratic” nature – participation of majorities and minorities in the “shared government” – and, above all, of a “liberal” nature – the protection and development of minority nations confronting the “tyranny

⁴ See *United Nations Development Report*, 2004.

of the (national) majority” in internal and international spheres. It is, therefore, a matter of establishing the “checks and balances” in a collective dimension which have received little or no attention from traditional political conceptions until recent years.

Over the last two decades, analyses of democratic liberalism have shown the normative and institutional biases of traditional approaches, which are of an individualist, universalist, and nationally statist nature that favour the majority national groups in plurinational democracies. These analyses have revealed, for example, the inability of the liberal, democratic, and social rights and institutions in constitutions based on the premises of Liberalism 1 to regulate an egalitarian and equitable treatment of national minorities. They have also revealed the fact that it is impossible for states to play a culturally and nationally neutral role similar to the one they adopt with other phenomena, such as religion. Consequently, in many cases, majority and minority national groups have an important moral role to play in not exhausting the individual components and dimensions of the basic values of dignity, liberty, political equality, and pluralism.⁵

Whatever the most suitable liberal-democratic solution or solutions may be will obviously depend on the context of each specific case (its history, institutional and international situation, political culture, types of actors, etc) but it seems clear that in contexts of *national pluralism* it is necessary to establish a much more refined interpretation and implementation of rights, rules, and procedures than those offered by traditional liberalism and constitutionalism. This greater complexity demands theories that are more sensitive and modulated to the variations of empirical realities⁶. One consequence of this has been the analytical refinement of the literature on normative theories of secession.

In conceptual terms, there is nothing to prevent the issue of where borders should be established from joining the democratic debate. But on an empirical level it is clear that states, democratic or not, are jealous of their territories. The introduction of a right of

⁵ Normative definitions of minority nations tend to be controversial. An incorporation of empirical criteria complementary to the historical and political ones in F. Requejo. “Federalism and Democracy. The Case of Minority Nations: A Federalist Deficit,” in *M. Burgess–A. Gagnon (eds), Federal Democracies, Routledge, London–New York, 2010: 275–298*. See also the following three “classical” references: Ch. Taylor, *The Politics of Recognition*, In: *Multiculturalism and the “Politics of Recognition,”* New Jersey: Princeton University Press, 1992; J. Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1994; W. Kymlicka, *Multicultural Citizenship. A Liberal Theory of Minority Rights*, Oxford, Clarendon, 1995.

⁶ While federalism and consociationalism as measures to recognise and to accommodate minorities have been studied for a number of decades through both normative models and the analysis of different empirical and comparative cases, secession has only received renewed analytical attention in recent years, especially in plurinational contexts.

secession for minority nations represents a clear break with the dominant logic that only accepts the right to self-determination for states. Excluding the specific cases of islands (Ireland or Iceland), so far, there have been few empirical cases of secessions in established liberal democracies (the clearest one: Norway from Sweden in 1905).⁷

Although different lines of reasoning are usually mixed in the political debate, it is convenient to clarify the main arguments used when discussing secession.

An established typology divides theories of “external” secession into two basic groups: Remedial Right Theories, which link secession with a “just cause,” which regard secession as a remedy for specific “injustices”⁸; and Primary Right Theories, which regard secession as a right belonging to certain groups that fulfil a number of conditions. These latter theories are subdivided into those that are ascriptive-nationalist nature and those that are associative-plebiscitary. So although traditional ascriptive approaches to secession are essential for some minority nationalists, secession is also defended on non-nationalist grounds.

⁷ In the international sphere, there are relatively few empirical examples of the constitutionalization of secession. The constitutions of Ethiopia and Saint Kitts and Nevis are the two clearest cases of the explicit inclusion of the right to secession. The former adopts an ascriptive approach, as the “nationalities” and “peoples” that constitute the state have access to the secession clause. The latter permits the secession of the island of Nevis through a referendum which must have the support of a two-thirds majority. While in Ethiopia there have been no secession proposals since Eritrea’s, which was preceded by a long armed conflict and occurred before the current constitution came into force, the island of Nevis conducted a secessionist referendum (1998) in which 61.7% voted in favour of secession without reaching the legal minimum threshold of two-thirds. The most recent cases of the secessions of Montenegro (2006) and Kosovo (2008) from Serbia occurred, in the first case, in accordance with a referendum with clear rules monitored by the European Union and, in the second, as a result of a unilateral declaration of independence by the Kosovar parliament, which was recognized by a majority of international actors once negotiations had broken down. These two cases are examples of international mediation when a state of deadlock has been reached regarding internal constitutional rules. Canada is a case of constitutional regulation which established, based on a much-discussed *Opinion* of the Supreme Court, that political and constitutional negotiations must take place if a “clear majority” of Quebec citizens responded to a “clear question” regarding secession (Secession Reference, 1998). These two references to “clarity,” however, have not been without controversy. The regulations of the Canadian *Clarity Act* (2000), following the Supreme Court’s *Opinion*, were countered when Quebec’s National Assembly passed the *Loi sur l’exercice des droits fondamentaux et des prérogatives du peuple québécois et de l’État du Québec* (2000). So far, no consensual rules have been established about what “clarity” means.

