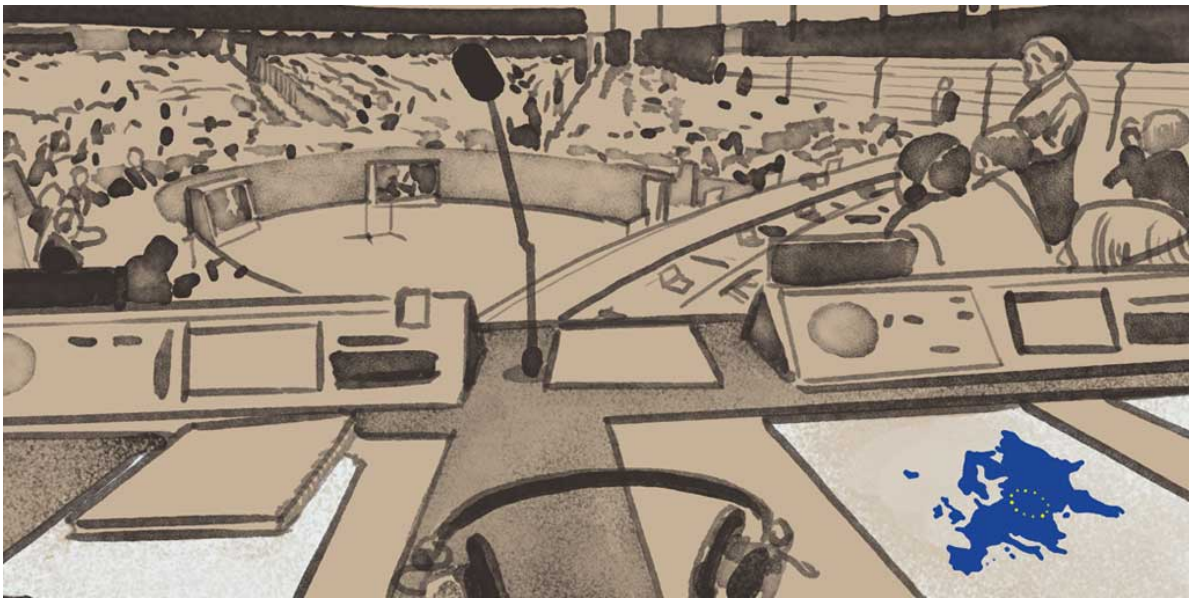
SOVEREIGNTY CONFLICTS: THE EUROPEAN DEBATE

Introduction: a code for resolving sovereignty conflicts in the 21st century

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The international dimension of this IDEES special issue reflects on the role of the European Union in territorial conflicts of sovereignty. Illustrator: César Cromit.

Disputes over sovereignty –who governs, where and on whose behalf– have shaped Europe's history since time immemorial, and the list of serious violations of rights that have accompanied these conflicts seems never-ending. Even today, well into the 21st century, one issue remains inaccessible to reasoned debate and democratic decision: modifying state borders.

Sovereignty conflicts in the 21st century: an initiative for Europe. Why do we need a code of good practice to resolve them?

The IDEES special issue "Catalonia – Spain: from conflict to political dialogue" analyses the various dimensions of this secular conflict in four interrelated axes, intending to structure and order the existing debates. The section we consider below focuses on the debate from the European perspective. It is a debate that questions the sovereignty frameworks of one

of the EU member states and should be understood within the scheme of a broader discussion on redefining governance on a European and global scale.

The contents we present are the result of the Centre for Contemporary Studies and IDEES magazine's collaboration with a project led by Eusko Ikaskuntza and the Institute of Catalan Studies to develop a code of good practice to facilitate the democratic resolution of territorial conflicts of sovereignty in Europe.

Within the framework of the project, an international congress entitled "Sovereignty Conflicts in Europe: basis for a solution" was held on the 11th, 12th and 13th of November in Bilbao last year, and a basis for a code of good practice to facilitate the democratic resolution of territorial conflicts of sovereignty in Europe was presented there.

The theoretical contributions collected in this volume were presented at the aforementioned congress, all of which are based on a shared diagnosis:

- Should the law provide a safe and just framework for resolving sovereignty disputes? Yes, without a doubt.
- With regard to managing this type of conflict, are there any existing good practices and examples we can follow? Yes, there are some interesting precedents.
- Do we have a regulatory framework in Europe to deal with these issues beyond certain *ad hoc* solutions seen in some countries? No. It all depends on how deep-seated the democratic culture is in each country.
- Given that the dominant interpretations of a peoples' right to exercise self-determination have failed to manage sovereignty conflicts in democratic contexts adequately, a supranational regulatory gap evidently exists.

