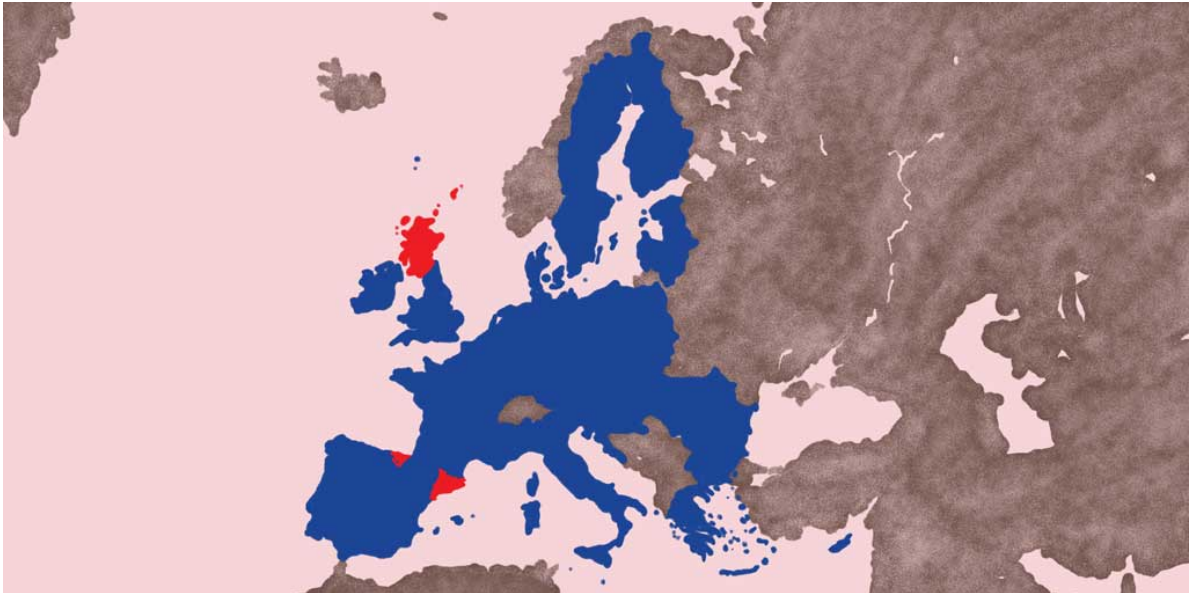


Secession and EU internal enlargement

Costanza Margiotta



Tal i com proposa l'autora, l'ampliació interna podria ser una oportunitat per una nova federalització de la Unió Europea. Casos com els de Catalunya, el País Basc o Escòcia plantegen la importància de prendre's seriosament aquesta via. Il·lustració: César Cromit

How should the European Union (EU) respond to a secession process from a member state when the new state expresses its wish to obtain member status in the EU?

The answer depends on the possibility of the EU changing the attitude it has adopted regarding secession from a member state, which was simultaneously revealed by its “non-immediate entry” attitude toward Scotland and not-so-veiled opposition toward Catalonia, and which conditions should be fulfilled for a secessionist state to be considered a new member state of the EU.

Recent European secessionist movements

Regarding the recent European secessionist movement, Scotland and Catalonia presented themselves as *pro*-European, and they requested independence and immediate entry into the EU as new member states. Nonetheless, both movements have been perceived by EU institutions as a danger to the European Project. The issues at stake are twofold:

1. There is the problem of meeting the conditions of access to the EU as a new member state without complying with the standard procedures of entry set out by Article 49 of the Treaty on European Union, which provides the legal basis for any European state to join the EU.
2. There is the question of whether the secession of a pro-European minority group would strengthen the Union, inspiring a new process of federalization of the EU.

Any European country may apply for EU membership if it respects the democratic values of the EU and is committed to promoting them. Given that the democratic framework seems to be attractive to recent European secessionist movements, particularly against the anti-liberal stigma that was often attributed to separatist movements [1] and considering that the purpose of recent secessionism movements is to correct the form of the existing state through democratic means [2], it would be important for European institutions to consider internal enlargement [3].

A seceding region is not in the same position as a third country; therefore, it should not be necessary to meet the conditions of access to the EU. EU law is already applied in those 'seceding states'

The possibility of the entry of new member states born inside the EU from secessionist processes without the duty for these new states to comply with the conditions set out by Article 49 of the Treaty on European Union should be taken seriously by EU institutions because a seceding region is not in the same position as that of a third country. For example, EU law is already applied in those "seceding states"; EU citizenship is automatically acquired through member states' nationality and there is a pro-European desire to remain inside a supranational political organization [4]. It would be important for EU institutions to consider the previously stated issues to suggest what conditions should be met to accept a new state born from a process of secession as a new member of the EU.

