SOVEREIGNTY CONFLICTS: THE EUROPEAN DEBATE

Why Should the European Union Intervene in Territorial Conflicts of Sovereignty of its Member States?

A View from the Perspective of the EU Itself

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The European Union, rather than a union of states, can be interpreted as a multilevel and multinational federation. This definition can be reflected in the European Court of Justice (ECJ) jurisprudence. Illustratior: César Cromit.

This article considers why the European Union (EU) should intervene in territorial conflicts of sovereignty of its Member States from the perspective of the EU itself. The starting point for this article is the fact that the EU tends to adopt a pragmatic approach to taking new action in a specific area and will generally only do so if it considers there is a significant issue or problem to be addressed, which if not will become an obstacle to the integration process or the functioning of the Union. It will argue that the recent Scottish and Catalan processes and developments that have followed highlight that the EU needs to intervene in this area because the EU's current position (or lack of it) is resulting in a significant erosion of democracy and human rights in the affected states and sub-state units, and by extension,

in the Union itself. Furthermore, it is beginning to threaten the mutual trust and cooperation between European institutions and Member States that are at the heart EU integration process.

For this, it will first discuss the aspects of the EU constitutional order that define it as a supranational entity or as 'more than a union of States', highlighting how the EU's response to conflicts of sovereignty so far, and in particular it's treatment of these as 'internal constitutional issues', reflects the lack of extension of these supranational or post-sovereign aspects of the EU to the sub-state level and is the cause of these problematic consequences for the Union. This article will not consider how the EU could or should intervene in these conflicts, or on what legal basis, as this will be the focus of other articles in this joint collection.

The European Union: more than a 'union of states'?

The ongoing process of EU integration has transformed the EU from an international to a constitutional order, with a growing interdependence between the legal orders of the Member States. Indeed, it is often described as a supranational or post-sovereign entity and references to it as a form multilevel and /or multinational federation are now also commonplace [1]. This definition of the EU as more than simply and international organisation or a 'union of states' can also be found in the EU's own constitutional and legal framework and in the case law of the European Court of Justice (ECJ).

In this sense, the EU Treaties make numerous references to its 'European peoples' as a constitutive element of the Union, which are distinct from its Members States. See, for example, Art 1 of the Treaty on European Union (TEU), which refers to a 'new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen''; and Art. 3.1. TEU: 'The Union's aim is to promote peace, its values and the well-being of its peoples''. In this way, the EU presents itself as a 'demoicracy' where different European peoples come together and coexist in a single European multinational polity [2].

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Core to this notion of a European 'demoicracy' is European citizenship, which is acquired through the nationality of a Member State but is distinct from it. As famously explained by the ECJ in the Van Gend en Loos judgement (1963), the EU is 'a new legal order of international law', the subjects of which 'comprise not only Member States but also their nationals'. As a result, it continued, EU law provides all EU citizens with a variety of rights derived directly from the Treaties, among them, the right to participate in the democratic

life within the EU. This is another example of the EU defining itself as more something more than an international organisation and putting forward a vision of European citizenship and of an incipient, plural European *demos*, as something more than merely contingent on the citizenship of a Member State.

While many of these theories on the EU as a 'demoicracy' are based on the idea that these European peoples are the peoples of the Member States, understood as nation states, various scholars have highlighted that there is no basis in the Treaties for this definition of peoples to not be interpreted as to include European peoples without a state as constitutive peoples of the EU [3]. As a result, therefore, the Scots and the Catalans, for example, can also be considered European peoples whose values and well-being should therefore be promoted and protected , and whose democratic engagement and decision-making should also as part of the process of creating the ever closer union of peoples that is the EU. Furthermore, as EU citizens, citizens of sub-state units such as Scotland or Catalonia also enjoy the full protection and plethora of rights derived directly from the Treaties.

Another treaty provision that is relevant for the questions considered in this article is Art. 2 TEU, which establishes the foundation of the Union on the values of respect for human dignity, freedom, democracy, the rule of law, the protection of fundamental rights, and the protection of minorities. It also establishes that these values are common to the Member States, making the EU a community not only of law but also of values [4]. According to the ECJ, '[The EU] legal structure is based on the fundamental premise that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU' [5]. These values can therefore be said to be at the very untouchable core of the EU legal order and as expression of a corresponding EU identity [6]. As such, they are therefore understood to transcend the scope of application of Union law as well as the scope of the competences of the EU and provide a clear frame of reference for any engagement with, and response to, a sub-state referendum process or conflict of sovereignty initiated at a sub-state level.