⁸ Secession is not regarded here as a primary right of specific collectives, but as a legitimate remedy for a series of circumstances. See H. Beran: “A liberal theory of secession”, *Political Studies* 32, 1984, 21-31; A. Birch: “Another liberal theory of secession”, *Political Studies* 32, 1984, 596-602; A. Buchanan: *The morality of political divorce from Fort Sumter to Lithuania and Quebec*, Oxford 1991, and *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2003

1) Remedial Theories (“just cause”) prioritise a number of reasons or specific cases that justify political divorce. A first general problem with these theories is how an “unjust” situation might be characterised. This obviously depends on the theory of justice used. There are also differences of degree in empirical situations that make it hard to decide when a line has been crossed (regulation of collective rights, fiscal treatment, redistribution, policies concerning education, culture, the media, etc.). These theories assume that the burden of proof resides with the minorities so in practical terms they are theories usually biased in favour of the state, even regardless of how it was historically created. In this sense, they are conservative theories which tend to legitimize state power⁹.

In general terms, remedial theories are basically thought from the individualistic, universalist, and statist postulates of liberalism 1. They turn a blind eye to democratic states’ lack of neutrality in national and cultural issues (nation-building policies), marginalizing minorities’ collective claims for national recognition and accommodation, which are usually formulated today through the concepts and values associated with liberalism 2. Nevertheless, a number of authors have recently tried to enlarge the conditions of just cause by including the state’s obligation to carry out policies of recognition and accommodation with its minority nations¹⁰.

A proposal for revising just cause theories in light of real world experiences would be to accept that the moral obligation to look for alternatives to external secession should have a deadline when the main problem at stake (national recognition and constitutional accommodation) has neither been defined nor solved. Shifting the burden of proof to the existing states would somewhat reduce the statist bias that such theories usually have.

⁹ From the secessionist side, however, just causes may exist because of the lack of national recognition and shortcomings in self-government (including the European and international spheres), permanent discrimination regarding fiscal policies, redistributive policies, and state investments, continuous rejection of real negotiations or the lack of compliance of the central state with previously agreed to solutions. For example, with language policy in Catalonia secessionists argue that co-officiality is geographically reduced (the whole state works in non-pluralistic patterns in central institutions and symbols) and that there is an unacceptable asymmetry based on the duty to all citizens to know Spanish but not to know Catalan.

¹⁰ For a quick overview of these theories, see F. Requejo-M.Sanjaume, “Recognition and Accommodation; from regionalism to secessionism”, in: M. Jewkes (ed.) *Federalism and Recognition*, Routledge 2015: 107-132. See also R. Bauböck, “Why Stay Together? A Pluralist Approach to Secession and Federation” in W. Kymlicka, *Citizenship in diverse societies*, Oxford: Oxford University Press, 2000; M. Seymour, “Secession as a Remedial Right”, *Inquiry*, Vol.50, Núm.4, 2007: 395-423; F. Requejo *Multinational Federalism and Value Pluralism*, Routledge, London – New York, 2005; A. Patten, “Democratic Secession from a Multinational State”, *Ethics*, 112, 2002: 558-586.

2) Primary Right Theories regard secession as a fundamental right.

Nationalist or ascriptive theories take as their basis that the nation is a legitimate political subject endowed with this right¹¹. Nationalist theories of secession have their own issues, prominent among them is the regulation of the rights of minorities within minorities (trapped minorities) and that of dual or plural identities¹².

Associative or plebiscitary theories give priority to democratic procedures to legitimate secession, whether this is through a referendum or based on the decisions of representative institutions¹³. In these kinds of theories, secession is neither regarded as a possible solution to the infringement on the rights or interests of a collective nor is it linked to any kind of specific national group. It is a primary right of a political and territorialized

¹¹ The legitimacy of secession would be based on a previous collective unit that has this right, which would be understood today in inclusive and universal liberal-democratic terms. This is the sphere of current liberal nationalists who, often in liberalism 2 terms, are critical of the practical consequences of the implicit state nationalism defended by unionist liberals despite their habitual legitimizing rhetoric based on moral individualism and state universalism. The collective rights of minority nations are seen as complementary to individual rights not antagonistic to them. See Y. Tamir *Liberal Nationalism*, Princeton, NJ: Princeton University Press, 1993; A. Margalit-J. Raz "National self-determination", *The Journal of Philosophy* 87/9, 439-46. 1990; M. Walzer *Thick and Thin: Moral Argument at Home and Abroad*, Notre Dame Press, 1994.