Internal enlargement conditions

To accept an easier internal enlargement than enlargement to third states, the following should be acknowledged:

EU law already applies in the regions that are seceding, which implies that it is not necessary for a new state to fulfill the accession criteria. The EU's "acquis"—the body of common rights and obligations that are binding on all EU countries—is already accepted in the seceding region. Internal enlargement would ensure that, the day after independence, EU law continues to apply to the same territory that it applied to the day before [5].

Moreover, respect and commitment to the values set out in Article 2 of the Treaty on European Union (TEU) would be demonstrated by the democratic process being followed to become an independent state. The respect for human dignity, freedom, democracy, equality, and the rule of law during the process toward independence should be one of the *sine qua non* conditions for the recognition of independence. Respect for human rights, including the rights of persons belonging to minorities [6], and respect for a pluralistic society and non-discrimination, tolerance, justice, solidarity, and equality between women and men should be included as fundamental principles in the new constitution of the state.

Moreover, it should be acknowledged that EU citizenship should be taken seriously, especially for those citizens of the seceding state who are residing in other EU countries. The denial of internal enlargement for EU citizens residing abroad would mean the immediate loss of rights connected to it that ensure non-discrimination in terms of access to rights (social but also political and civil) on the basis of nationality and the inability of sedentary ex-EU citizens to keep their European status. EU continuity should be guaranteed because the consequence for EU citizens living in the EU and not in the seceding state would be the immediate and irrevocable loss of rights connected to that status.

Internal enlargement would protect the region's citizens in terms of continuity of EU citizenship [7]. The existence of EU citizenship puts the seceding region in a different position from that of a third country, where no EU citizenship is acknowledged. For this reason, internal enlargement should be recognized to promote a "Europe of Citizens" narrative instead of a "Europe of States" narrative.

Finally, European institutions must consider the pro-European desire to remain inside a supranational political organization because the process of federalization could be reinforced by the entrance of new states whose European afflatus is much more significant than that of many existing EU member states. The greatest criticism of the EU from many quarters is that it has interrupted the process of federalization in many of the areas where it began; therefore, the emergence of new pro-European states could resume the interrupted process. Secessions from member states could be a means to propose new federalization of the EU. The question is whether the secession of a pro-European group would strengthen the Union.

Given that a secession from the Union (such as Brexit) has signified an interruption in the European integration process, it would be interesting to know if a secession "in" the Union (such as the Catalan one from Spain or the Scottish one from the UK) would generate a new wave of federalization of Europe. These secessionist processes could be good candidates for "constituting" Europe as a federation. In my opinion, "secessions in" could be the proxy for a new process of federalization. Europe could be subject to a new federalizing dynamic thanks to a proliferation of states due to internal enlargement.

Secessionist processes could be good candidates for constituting

Europe as a federation. The EU could be subject to a new federalizing dynamic thanks to internal enlargement

The secessionist phenomenon in processes of supranational integration can represent an important factor for the softening of territorial conflicts [8]. Notably, we are seeing scenarios that already have paths of decomposition and rearticulation of state sovereignty, which register a deep attenuation of absoluteness [9]. In particular, regarding the EU, one could even go so far as to reconfigure a demand for secession from external (to the member state) to internal (to the EU), relativizing its disruptive scope¹⁰. By contrast, the refusal to initiate a political debate on secessionist issues in European institutional bodies—an attitude that has prevailed until now—could only result in the reaffirmation of the state-centric vision far from the perspective of a deeper political integration of the EU.

Democratic framework

The democratic framework seems to be the most attractive for the recent European secessionist movements; therefore, it would be important to indicate the minimum requirements that an aspiring seceding territory should have to apply for EU accession afterward.

Importantly, the lawfulness of the secession can permit a smooth transition from secession to a new member state [11]. Not all secessions are lawful, as highlighted by the Canadian Supreme Court's landmark decision on the secession of Québec. However, if a set of common principles can be identified for a secession to be lawful, then a seceding territory could be accepted as an EU member state.

The EU's response to internal enlargement should depend on how the secession is achieved and how to define that achievement legally. The legal and political consequences of a declaration of independence depend on the way in which the new state was born. Certainly, recent practice seems to show that respect for the democratic principle is necessary yet not sufficient to absorb the secessionist process.

At present, the TEU recognizes the right of member states to secede from the Union, but there are no specific rules on secession. Separation is still subject to the existing rules of international law and the constitutional arrangements of member states. Thus, it is still necessary to consider these legal orders to develop talk of secession in terms of legality. Even if there are differences among EU member states, there should be principles shared among most EU countries that permit the definition of what a lawful secession process would look like in the EU according to the common constitutional traditions of its member states and international law. The procedure cannot be unilateral on the part of the seceding territory without the involvement of the central government, and the procedure itself (whether it leads to a formal constitutional amendment or not) must be agreed upon among the parties, regardless of its outcomes. Additionally, it must follow democratic principles through the involvement of the people via a national or regional referendum (or both) with

the rule of law.