It is on the basis of these supranational features of the European Union that the Scottish and Catalan Governments framed their referendum processes, in representation of European citizens and peoples and with reference to the EU's founding values, with the expectation that the *sui generis* EU constitutional framework would enable them to break away from their host state while remaining within the EU [7]. As will be discussed below, the EU institutions and states did not respond favorably to these processes, treating them simply as 'internal issues' of the corresponding Member State, reflecting a more general exclusion of the sub-state level from the supranational dimension of European integration. And it is this tension or contradiction between the opportunities offered by the European constitutional framework, on the one hand, and the EU's response, on the other, that is resulting in the very problematic consequences considered in the rest of this article.

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It is worth noting that these sub-state pro-independence processes have also been characterised as an affront to the values of the EU and the EU integration process, and indeed, it may appear paradoxical that these sub-state units or peoples are attempting to exercise their right to national self-determination in order to then join a supranational or post-sovereign order such as the EU, where EU Member States are then understood to have renounced their sovereign rights in order to form this new type of polity [8]. However, this highlights that this process EU multilevel constitutionalisation has so far failed to provide any meaningful voice and representation for sub-state units and peoples in the working of its institutions and procedures. From a sub-state perspective, the working of the EU is still very much wedded to a dualistic vision of the Union as a binary relationship between the EU as a supranational project on the one hand, and the nation state on the other. This therefore helps to explain the decision of these sub-state units such as Scotland and Catalonia to attempt to establish themselves as full EU Member States through a process of national self-determination, while still fully committed to the EU supranational project and its wider objectives.

The erosion of democracy and the protection of rights in the Member States

As has been highlighted, the Scottish Government's case for independence was clearly framed within the European Union and this was also a matter of fundamental importance for a majority of Scottish citizens. However, due to lack of clear legal provisions regarding what would happen if a part of one of its Member States became independent, a central issue in the referendum debates became whether an independent Scotland would be able to remain within the EU, or whether it would have to leave to reapply like any other aspiring state, leaving Scotland and its citizens temporarily out of the Union. The EU itself was silent on the issue throughout the process, stressing the principle of non-interference in internal matters of the Member States. However, comments made by certain EU representatives seemed to indicate a certain hostility towards the referendum process and the possibility of an independent Scotland remaining in the EU, with, for example, the then President of the European Commission, Jose Manuel Barroso, declaring on BBC television that it would be 'extremely difficult, if not impossible' for Scotland to remain in the EU. These comments were strongly criticized at the time. Barroso's successor, Jean Claude Juncker, revealed a seemingly more accommodation approach, but did not mitigate the above.

In the case of the Scottish referendum process, the lack of a clear legal framework for these conflicts, and the lack of a clear response from the EU largely hijacked a significant part of the democratic deliberation and debate leading up to the vote, detracting from the focus of

the central issue of Scotland's independence from the rest of the United Kingdom [9]. In addition, the uncertainty regarding what the outcome of the EU question would be in a potential vote for independence benefitted the UK's position, therefore affecting also the democratic decision-making in the referendum. A legal framework and legal position on the part of the EU would have avoided this.

More significantly, in the case of Catalonia, the EU had to engage with a referendum process that was not recognized by the Spanish state, who rejected even the very existence of a 'Catalan people' with a right to decide their constitutional future under the existing constitutional framework. The Catalan Government, together with trying to frame their demotic claims by reference to the EU and its principles, also sought to bring the EU institutions into the conflict to act as mediators between themselves and the Spanish authorities to enable the referendum to go ahead. In this sense, for example, in 2014 the Catalan President, Artur Mas, sent letters to the Heads of State and Government of the 27 EU Member States and to the EU Commission, asking for support for a 'peaceful, democratic, transparent European process'. In 2017, the new Catalan President, Carles Puigdemont, stressed in a speech given to the European Parliament, that the conflict was a 'European problem' and that Europe couldn't look the other way, and must instead 'be part of the solution'.

