



## EDITORIAL

### THE THOUSAND *CATALUÑAS* OF EUROPE

Irrespective of the perspective from which one looks at the Catalanian events, which are still unfolding under our incredulous eyes, the impression can only be univocal: Spain is right and Catalonia is wrong. The claim of the Spanish Government to preserve the unity of the nation is well founded; conversely, the independence proclaimed by the Catalanian Government amounts to an *extra ordinem* revolutionary act.

This is the conclusion that must be naturally drawn from an inquiry conducted on the basis of Spanish Constitutional law. While recognising “the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all”, Section 2 of the Spanish Constitution points out that “[t]he Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards”.

This would inevitably also be the conclusion to be drawn from an international law perspective. The prevailing scholarly view, and the international case law, regard secession as the outcome of a factual process that takes place in an area largely unregulated by the law and, therefore, is neither permitted nor prohibited by international law (along these lines, see International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, paras 79-84). Only indirectly do international rules govern that process, imposing on the parties to the conflict the obligation to comply with fundamental interests of the international community, such as the prohibition of excessive use of force and the obligation to comply with the rules protecting human rights. Moreover, the situation in Catalonia does not seem to come within the scope of the principle of self-determination, that applies to a minority group only if it is excluded from the governmental functions of a territory on grounds of race, creed or colour, according to the famous Declaration of the UN General Assembly on the Friendly Relations among States of 24 October 1970, UN Doc. A/RES/25/2625.

The same answer unequivocally flows from a legal inquiry conducted on the basis of European law. Also from that perspective, it is difficult to identify legal rules or principles conferring to sub-state entities a right to secede from their home country. Quite the contrary, from its inception, the EU legal order is based on the international conception of its Member States as unitary actors, represented by their Governments. States, and only States, can become members of the Union or withdraw from it. And States are

the only politically organised communities that can convey, albeit indirectly, democratic legitimacy to the Union, under Art. 10 TEU.

It is in this conceptual environment that the Commission has elaborated its conception of a secession from a Member State as a process entailing the exclusion of the seceding territory from the EU. This conception has been probably developed with a view to discouraging secessionist movements. In case of a unilateral secession, if the newly born State applied to the EU, it would probably meet the fierce opposition of its former home country, which would presumably veto its application. In the light of the dim perspective of an independence outside the EU, where the small newly born State would be left alone to navigate the troubled waters of the globalisation, many claims would probably vanish.

From a legal viewpoint, however, this conception is not as obvious as presented. It is based on the classical principle of the clean slate, according to which a newly born State has not obligations deriving from treaties concluded by its predecessor in the government of the same territory. However, the international practice is much less univocal than this facile formula may indicate. The classical rule of the clean slate, designed to secure the absolute freedom of action of the newcomer in the club of the sovereign entities, has been developed in a very simple legal world, hinged around a conception of international obligations as an exception to the absoluteness of the sovereignty exerted by a State on a given territory. It is less adequate to the needs of contemporary international law, where States are under a plethora of international obligations designed to fulfil a variety of different values and interests, individual, collective or even universal. Correspondingly, the international practice of States succession in regard to treaties appears to be much more nuanced and variegated than the Commission seems to believe. More and more, international law tends to favour the continuity of the legal regime applicable to a given territory that has acquired statehood, in particular with regard to treaties that confer a certain territorial status or grant rights and duties to individuals settled therein, or with regard to legal regimes whose enduring application corresponds to a collective interest of the international community.

Arguably, to deal with the troubled issue of the secession of a part of the territory from a EU Member State, the continuity model may be more appropriate than the clean slate model. Not only would it ensure the uninterrupted possession of the rights conferred by EU law to individuals, who, at least from *Van Gend den Loos* on (Court of Justice, judgment of 5 February 1963, case 26/62), are, indisputably, subject of this composite "new legal order of international law" (*ibid.*, p. 12). It could also serve the collective interest not to have the Union suddenly amputated of part of its territory and of its citizenship. Thus, if a choice ought to be made between the two models, that of the clean slate and that of the continuity in the rights and obligations flowing from a treaty, the latter would seem more consistent with the overall objective of integration that is the *raison d'être* of the EU.