Exploring the question of the legality or illegality of secession is necessary to avoid simply admitting that law cannot address secessionist crises [12] and that it is instead determined by power politics [13].

Therefore, it is necessary to ask whether the issue of legality when referring to secession can be discussed in terms of *liminal legality*, residing on the border between internal and international legal order, and if this legality, while waiting for EU law to govern internal secession, is sufficient to legitimize EU internal enlargement.

At present, the problematic dimension of legality in the secessionist process is still found between constitutional and international law. According to the Canadian Supreme Court, “A failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government’s claim to legitimacy, which is generally a precondition for recognition by the international community” [14]. In the opinion of the Court, after a referendum of independence is successful, the secessionist movement cannot declare unilateral secession; however, a state cannot “remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada,” and “the rights of other provinces and the federal government cannot deny the right of the government of Québec to pursue secession, should a clear majority of the people of Québec choose that goal, so long as in doing so, Québec respects the rights of others” [15].

Following this well-known opinion reference of the Supreme Court of Canada [16], it is now necessary to admit that the expression of popular will through a referendum (free and open to all) in favor of secession cannot leave the central state indifferent. Rather, after a vote in favor of secession by part of the state, the central state is obliged to enter into negotiations with the group that intends to separate, and these negotiations do not necessarily have to result in secession. The Court, while not recognizing an obligation for the state to accept a unilateral declaration of independence, does not deny that a state should allow separation in cases where a clear majority in a given region supports that request. Based on the reference of the Canadian Court, we can deduce that, when there is an obligation for the central state to diligently search for a political solution to the crisis, the secessionist group must not declare independence before the end of negotiations.

The European Union could suggest a common proceduralization of secessionist processes in order to peacefully address the sovereignty conflicts inside EU, to make these processes legal and to avoid the escalation of conflicts. Any alternative to conflict is procedure

My view differs on the Canadian reference because I maintain that *if and only if* the process

through which the separatist movement arrived at a referendum was legitimate and agreed to by all parties [17] then what I call *liminal legality* [18] would allow something different from what was recommended by the Canadian Court. It would allow for the inevitability of secession following a referendum in favor of independence, no matter how the negotiations are going or have gone, and the possibility for the secessionist group, after a vote with a clear majority in favor of secession, to declare independence immediately, even before the end of negotiations, and provide the possibility for the new state to enter the EU as a member state before being recognized by the parent state.

The test of *liminal legality* between an internal legal system and the international order could occur when the process through which secession is or was pursued is legitimate and respects the democratic principle. The Scottish case is an excellent example of the secession process through the accomplishment of a consensual referendum [19]. In my opinion, the *legality* of the Scottish secession would have certainly allowed Scotland's entry into the EU as a new member state in the case of successful Scottish independence.

Internal lawfulness of secession

The remaining problem is the question of which democratic rules are useful for the European system to prove the *internal* lawfulness of secession [20]. It would be necessary to understand if and how it is possible to democratically determine the external borders of a new state and which instruments would be appropriate for that to oblige the central state to tolerate a possible secession. Herein lie the problems of the (difficult) relationship between secession and democracy [21] and the value of the majority rule and the referendum in the secessionist process [22]. When referring to the definition of new external borders, can majority rule and a referendum be considered respectful of the accepted democratic principles? [23] The majority is known as an artificial rather than a neutral concept [24], that can be constructed through political and legal decisions by including or excluding people or groups from the right to vote.

Particularly in the EU, secession should be pursued in compliance with the fundamental values of the EU, such as democracy, the rule of law (Article 2 TEU), and compliance with Article 2 TEU. Additionally, the common constitutional traditions of a seceding territory cannot be assessed by only considering the democratic functioning of the institutions within it and their respect for the rule of law [25]. To accede to the EU, the entire process leading to secession on the part of the seceding territory must be accomplished according to the principles enshrined in Article 2 TEU and derived from Article 6(3) TEU [26].

A good starting point would certainly be the EU becoming an actor of a process of proceduralization, promoting good procedural practices for secessionist crisis. In promoting the rule of law, the EU could suggest a common proceduralization of secessionist processes in order to peacefully address the sovereignty conflicts inside EU, to make these processes legal and to avoid the escalation of conflicts. Any alternative to conflict is procedure. Subjecting secession to a legal regulation could avoid a prevalence of the force of the normative power of the factual. The capacity to neutralise secessionist crisis and its

potentially destabilising elements -keeping alive the systemic structure of the legal order- should be demonstrated, since law somehow always needs to follow the facts, and that facts are the intra-European demands of secession.

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