However, in response to these attempts to Europeanise the conflict, the Spanish authorities also intensified their contacts with other Member States and the EU institutions and bodies and request their support for what they defined as an internal constitutional issue. The EU's approach to the claims and requests coming from Catalonia largely supported the position of the Spanish state and focused on two main messages: the first was that the conflict was an internal constitutional issue and that the EU institutions would therefore not intervene. For example, the President of the European Commission, Jose Manuel Barroso, declared that 'he would make no comments on a question of the internal organization of the constitutional arrangements of Member States'. The second message was more controversial as, despite claiming that the EU remained neutral in the conflict, different EU representatives did intervene on the question of whether a newly independent Catalonia could remain in the EU. For example, Mr Barroso again, in response to a question from a Catalan MEP, stated that 'a newly independent state would, by the fact of independence, become a third country with respect to the EU and the Treaties would no longer apply to this territory'. These messages showed very clearly that the EU and its Member States were not going to assume the role of intermediaries that the Catalan authorities were requesting. Furthermore, these messages clearly endorsed the position of the Spanish Government in the conflict, largely bolstering its own strong-handed response to the requests for a democratic vote and a negotiated process. In the months leading up to the 2017 referendum, and with the escalation of the conflict, the EU's support for the Spanish state's position became even more explicit, with several EU representatives stressing the need to respect the Spanish constitutional framework and the rule of law.

As is well-known, the Catalan authorities proceeded with the referendum regardless, and the Spanish authorities responded with an extensive and disproportionate use of force against voters, and with the suspension Catalan autonomy and arrest and imprisonment of

those political and civil society leaders that did not leave the country. They were subsequently tried for sedition and misuse of public funds and sentenced to terms of between 9 and 13 years in prison. These developments have been strongly condemned internationally as very serious violations of democracy and of human rights [10].

> It is hard not to conclude that the EU's refusal to intervene at the insistence of the Catalan authorities, in addition to its strong endorsement of the increasingly strong-handed response of the Spanish state, led to the escalation of the conflict that resulted in the violation of rights that ensued, in clear contravention of the values included in Art. 2 of the Treaty of the EU

In the light of all the above, it is hard not to conclude that the EU's refusal to intervene and attempt to find a negotiated outcome at the insistence of the Catalan authorities, on the one hand, and its strong endorsement of the increasingly strong-handed response of the Spanish state, on the other, led to the escalation of the conflict that resulted in the violation of rights that ensued, in clear contravention of the values included in Art. 2 TEU. In a controversial subsequent development, Jean-Claude Juncker declared that the in adopting this position the EU also saw itself as defending its own interests, stating that 'If we allow….that Catalonia becomes independent, others will do the same…I would not like a European Union in 50 years that consists of 90 states'. As was highlighted in the initial section of this article, this position is not in line with either the wording or the spirit of the EU Treaties.

A clear legal framework, and in particular, one that set out clearly the requirements for such processes to comply with democratic principles and human rights, and the EU's early intervention, would have avoided the escalation of the conflict and the subsequent violation of democratic principles and human rights that ensued. But the impact of these processes, when not approach and resolved with a clear democratic framework, goes further than the affected states themselves.

The erosion of the trust and cooperation between Member States and the European Institutions

A second consequence resulting from the EU's lack of clear legal position on, and response to, conflicts of sovereignty has been the erosion of the cooperation between European Institutions and the Member States, which are the heart of the European project. Firstly, due to the lack of a clear EU legal position on this issue, it is resulting in tensions between different EU institutions, where they have been put on the spot when having to address different elements deriving from these processes without a clear EU framework of reference. We have already considered some of the statements made by representatives of

different EU institutions leading up to the Catalan referendum, above. After the day of the vote, the Commission published a statement stressing that the referendum was not legal and that this was an internal matter for Spain to resolve. The President of the European Council, Donald Tusk, took a slightly more accommodating approach, stating that he had spoken to the Spanish Prime Minister and called for ways to 'end the escalation and use of force'. Interestingly, different MEP's published a variety of reactions ranging from a strong condemnation of the violence and calling on the EU to intervene, to insisting that the central message had to be that if Catalonia left Spain they would also leave the EU. The division in opinions and positions within the different institutions was therefore very clear.