¹² These theories have been often criticized due to the difficulty in defining beforehand which groups have a primary right to secede. Once it has been determined, the theory may provoke contradictions with regard to strict democratic patterns to create a state without the need for majority demand. It is argued that giving the right of secession to nations would multiply the number of secessionist claims in the world, which is associated with a high level of instability, especially where national groups overlap territorially. However, this latter criticism seems a flawed line of reasoning from an empirical perspective because there are few of these claims in current liberal democracies. We do not develop these two issues in this paper. In recent years, theoretical and comparative analyses have revealed potential liberal-democratic institutional solutions to accommodate these two questions. See A. Gagnon-J. Tully *Multinational Democracies*, Cambridge University Press, 2001; U. Amoretti-N. Bermeo (eds) *Federalism, Unitarism and Territorial Cleavages*, The Johns Hopkins University Press, Baltimore-London 2004; M. Burgess-A. Gagnon *Federal Democracies*, Routledge, London-New York, 2010.

¹³ The key values here are individual moral autonomy and the right to choose voluntary political associations. They represent the pillars of the consensual legitimacy of a democratic political authority. If this consensual base of the state's authority is not shared by the majority of individuals, secession is a legitimate act according to liberal-democratic patterns and constitutes a right that must be legally regulated.

nature based on the individual preferences of the members of a group of citizens¹⁴. Some difficulties easily arise: these theories may mean, for example, that it is considered potentially legitimate for a group of relatively recently territorialized immigrants to secede. It has also been argued again that an a priori right to secession established in these terms might result in the ad infinitum fragmentation of political communities and would not permit democracy to develop correctly as it would be permanently threatened by internal disintegration¹⁵.

Table 1: *Secession theories in liberal democracies.*

Theories	Legitimacy of Secession	Rights at stake	Right to Self-determination
Constitutional and traditional liberal	No	Individual and collective rights only for the state	Only for the state
Just cause	Yes, in some cases	Violation of basic individual or collective rights	In case of violation of human rights, violation of federal agreements, no safeguard of economic interests, permanent negative redistribution.
Nationalist	Yes	Individual and collective rights of minority nations	In order to protect culture, to achieve better social justice, recognition and political accommodation.
Plebiscitary	Yes, with territorial conditions	Individual	To improve individual autonomy and freedom of voluntary association.

Kantian/Hegelian approaches applied to secession (different practical and institutional consequences regarding recognition and accommodation of national pluralism).

¹⁴ The authors who have formulated this approach establish conditions that must be met: the state must be feasible in empirical terms (number of citizens, etc.) with guaranteed rights for minorities and secession does not prevent the viability of the former state or generate political instability, etc. Historical or national considerations are in principle alien to the internal logic of this perspective but they may come back through the backdoor (the exclusion of territories “essential” to the “rest-of” state). See H. Beran, “A Liberal Theory of Secession”, *Political Studies*, XXXII, 21-31.1984, A. Wellman *A Theory of Secession: The Case for political Self-determination*, Cambridge University Press, 2005.

¹⁵ See M. Moore *The Ethics of Nationalism*, Oxford University Press 2001, See also “The Constitution-making process”, *Advisory Council for National Transition (CATN)*, Report n.10, Catalan Government, 2014.

The following table summarises the legitimacy bases of the three standard theories of external secession¹⁶.

Today's secessionists in Europe use arguments coming from ascriptive as well as from associative theories. While ascriptive theories fit well with traditional nationalist claims, associative theories have become more salient in recent times, especially regarding the democratic nature of a referendum about independence¹⁷.

Political and social actors that advocate for secession usually combine the two kinds of primary right theories as legitimating ways of gaining independence, with ascriptive patterns being predominant when justifying the group of citizens involved in referendums, and plebiscitary lines of reasoning being predominant when justifying the intrinsic democratic pattern of the referendum itself. These legitimating avenues are complementary to reasons based on just cause theories, which are built on the aforementioned mistreatment in specific policies regarding national recognition and constitutional accommodation¹⁸. In spite of the weaknesses that each specific theory display when considered alone, the practical legitimating strength of the secessionists' position consists in combining the strong normative sides –just cause, national and democratic– highlighted by the three aforementioned theories¹⁹.

¹⁶ These bases may also be established following a complementary Hegelian approach which focuses on the concepts of political recognition and accommodation and a more exclusive Kantian approach based basically on moral individualism. This point is developed in F. Requejo, "Plurinational Federalism and Political Theory," in J. Loughlin-J. Kincaid-W. Swenden (eds), *The Routledge Handbook on Regionalism and Federalism*, Routledge, London-New York, 2013: 34-44.