Professor Francesco Palermo reminds us that "law cannot decide whether a conflict is justified or not, and by no means can it side with one party or another". Law is not "the measure of the world" because political legitimacy is not awarded solely on the basis of positive legality. However, it does provide us with an incredibly useful tool: procedure. Safe, fair and equitable processes for managing conflicting individual and collective projects democratically. Let us describe the core content of this initiative in more detail:

1. **We are talking about real conflicts.** We are not dealing with superficial debates or occasional jurisdictional disagreements that can be quickly resolved. We are talking about historical conflicts that have caused collective suffering and recurring violations of rights and freedoms. As stated in the basis document, "territorial sovereignty conflicts are defined as disputes in which a sizeable part of the citizenry in a sub-state political community attempts to exercise the right to freely and democratically decide its political status, including the possibility of becoming a sovereign state, without recognition from the state in which it is integrated. Territorial sovereignty conflicts go beyond a mere request for recognition or demand for self-government from a political community. They refer to the possibility of

accessing sovereignty, which can be understood as the supreme decision-making power originating from a political community, that does not prejudge or limit that community's subsequent legal-political status".

The proposal presented here attempts to pinpoint fair and democratic formulas that will enable us to manage current conflicts and avoid future controversies.

2. **The conflicts are territorial by nature**. Even though in many cases the actors involved are national or cultural minorities, in this type of conflict, the issue of the exercise of political power in a given territory –the territorial projection of power– is a core element: it is not just about managing cultural plurality –which, incidentally, indisputably exists in each and every one of the European states, albeit to differing degrees– but about defining the territorial status of *demoi* and resolving disputes over the exercise of political power in a territory.

3. **Sovereignty is at stake.** Effectively, although the recognition of the sub-state community or its accommodation in the State are relevant factors for these purposes, the core of the conflict is the unsatisfied demand for sovereignty. In other words, a political community's free capacity to self-organise internally and establish the relationships it desires with other political communities is in dispute.

4. **They are conflicts that have arisen within the European states**. The proposal for a code of good practice is based, in principle, on a European framework: on the one hand, it is aimed at European institutions and, on the other, it does not attempt to address interstate or irredeemable conflicts that affect two or more states. The initiative focuses on what has been called the "internal or domestic conflict" of states and has a clear purpose: to overcome this limited interpretation. Because, in reality, nothing that happens within European states can truly be deemed "internal" to those states any more, and, in any case, it is an "internal" issue for the "European house" and falls under the rule of European law. This is not to say that the proposed formulas would not be valid for non-European geographies or multi-state conflicts. Ultimately, we are talking about democratic management based on agreement; it is about solving problems rather than problematising solutions that are just and democratic.

Indeed, given the *sui generis* nature of its political articulation, based on a complex, non-monistic interpretation of sovereignty, the European institutional space is probably well placed to offer up a code of good practice that could be valid on a global scale. In a context of acceleration, of a rupture of the secure frameworks of modernity, in which an adaptation is taking place –not the disappearance of nation-states– the question of sovereignty acquires an unsuspected centrality. In his well-known trilemma –globalisation, democracy, sovereignty– Rodrik [1] discussed the need to opt for two categories and sacrifice the third. Without denying the theoretical and practical tension between the three terms, perhaps we can simplify the trilemma by focusing on the key concept: democracy. Thus, we would no longer choose from three options, but two: *immune, walled* states –as described by R.

Esposito [2] and W. Brown [3]– or debate and democratic decision on the political structures that govern us, their union and separation, the delimitation of spheres of power and the flows of ideas and people. Clearly, the second option is preferable.

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Moreover, the proposed code of good practice is opportunely positioned in one of the main open debates in Europe today. The debate on the virtuality of the "European rule of law" and the guarantees that it should afford in terms of safeguarding the rights and freedoms of all its citizens. Clearly, the "European law empire" must protect the LGTBI community's rights, freedom of expression and the independence of judiciaries. Furthermore, that protection cannot be limited to assessing the legality in force in each member state and its degree of concordance with the EU's own internal regulatory procedures. It must go further: the European rule-of-law empire must protect rights and freedoms, and its institutions must take a proactive stance in their defence. A law empire that, let us not forget, cannot be solely limited to positive legality because its door must always remain open to integrate a growing array of rights and freedoms. Therefore, it can also be argued that procedures for internal enlargement, or, in other words, the general principles that govern the processes for creating new independent states in Europe, must be incorporated into this "European rule of law". It is just another step towards the democratisation of Europe.