This is, indeed, the position advocated, with great persuasive force, by Kochenov and van den Brink in a seminal work published in the very first issue of *European Papers (Secessions from EU Member States: The Imperative of Union's Neutrality)*, in Vol. 1, 2016, No 1, p. 67 *et seq.* In their view, the neutrality of the EU *vis-à-vis* a secession in one of its Member States should entail, if conducted on the basis of a democratic method, the automatic membership to the EU of the new State, and the consequential need to amend, to the extent necessary, the founding treaties. In Kochenov and van den Brink's view, this conclusion is the most consistent with the ethos of the Union, "the tamer of States and the promotor of liberal, inclusive and tolerant nationhood" (*ibid.*, p. 85).

This felicitous definition encapsulates in a few words the entire political philosophy that underlies the process of integration. The establishment of a European Union was regarded precisely as the antidote to the "absolute sovereignty of the national States" by the Ventotene Manifesto. This text, written between 1941 and 1942, well describes the feverish intellectual reflection that ultimately gave birth to the idea of a federation among the European peoples, designed to cure "[t]he multiple problems which poison international life on the continent [that] have proved to be insoluble: tracing boundaries through areas inhabited by mixed populations, defence of alien minorities, seaports for landlocked countries, the Balkan Question, the Irish problem, and so on".

There is, however, a case to be made for escaping the paralysing alternative between contradictory claims of sovereignty. If the historical mission of Europe is to assuage the "absolute sovereignty ideologies", to borrow again an expression used by Kochenov and van den Brink (*ibid.*), this entails moving away from two opposing versions of nationalism: the one inherent in the claim to the unity of the Member States – many of which still encompass ethnic, national or religious minorities – as well as the one inherent in the claim for statehood of these minorities. The latter is not less poisonous than the former, as it entails the acquisition, by a territorial community, of the stigmas of sovereignty against which it had hitherto strenuously fought. The conception of the European Union as an antidote to a poisonous bite, hence, must work both ways: against the bitten and against the biter.

But how can the EU help solve what appears to be an unsolvable conundrum? The EU is not a panacea and its invocation is certainly not a ready-made recipe for whatever difficulty may arise. However, a line of conceptual research based on its historical mission could point to a direction along which both antithetical claims could be assuaged.

One of the idiosyncratic features of the political system of the EU is its reliance on the international system of representation according to which the Member States are represented by their executives. Yet, precisely this model can represent a powerful incentive to claim independence and, conversely, to resist it. By claiming independence, sub-State communities are driven by the luring idea of having a seat in the European

“control room”; conversely, by resisting it, Member States reaffirm the idea that that room is reserved to the current members of that exclusive club.

In other words, in European as well as in international law, statehood is a threshold notion (all-or-nothing). If this personification of the State as a unitary entity is comprehensible under international law, it is less comprehensible at the European level, namely in a Constitutional legal order whose ultimate objective is to attain a high degree of integration among the peoples of Europe.

The question thus arises as to whether in European law this monolithic representation of statehood can be attenuated in favour of institutional solutions that reflect more faithfully the pluralistic nature of the modern forms of State.

It is certainly not the aim of the present writing to indicate the lines of a possible reform of the Constitutional setting of the Union; the more so at a time in which the pace of history seems rather to point to the opposite direction; to celebrate the triumph of the Member States as the main stakeholders of the European club. But it is precisely at this time that scholars have the moral duty to present the shortcomings of this historical tendency and the benefits of taking a different direction.

In particular, a transformation of the composition of the Council into a permanent body, including not only representatives of the Governments of the Member States, but also of their National Parliaments and, where present, also of their sub-national communities, may considerably defuse the tendency to independentism that is still present around Europe.

The adoption of a pluralistic representation of States within the EU may have other substantial benefits. It would help express the wider range of interests of the Member States and not only those of their executives; it would loosen the grip of national political pressures and facilitate the emergence of a general interest of the Union. It would attenuate the intergovernmentalism inherent in what has been labelled as *la méthode de l'Union*, that constitutes the mortal sin of the process of the European integration.

**E.C.**