¹⁷ Considering Catalonia and Scotland as *demos* is usually based on ascriptive arguments of historical or national nature. However, the relative salience of culture, language, and even history is reduced when a "right to decide" (referendum about secession) has been claimed. These two features may be seen as the two sides of the right to self determination. In practise, the possibility of dual citizenship after secession seems an acceptable solution and may even become a condition for accepting independence. Dual citizenship has repeatedly been accepted by prominent Catalan nationalists, following the Scottish model. An analysis of the Catalan "right to decide" in "The consultation about the political future of Catalonia", *Advisory Council for National Transition (CATN) Report n.1*, Catalan Government, 2014. See also J. López (Ed) *El dret a decidir. Àmbits de Política i Societat*, Barcelona: Col·legi de Politòlegs i Sociòlegs de Catalunya, 2013.

¹⁸ Scotland and Catalonia are two pro-European countries which diverge in their relation to the European Union in a rather paradoxical way: Scotland voted clearly in favour of remaining in the EU in the Brexit referendum (2016) but it may find itself outside of the EU as a member of the UK, while Catalonia is usually threatened by the main Spanish political actors with exclusion from the EU if it gains independent, despite the pro-European stance of Catalan institutions and citizens over many decades.

¹⁹ This composed legitimising line of reasoning is present in the political and electoral campaigns of secessionist parties and political associations in Catalonia, Scotland, Quebec, and the Flanders. As of today, there is a lack of descriptive and explanatory empirical research to quantify these components in each specific case.

Nevertheless, it would seem that there could be an alternative way for European minority nations to gain independence: to approach this goal following the patterns of an internal process within the framework of a European para-federal polity. Let us turn our attention to this European dimension of potential internal secessionist process.

3. Second track. The case of “internal enlargement” in the European Union

External secession theories are somewhat misplaced when it comes to justifying claims that aim for *internal secession*, when the claim is not for complete independence from common rule but for access to it. Internal secession, though rarely theorized, is a procedure we often find in federal systems where new states are carved out of the existing ones and given member state status. Internal secession may then be conceived of as an internal enlargement, where the number of member states grows but the territory of the union does not. Particularly in federations, where the existence of two levels of *demoi* is constitutionally enshrined, the question of whether federal institutions confronted with such claims have to prefer loyalty to the affected member state or to the affected citizens is relevant. As it comes out, the constitution or treaty plays not only a practical role but also provides moral guidance and constraint.

This is not a moot point. Since the Scottish National Party (SNP) invented the formula of “independence in Europe,” in Wales, Catalonia, the Basque Country, and other places movements and parties of stateless nations have exchanged their previous commitment to a “Europe of the Regions” for this new formula. Recently, Anderson and Keil²⁰, have highlighted that continued EU membership is central to secessionist discourse, as analyzed in the programs of SNP and the Catalan coalition *Junts pel Sí*²¹, though this does not apply to all secessionist movements. Some standard accounts consider the EU is lowering the costs of secession if the seceding territory maintains membership²². It may be achieved with minor costs, as not all the elements of a totally sovereign²³ state

²⁰ See Anderson, Paul/Keil, Soeren: “Minority Nationalism and the European Union”, *L'Europe en Formation* 379, 2016, 1, p. 40-57.

²¹ Junts pel Sí is the electoral list of candidates from former Convergència Democràtica, Esquerra Republicana, off splits of the Catalan socialist party and Unió Democràtica, and independents that won the parliamentary election in Catalonia (2015).

²² To explain the success of the idea of “independence in Europe,” some authors stress the usefulness of dispelling fears of going it alone. See John McGarry/Michael Keating (eds.), *European Integration and the Nationalities Question*, London/New York 2006.

²³ See Keating in this volume.

have to be provided for. The common market is maintained, no customs service has to be organized, frontiers would be secure (but not significant) including the one with the “rest-of-the state.” But there are also moral advantages in comparison to external secession. Fears of revenge or of further expansion of the new state and of retaliation against anti-secessionist minorities in the new state and against remaining members of the seceding community in the “rest-of” state may be of lesser importance. Sympathisers with the secessionists that may remain in the host state’s territory would still have links to the economic or cultural centres they prefer even after secession as long as there are open frontiers²⁴. If—as it seems—stateless nationalism and state nationalism became increasingly similar and the question of whether the latter should be privileged and why in Europe becomes more pertinent.