Firm foundational ideas from which to articulate a consensus

This project intends to pursue a path not often trodden. It is based on several firm ideas that break away from the topics, common misunderstandings and even falsehoods typically seen in territorial sovereignty conflicts. The firm ideas underpinning this project, and the document that was presented at the Bilbao Conference are the following:

Conflicts do not disappear if you turn a blind eye. Today, in Europe and the rest of the world, several conflicts could be defined as "territorial sovereignty conflicts". Territorial sovereignty conflicts occur when states and sub-state political communities refuse to accept any of the pathways to negotiating a new political status between them, whether that be a new structural framework, increased self-governance, or the chance to decide the possibility of constituting new independent states.

Rather than being remnants of the past, these conflicts are based on the vindication of fully contemporary values. They are often interpreted along the lines of nineteenth-century

demands, as remnants of a past nationalism, but this is an interpretation that seeks to hide, in a time of shared sovereignties, recognition of collective rights and fluid identities, the prevailing structures of political decentralisation and state borders that no longer need be immutable. Instead, they can be reviewed and updated to adapt to the demands of territorialised political communities. In short, they are expressions of current democratic demands.

It is often said that they are internal matters for individual states, but insofar as they affect individual and collective rights, they must be treated from the conviction that protecting these rights is an issue that transcends state lines and concerns the entire international community. Just as, today, it is unthinkable to view the violation of human rights as a "strictly internal matter", territorial disputes over sovereignty often affect fundamental individual and collective rights and, equally, an external perspective on the state itself can drive that dispute towards democratic channels and thus facilitate its resolution.

Similarly, they must be resolved from a contemporary interpretation of democratic principle, the rule of law, and full respect for human rights. There is a broad consensus, albeit often difficult to materialise, around the idea that these and other disputes must be resolved through democratic solutions that consider all parties in the conflict and ensure scrupulous respect for human rights and the rule of law. The use of violence is not a legitimate means of solution.

The solutions are not, however, straightforward. These solutions are not easy. Firstly, the states' internal dynamics mean they must confront democratic demands and logics that question their territorial integrity. Secondly, in the international sphere, the geostrategic state-level interests in international political logics make it hard to take an open approach to the demands of all parties, especially when it involves taking a position on specific cases. This is why providing a general, 'non-*ad hoc*' framework for the democratic management of these conflicts, with appropriate safeguards, will allow the European institutions to intervene safely and facilitate solutions enshrined in general international principles and standards

Solutions can be facilitated by a code of good practice like those that already exist for other issues. We know we can develop a code of good practice to resolve these conflicts because we have seen them used for other issues. Given the series of examples (cases and generated jurisprudence) and the current interpretation of different principles, rights and duties, it is reasonable to infer that some standards could be driven from European spheres.

Within the European framework, several institutions could contribute to its development and momentum. With their different criteria and areas of action, the various European institutions could, in accordance with their competences, principles and inspiring values, promote this common framework of standards for the resolution of territorial sovereignty conflicts. From the European Parliament to the Commission, the European Council, the Council of Europe and the Organisation for Security and Co-operation in Europe.

> In accordance with their competences and inspiring values, the European institutions could promote a common framework of standards for the resolution of territorial sovereignty conflicts

The development and use of these standards will strengthen the European project. Both in terms of strengthening its founding values and from a pragmatic point of view, having a code of good practice or other types of legal or political-impetus-based tools to move things in the right direction would contribute to the bloc's stability by having a bearing, over time and without *ad hoc* readings, on tensions that could end up indirectly affecting the entire European project. They would also contribute to a system of governance that offers a framework for the democratic, guaranteed and safe management of territorial sovereignty conflicts, thus strengthening the links between European citizens and territories and even promoting the values and principles of the European Union and other European institutions.

A lengthy process

The texts compiled in this series sit within the wider framework of an ambitious initiative. This is not a simple compendium of papers linked to a few purely academic seminars. These texts form part of the academic groundwork that laid the foundations for a code of good practice that can help us develop a democratic protocol for solving sovereignty conflicts in Europe. The congress at which they were presented is merely a midway point in a lengthy process, which will be as ambitious as necessary.