The ECJ became involved when three of the members of the former Catalan Government (Oriol Junqueras, in pre-trial detention, and Carles Puigdemont and Toni Comín, residing in Belgium) were elected to the European Parliament in 2019, but were not allowed to take up their seats due to their lack of compliance with the specific requirements of Spanish legislation. This was challenged and, in response to a preliminary reference from the Spanish Supreme Court, the ECJ declared that MEP's have immunity from the moment that they are elected. This was particularly significant for Oriol Junqueras, who had not been allowed to leave jail to take up his seat; but as he had then been sentenced to 13 years in jail due to his participation in the referendum, the Spanish Supreme Court refused to release him, adopting a position that has been described as 'ignoring the spirit and the wording' of the European Court's decision [11]. However, the ECJ's decision did allow Puigdemont and Comín to take up their seats, and they were followed by another member for the former government, Clara Ponsatí, who was living in Scotland and gained her seat as a result of Brexit. Currently, the focus is on the European Parliament itself, which is considering whether to waive the immunity of three Catalan MEP's, so that they can be extradited to Spain to be tried for the charges against them in relation to the referendum, at the request of the Spanish authorities.

Tensions in this context are also arising between different Member States, as they are also being put on the spot and having to engage with, and respond to, different developments resulting from the Catalan process without a clear common frame of reference or European position on the conflict. This can be seen, again, in the very different reaction from different Member State leaders to the Spanish authorities' severe and controversial reaction to the Catalan referendum. Another clear example of this is the situation that can only be described as the 'European Arrest Warrant' saga [12].

Here, we must remember that the European Arrest Warrant is an element of inter-state cooperation based on the trust between Member States – within the EU, if one Member State request the extradition of someone accused of a serious crime, the general principle is that the other Member States will extradite them, with few exceptions possible. As highlighted above, following the Catalan independence referendum of 2017 and subsequent developments, the Spanish authorities adopted a series of repressive measures, including charging the leaders of the movement with the very serious crimes of sedition and the misuse of public funds. A number of members of the former Catalan Government, including the President Carles Puigdemont, left Spain for other EU Member States, and the Spanish Supreme Court attempted to secure their extradition through the European Arrest Warrant.

However, these attempts have so far been notably unsuccessful, as for example in the case of Puigdemont, the Spanish courts ultimately revoked a request sent to Belgium (2017), as there were indications that the Belgian courts would not accept the double criminality for sedition, and one sent to Germany (2018), were extradition was only granted for the lesser crime of misuse of public funds.

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After the trial of those leaders that remained in Catalonia, where they were given jail sentences of between 9-13 years, a subsequent attempt to use the European Arrest Warrant to secure the extradition of another member of the former Catalan Government (2020), Joaquim Puig, failed again as the Belgian court decided that the Spanish authorities that issued the warrant were not competent to do so. These states are clearly reluctant to extradite these persons, as they would then face the disproportionate criminal charges brought against them by the Spanish authorities and potentially long prison sentences, but from the perspective of the EU legal framework these developments are eroding the effectiveness of the European Arrest Warrant process and the principles of cooperation and trust on which it is based.

If the European Parliament decides to waive the immunity of the ex-members of the Catalan Government, it will be the Member States where they have residence that will need to decide on their extradition. Belgium will therefore again have to decide on the cases of Puigdemont and Comin, and it is also worth noting that proceedings in relation to the extradition of Clara Ponsatí were suspended in the Scottish courts when she became an MEP. Concerns have also been raised about how the Spanish authorities have been using European Arrest Warrant, revoking it when they are not satisfied with the receiving court’s decision, as trust in this context must work both ways.

Why then should the EU establish a clear legal position and intervene, when necessary, in these conflicts of sovereignty in its Member States?

In order to avoid the erosion of the principles of democracy and the protection of human rights, on the one hand, and of the trust and cooperation between EU institutions and it’s Member States, on the other, the discussion above highlights a number of very clear reasons why the EU should establish a clear legal position and intervene, when necessary, in the conflicts of sovereignty of its Member States:

- To provide clarity and legal certainty in the EU's approach and legal response to these questions.
- To provide clarity and legal certainty as to what are the requirements deriving from democratic principles and human rights in these processes, and to avoid them being breached.
- To avoid the escalation of conflicts arising in Member States in this context, as both state and sub-state institutions would be conditioned by and have to act in accordance with the EU framework. This would then also avoid their detrimental impact on the EU level and on other member states.
- To ensure the unity of approach to, and therefore mutual trust and coordination, on the part of the EU and its Member States, in response to any specific issues arising from a particular conflict.

Overall, this change in approach would also strengthen the EU constitutional framework and be a first step in the much-required extension of the EU's recognition, its inclusion in its institutions, bodies and processes, and the full application of its fundamental values to the sub-state level, the sub-state nations and their citizens.

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