Privileging the existing states was not the objective of post-war Europeanists. This movement even mirrored older European concepts of federalism, opposed to the Madisonian liberal US-type federation with its two tier game of levels of sovereignty. “Integral federalists” like Denis de Rougemont recurred to Proudhonian, even Althusian, ideas of federalism. The Maastricht and post-Maastricht institutional structure and political practice of a “Europe with the Regions,” where stateless nations did not find the asymmetrical recognition they claimed, would not have satisfied the defenders of de Rougemont’s original claim of a “Europe of the Regions” as the building stones of Europe, where the regions would not be like new states but an alternative to the state model.²⁵ It would not have satisfied the defenders of Guy Héraud’s “Europe of the ethnic groups” provide what Breton nationalist Yann Fouéré called a “Europe with a

²⁴ Keating paints a somewhat paradoxical image of the Europeanisation effect on stateless nations: “As minorities and stateless nation movements have Europeanized, modernized and even adapted their histories to a liberal democratic teleology, they thus challenge the state on its own moral and normative ground. This is one reason why the spread of universal values of liberalism and democracy do not resolve nationalities questions. On the contrary, they can exacerbate them, as minorities move from being ethnic fragments with particularist demands to making broad claims for self-government and social regulation. A move from ethnic to civic nationalism, or to constitutional patriotism, does not thus resolve the problem if this means the creation of new and separate sovereign states.” See Keating, Michael: “Plurinational Democracy and the European Order”, Sonja Puntischer Riekmann, Monika Mokre, Michael Latzer (eds.): *The State of Europe. Transformations of Statehood from a European Perspective*, Frankfurt am Main/New York 2004, p. 210-211.

²⁵ See Nagel, Klaus-Jürgen “Between Independence in Europe, a Europe with a Hundred Flags, and a Europe of or with the Regions. Conceptualising the Relations between Stateless Nations and European Integration in Western Europe (1945-2010)”, István Horváth / Márton Tonk (eds.), *Minority Politics Within the Europe of Regions*, Cluj-Napoca: Editura Institutului pentru Studiarea Problemelor Minorităților Nationale/Scientia Publishing House, 2011, p. 61-86. See also Eve Hepburn (2008), “The Rise and Fall of a ‘Europe of the Regions’”, *Regional & Federal Studies*, 18:5, 537-555.

hundred flags,” or what Leopold Kohr planned as a proto-green cantonalist Europe where “small is beautiful”.

As it came out, the EU’s multilevel framework is very different. It saved some privileges for state actors.²⁶ Developments over the last twenty years have worsened the perceived opportunity structure for stateless nations even if they are at the same time political entities of a member state. Most of the enlargement states have centralized structures. Strong regions of the west of Europe cannot find suitable allies in the east. Regional funds, essential for Occitania, Sardinia, Galicia, Wales, etc. have gone eastward.²⁷ Particularly after eastward enlargement, states are back, and the Laeken process and later the run-up for the Lisbon Treaty only confirmed this. In parallel to what happened with autonomy arrangements in some states, the upsurge of “independence in Europe” seemed to be the result of minority misrepresentation, flaws in political self-government, and disappointments in the post-Maastricht evolution of the EU.

While some majority nations put the claim for “independence in Europe on the desk, analytical literature concentrated on the juridical possibilities of achieving this under the EU treaties.²⁸ While some authors see this as unproblematic, others tend to view it as impossible, particularly in cases of unilateral secession.²⁹ Juridical discussion focused on how to maintain membership in a EU that only provides for the accession of new members (Art. 48 TEU, not conceived to provide for internal secession cases) or for small changes to treaties (49 TEU, not conceived for membership application) and the total secession of member states from the Union (article 50 TEU). In most scenarios, unanimous votes in Council are necessary, which gives any member state a veto position. Our purpose here is not to contribute to the juridical discussion³⁰, which will be

²⁶ The authority on the official languages in Europe, for example, has always been reserved for the states – providing an argument to push for statehood. Anwen Elias, in her introduction to a special edition of the journal *Regional and Federal Studies* dedicated to *Whatever happened to the Europe of the regions?*, wrote: “By the beginning of the new millennium, much of the ‘hype’ associated with the Europe of the Regions idea had faded.” (2008: 485)

²⁷ Nagel, Klaus-Jürgen: “Transcending the National/Asserting the National: How Stateless Nations like Scotland, Wales and Catalonia React to European Integration”, *Australian Journal of Politics and History* 50, 2004, 1, p. 58-75.

²⁸ See Guirao, Fernando: *An independent Catalonia as a member state of the European Union?* Terra ignota; Xavier Cuadras-Morató (ed.) *Catalonia: A new Independent State in Europe?*, Abingdon: Routledge 2016.

²⁹ From a critical standpoint: Arraiza, José-María: From the „right to decide“ to the „duty to negotiate“ and back: The Catalan bid for independence in domestic and international perspective, *Europäisches Journal für Minderheitenfragen* 6, 2013, 2, p. 101-118.