Just as progress in the democratisation of Europe relies on European nations and their citizens engaging with the collective project, this initiative has made it thus far and, above all, will only be viable in the future if it is developed with the participation and collective work of dozens of international experts from a plethora of other universities and research centres around the world.

The papers collected here clearly demonstrate the academic calibre of the initiative. Perhaps not every expert in the field has cast their eye over the project, but those who have are, without doubt, renowned international experts. They may not concur on all of the proposals for good practice –there is a plurality of perspectives– but they have joined this project because they believe that sovereignty conflicts should be managed democratically and with full legal guarantees.

The first version of the basis for a code of good practice stems from what, in Basque, is known as *auzolan* or community work. *Auzolan* is not at all easy to achieve in an academic world that has been reticent to reward collective work of late; other than that which features in 'prestigious' publications, which are often as prestigious as they are irrelevant when it comes to solving real-world social and political dilemmas. In this particular case, we are talking about a collective work based on a questionnaire sent to more than 70

international experts. Using the fifty responses received, a team of 12 people drafted the first version of the code of good practice, which was presented at the Bilbao congress.

The initiative does not end here. Once the first version of the basis document has been presented publicly, over the next few months the text will be consolidated based on the contributions made at various academic seminars convened expressly for that purpose. Subsequently, throughout 2021, the initiative's backers will use the considerable collaborative space that has been articulated to forge an agreement on the best way to reach the European institutions and insert the code of good practice into their agenda.

This *auzolan* goes beyond academia, it surpasses the necessary theoretical reflection. Indeed, the initiative has shaped a broad and diverse cooperative space that demonstrates the relevance of the issue in society today. Eusko ikaskuntza and the Institute of Catalan Studies have offered a wide organisational umbrella to a partnership that brings together institutions dependent on the Basque Government, such as the Basque Institute of Public Administration (IVAP), and several of the Generalitat's institutions, such as the Institute for Self-Government Studies (IEA), the IDEES magazine itself and the Centre for Contemporary Studies (CETC). A growing range of foundations and research institutes interested in opening a European-wide debate have also joined the collaborative space.

Looking ahead

Experts agree that the European institutions must have a part to play in resolving these conflicts and that a code of good practice can be an appropriate tool for establishing shared criteria at a European and even international level.

The obstacles are evident and known. However, experts stress that the real contribution of the Code is to usher in a change of perspective and mentality in dealing with these territorial conflicts. A change that will force a re-evaluation of the historical prejudices and visions in these types of disputes, one that will lead us to reject constitutional fundamentalism and rivalries and point us towards a balanced, cohesive and shared path to deeper democracy, where institutions stand side-by-side with a citizenry whose democratically-made decisions are heeded, and where the idea of subsidiarity is both welcomed and coherently developed. Without a doubt, it is an ambitious and complex endeavour, but one that is both necessary and timely for the current European scenario.

There is an open debate on the need to strengthen the rule of law in the European Union. The Commission has set out concrete actions to strengthen the Union's capacity to promote and uphold the rule of law by promoting a common rule of law culture, preventing rule-of-law problems, and providing an effective response [4].

The debate is therefore open on what should be the standard rule of law required from member states in order to move forward and consolidate the European project, with a European citizenry that already enjoys fundamental rights such as those guaranteed by the EU's 2009 Charter of Fundamental Rights [5] and the commitments and values proclaimed

in Article 2 of the TEU.

Furthermore, the Council of Europe is opening up the debate on protecting national minorities and the desirability of revising the Framework Convention for their Protection (1995) [6]. In turn, substantial observations and recommendations were made to the states –including Spain– by the United Nations Special Rapporteur on Minority Issues (2019), warning of possible breaches of international commitments in the field [7].

Lastly, Brexit has also set the stage for both Scotland and Northern Ireland to consult their citizens on their future political status and democratic will to return to the European Union in the coming years. Europe lacks a regulated pathway for accepting new democratically created states into its fold, and it seems the current climate may accelerate the need to legislate a secure and democratic process for internal EU enlargement.

Thus, in this complex scenario, thanks to the intense and productive collaborative work carried out between 2019 and 2020 by the academic, social and institutional partnership that has supported this project, we are now in a position to offer the European institutions a proposal for its public and structured debate on the need to adopt a regulatory tool that uses a common European standard to guarantee European citizens that territorial conflicts of sovereignty will be managed and resolved in accordance with the values and principles of the rule of European law —in other words, guaranteeing the principles of democracy, respect for human rights, legal certainty and respect for minorities.