³⁰ See also Christopher K. Connolly: Independence in Europe: Secession, sovereignty, and the European Union, *Duke Journal of Comparative and International Law*, 24, 2013, p. 51-105.

tackled by other contributions to this volume. We are asking whether a claim or even a right to secede, if it exists, is affected when the secessionists want to remain inside the EU maintaining their European citizenship. This is a new issue in academic discussion and up to now only few contributions conceive of independence without leaving the EU as an internal secession and/or internal enlargement.³¹

Internal secessions are a matter of federal practice but far less of federalist thought. There are precedent cases of such internal secessions from member states that have happened inside liberal democratic federations. Jura in Switzerland, Nunavut in Canada, and some Indian states (Chhattisgarh, Uttaranchal -renamed Uttarakhand-, and Jharkhand in 2000, Telangana in 2014) have been created by internal secessions. There is not much literature on the moral issues at stake³², however, if we look at the precedent cases of successful member state creation, we find that in the aforementioned cases all tiers, that is the population of the seceding area, the member state, and the federation had to approve. Even the other member states of the federation participated in the process, albeit only by a majority vote in the second chamber. They were also affected, because power relations and thereby the chances of building federal majorities may change if a new member unit is created. The directly affected member state and also others may not welcome newcomers, if only for their foreseeable policy preferences (e.g., on austerity or deficit spending). While external secession theories try to develop moral rules that should be applied in the absence of an encompassing system of rules provided by international law, in internal secession, this framework may exist in the federal constitution or treaty. This is usually accepted by defenders and opponents of secession and therefore works as a constraining or supportive element for secessionists.

Precedent cases of successful internal secessions show the initial rising of the secessionist claim was easier than in cases of external secession, since the federal government could not reject it outright. In federations like Switzerland, India, or Canada, the internal secessionists were not immediately delegitimized or threatened with being thrown out of the federal system. With the *demoi* of the member states, on the one hand, and the collective *demos* of the federation, on the other, the actors on the federal level had to try to remain loyal to the states, including the one affected by the secessionist claim but they also had to treat the secessionists as citizens of the federation and members of the

³¹ See Matas, Jordi/González, Alfonso/Jaria, Jordi/Román, Laura, *The internal enlargement of the European Union*, Centre Maurits Coppieters, Brussels 2010; Kenealy, Daniel: How Do You Solve a Problem like Scotland? A proposal regarding 'Internal Enlargement' in *Journal of European Integration* 36, 2014, 6, 585-600.

³² See Anthony C. Gilliland: *Federalism and the creation of new states: justifying internal secession*, PhD thesis, Universitat Pompeu Fabra, 2013.

federal *demos*, with rights that in principle were to be treated on an equal footing with those of the anti-secessionists, and never rejected offhand. Comparing to the treatment of claims for external secession, the centre has more difficulties in suppressing or ignoring the claims.

But there are also constraints on secessionists. While those that fight for a full secession want a constitution for themselves, internal secessionists have to accept the amendment rules of the federal constitution and this amendment has to be accepted by the other member states.³³ This acceptance may or may not require unanimity (in federations, overwhelming majorities are necessary for constitutional amendments but unanimity is more typical of confederal arrangements). It may be important that the EU, unlike federations, does not fully represent the member states on the international scene. Federations that do so may have a moral argument in favour of strict rules for accepting internal secessions as they will have the duty of representing the new member state abroad, even if not sharing its standpoints.

If we try to infer standard rules from accepted processes like the Jura secession from the canton of Berne, we find a central government that weighed the different principles of the constitution and adopted a mediating role. While allowing the Jurassiens to vote, government at the same time also protected the canton of Berne and the other cantons against the possibility of a unilateral decision by a territorial majority.

This is even more relevant as the new Canton of Jura was not content with dividing the representation of the canton of Berne at the centre (for example by establishing a semi canton with lesser power in shared government), but strove to become a full canton, thereby increasing the number of senators and reducing the individual weight of each state in the Senate. A division of the representation of Berne in the Senate (like in the case of other cantons that had split) might have been less problematic, as this would not have affected the other cantons' power in the same way; likewise, one might argue that their say on the process should have had lesser weight if the combined power of the new and the rest-of state equals the one the former state had.

EU institutions, confronted with internal secession claims –so far mainly of Catalans and Scots–, have either hidden behind the “no comment” on internal affairs of member states or more or less openly sided up with the member states. More than once they have given indirect support to the scenarios for non-membership published by the British

³³ See Bossacoma, Pau: *Secessió i integració a la Unió Europea. Catalunya nou Estat de la Unió?*, Barcelona: Generalitat de Catalunya/Institut d'Estudis de l'Autogovern 2016.

and even more by the Spanish government.³⁴ These governments have successfully used the EU as bailiff to scare those citizens that might prefer secession but wish to remain in the EU. It is questionable how far this menace has worked as planned.³⁵ However, it may speak to the current state of the Union when it behaves in a way acceptable for a confederation or an agency at the service of the states but not for a federation.

In a federation, the moral obligation for the central power to adopt a more neutral but active intermediating position stems from the fact that the secessionists, as well as the anti-secessionists, if they want to remain, are citizens of an existing federal *demos*, and they deserve some consideration of their rights (while in a confederation the central agency may only be loyal to the member states that signed the treaty, each member ideally holding veto power).

This now brings us to the question of whether there is such common citizenship in Europe. Even if we concede that European citizenship is based on member states' citizenship, the European Court of Justice has started to establish notions of common citizenship.³⁶ A wider interpretation of the concept of citizenship also takes into account its symbolic function of generating identification. This function of European citizenship would suffer if the EU renounces part of its population without trying to defend the continuity of their European citizenship against an unwilling "rest-of" state. It might be seen as an abuse of law if the secessionists first insist on leaving but then decide to maintain their state (and thereby European) citizenship against the will of the rest; however, a non-discriminating removal of their citizenship also may be seen as an abuse.³⁷

If (as we have argued) internal secession is guided by the acceptance of the pact, it is in the EU treaties and practices secessionists may find moral and practical support³⁸

³⁴ Spanish foreign minister García-Margallo warned that a unilateral declaration of independence would condemn Catalonia, "to wander through space without recognition and to be excluded from the EU forever and ever." British Prime Minister Cameron warned Scotland that it, "would have to queue up behind other countries [...] that [were] already on the path towards membership." (both cited in Muro, Diego/Vlaskamp, Martijn C.: How do prospects of EU membership influence support for secession? A survey experiment in Catalonia and Scotland, *West European Politics* 39, 2016, 6, p. 1115-1138).

³⁵ See Jordi Muñoz/Raül Tornos: Economic expectations and support for secession in Catalonia: between causality and rationalization, *European Political Science Review* 7, 2015, 2, 315-341. However, Muro/Vlaskamp 2016 found only a limited effect, higher in Catalonia than in Scotland.

³⁶ See Bossacoma p. 64.

³⁷ There may be the possibility of the Commission bringing an act like that to the ECJ, since the Commission can bring member states to court that harm the principles of democracy (7 TUE).

³⁸ For an exhaustive list, see Bossacoma 2016. See Antoni Bayona, El "dret a decidir" i els valors fundamentals de la Unió Europea, *REAF* 20, 2014, p. 132-173. See also CATN report n. 6 "Integrative ways of Catalonia to the European Union (2014) (Advisory Council for the National Transition, Catalan Government).

from the “ever closer union” in the preamble to the references to cultural diversity. The principles of democracy and freedom as established in art. 2 TEU, the protection of minorities and respect for pluralism (art 2 and 3.3. TEU), European citizenship (art 3.2. and 9 TEU) may balance other principles like the respect of territorial integrity and the national and constitutional identity of the member states (art 4.2. TEU). The EU has set out to promote democracy even outside its frontiers and it makes it a principle for adhesion (art 49 TEU). Principles such as peace, freedom, democracy, justice, human rights, and the recognition of pluralism as established, for example, in art 2 and 3.2, have created expectations in the members of substate nations that their claims may get a fair treatment by the EU if they behave in a peaceful and democratic manner.

In practice, probably the morally and practically best way in a situation of contradicting principles (citizenship, democracy, freedom, rule of law, etc.) that must be balanced out, considering the absence of precedent cases (in the EU) and jurisprudence, could be sought in a necessary transitory solution during which states were not given full membership. Kai-Olaf Lang argued that after a potential Catalan secession, European law could still be applied.³⁹ As in the cases of the former GDR, Northern Cyprus, and Greenland, pragmatic solutions may be found with the active guidance of the EU. Somewhat ironically, ad hoc rulings or *modus vivendi* agreements mean that asymmetry would be back, at least for the time being. Against tendencies pushing towards a two tier (con)federation, the old ideas of asymmetric arrangements in a multi-tiered EU may resurface.

Ironically, if big member states are the most considerable impediment, in the end, one might recall dividing the big states was one of the goals of integral federalists (Denis de Rougemont) and defenders of the Europe of the Peoples (Guy Héraud) or the proto-Green advocates of “small is beautiful” following Leopold Kohr.

Let us sum up the major points: Internal secessions in federations are very different from external secessions that were the topic of the secession theories in the previous section. Even in the most restrictive versions of external secession theories, if justification is found, unilateral secession may proceed. In contrast, internal secessions can never be unilateral, as the other members of the pact have to agree.⁴⁰

³⁹ Kai-Olaf Lang, *Catalonia on the road to independence?*, Stiftung Wissenschaft und Politik, SWP-Aktuell 50, August 2013.

⁴⁰ An absolute veto of the affected member state has been granted in the Jura case, but not in the Indian cases. This topic is relevant for cases inside the EU.