Taking the congress as the midway point of the project, 2021 will see it enter into a second phase, with the second half of the year presenting a timely opportunity as the Council of the Union’s rotating presidency is handed to Slovenia: a newly created state. The open debate at the Conference on the Future of Europe will also provide a welcome opportunity to discussion.

In 2021, the aim is to design and implement strategies that will allow the proposed *Code of Good Practice for the Resolution of Territorial Conflicts of Sovereignty* to be presented to the core European institutions, with due legitimacy and academic solvency. Because if one thing has become clear, it is that the European system of governance lacks forums and deliberative spaces designed to manage and resolve internal sovereignty conflicts democratically. This is a significant weakness that needs to be addressed with a long-term proposal. Developing this strategy will entail work in several different fields:

1. **Further expert academic work**. In the academic field, the challenge is to create a sufficiently contrasted and well-prepared document that will be accepted as a working document by the European institutions and open a public debate on the need for a code of good practice for the resolution of territorial conflicts of sovereignty. Articulating a public and structured debate in the academic field and within the European institutions will be a vital step towards achieving normative value for the basis we present.

   We will, therefore, conduct a technical analysis with experts to establish which

avenues and tools we should explore to turn our proposed code of good practice into an instrument with regulatory force. To do this, during the first half of 2021, we will use the document presented at the congress (version 01) as a basis and continue the substantive debates around some of the issues it did not sufficiently address in order to produce a more contrasted version (version 02). We will also produce various forms that will appeal to each target institution's specific character and particularities. To this end, we plan to hold one or more academic seminars to further discuss these issues with experts from the various fields covered by the initiative's target institutions.

We also plan to promote the project and the academic debate in various prestigious academic institutions to put their weight behind it and help pave the way for its presentation to the European institutions and create an academic network that supports the need for the Code of Good Practice. We will also consider preparing diverse academic works to form a bibliographic reference base around the academic debates stemming from the subject and articulate a network of leading academics who wish to contribute to the search for just and effective solutions.

2. **In the social and the politico-institutional sphere: pedagogy, socialisation and collaboration**. A considerable pedagogical undertaking is required. We must be meticulous in our presentation of the initiative to the European institutions and draw on all the cooperation and synergies necessary to ensure success. We need to circulate the document and emphasise the importance of finding pathways and tools that can resolve conflicts democratically, anticipating any potential democratic regressions or escalations of violence.

To summarise, the basis document for the development of a code of good practice for the democratic resolution of sovereignty conflicts in European states has provided all the ingredients necessary to solve these types of conflict democratically and is the perfect starting point for a debate that must culminate in the drafting and approval of a European standard that European states affected by this type of conflict must respect.

> A Code of Good Practice is an effective vaccine against the erosion of democracy and promotes European federal integration, consolidating peace and cooperation

Lastly, the Code is an effective vaccine against the erosion of democracy and promotes European federal integration. The Code helps to determine the role and contribution of the European institutions, consolidating peace and cooperation in the context of shared and open sovereignty between member states. Even with legal barriers, there is still room for the EU to actively participate in our proposed endeavour. The Code will be a considerable asset for democracy and European law. The basis document of the Code raises some

profound issues that could bring about changes in a Europe that must evolve, but must do so in a regulated way using deliberative instruments.

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4 — European Comission (2019). *Initiative to strengthen the rule of law in the EU.* Available online.

5 — EU Charter of Fundamental Rights (DO C 202 de 7.6.2016, pp. 389-405). Available online at EUR-Lex – Access to European Union Law website.

6 — An initiative promoted by the Swiss foundation Convivenza (in collaboration with EURAC and sponsored by the Council of Europe's Congress of Local and Regional Authorities) is currently pushing for a revision of the Convention on National Minorities and arguing that it should be complemented by mechanisms designed to give a voice to peoples without a sovereign state of their own. Learn more at convivenza.ch.

7 — Section 88 of the United Nations Special Rapporteur report on Minority Issues refers to the events and trials linked to the Catalan referendum on 1 October 2017. It urges the Spanish State to comply with the principles of legality and certainty and not unduly criminalise acts related to the democratic rights of freedom of expression and freedom of peaceful assembly in exercising the right to participate in public and political life. Report available online.



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