Whether we consider the EU a federation or even as a kind of hybrid confederation-federation system, the path for secessionists striving for independence in Europe by internal secession is always quite different from the one that leads to complete independence. The path to internal secession is wider, as the claim cannot be dismissed so easily on restrictive remedial rightist grounds. In fact, strict remedial rightist views can never deal with cases of internal secession: internal secession is always based on some form of consent, which is a basic element in federalism. Neither do the principles of choice theories wed easily with internal secession, as the latter can never proceed by the mere decision of the substate majority. On the other hand, the sometimes long list of conditions that choice theorists provide to exclude blackmailing or oppressive secessionists can also not apply to internal secessions, as internal secessionists abide by the rules of the pact.

To defend a position of internal secession means accepting the existing constitution at least for the time being. Internal secessionists look for support in its principles (for example, in the EU treaties) and in the case of a federation, they may count on the potential of active intermediation by a central government that has to consider the rights of the members of the federal *demos* as well as the member states. The continuity of the federal system facilitates more stable outcomes.

The remaining question, however, is if the EU will evolve or not towards a more federal polity. In the current confederal trends we see today, the salience of external secession still seems the most realistic way for secessionists in the current European states. Nevertheless, the future has yet to be written

4 Conclusions

Secession is a pertinent issue inside the EU. Some secessionist movements challenge the frontiers of existing states on liberal and democratic grounds. We argue for new ways of looking at this subject. We consider that there are two morally and practically different paths open to secessionists in the EU: the classical external secession from a member state and the internal secession inside the EU.

Firstly, the three external secession theories previously summarized show strong normative points to be considered in an advanced liberal democracy but they also show weak moral and practical points. On the one hand, remedial right theories focus on potential unfair permanent socioeconomic, cultural, and symbolic grievances and negative discriminatory patterns that are relevant for democratic theory and practice but they are also marked by an ambiguous characterization of what makes a situation unjust and

they also show a clear statist bias that seems difficult to justify with liberal-democratic patterns. On the other hand, primary right theories highlight the political importance that self-esteem and self-image usually have for individuals (ascriptive theories) as well as the majoritarian democratic criterion as a mean of making collective decisions (plebiscitary theories). All these theories have often been rejected on the grounds of endlessly fragmenting the world into a myriad of small and eventually nonviable states and for endangering new minorities (in the case of ascriptive theories). The former presumption seems exaggerated at least in the European context while the latter is empirically flawed in the EU. Plebiscitary theories establish the necessity of a majoritarian decision in the particular political community but many of the “small print” conditions to limit fragmentation seem morally questionable or impracticable.

In the practical political world of the EU, secessionist movements combine arguments from different external secession approaches in ways adapted to each case. Oftentimes the relative salience of ascriptive cultural or linguistic issues and even historical references have been reduced in favour of strengthening moral positions for a democratic right to decide. Be that as it may, these three kinds of theories have in common that they provide more or less wide justifications for (some) cases of unilateral secession. They are usually made for situations when constitutional rules are superseded by stronger moral reasons (severe injustice, national self-determination, and liberal democratic majorities).

Secondly, the “legitimacy avenues” for an internal secession inside a federation are different from those that existing theories of external secession provide. Federal theories usually insist on the moral importance of the pact. By claiming internal instead of external secession, secessionists accept a normative framework that is also dear to their adversaries, the federal constitution or treaty. Claims for dividing a member state (internal secession) may have to face (but may also count with) the central government’s restrictive and actively intermediating role. Members of the federal *demos* cannot be ignored on grounds of an exclusive loyalty to the member state.

If the EU was considered more a federation than a confederation, a member state’s internal secessionist claims could not be rejected on the basis of failing to fit into the categories of external secession theories making it then easier to present those claims. However, to amend a federal pact, a consensus between the affected member state and the agreement of the federation would be two necessary requirements, while on the other side, it would be morally difficult to reject negotiations on a solution from the start.

On balance, to comply with the high moral and practical barriers of an internal secession may be more difficult than justifying a unilateral external secession. It may well

be that these difficulties, particularly when enhanced by actors that usually see the EU in terms of a polity based on confederal terms and in which the accounts of a Europe with the Regions has so far failed, may encourage and drive secessionists towards full external secession, where their claims can be based on the mixed moral and procedural elements provided by the standard external secession theories. In line with a view of the EU that is neither federal nor confederal but *sui generis*, a potential alternative could consist of establishing pragmatic or *modus vivendi* asymmetrical agreements, based on specific cases within this polity. A priori, this could have moral and practical advantages and it may bring us back to ideas of asymmetric arrangements that take federalism beyond the models of traditional federations and confederations⁴¹.

⁴¹ See Requejo-Nagel, *Federalism beyond Federations*, Ashgate, Farnham -Burlington, 2011

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