

The Right to National self-determination within the EU: a legal investigation

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On 21 December 2016, the European Court of Justice recognized that “the customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its *Advisory Opinion on Western Sahara*, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence. It is, moreover, a legally enforceable right *erga omnes* and one of the essential principles of international law.”¹ As constant case-law of the ECJ shows, general international law is part of EU law² and, as such, is binding on EU institutions and Member States, especially if it concerns fundamental human rights (De Burca, 2010). Has thus the ECJ, through its 21st December 2016 Decision, recognized a right to self-determination within EU law to “all non-self-governing territories and to all peoples who have not yet achieved independence”, including among many others Basques, Bavarians, Catalans, Flemings or Scots?

Such a conclusion would undoubtedly be hasty, since the case under examination by the ECJ in its December 2016 Decision was clearly linked to a frozen decolonization process (Western Sahara), and not to the European context. However, the Judges sitting in Luxembourg did not refer expressly to the decolonization context in their decision – as they could have by referring themselves to one of the numerous UN General Assembly Resolution dealing with the Right to self-determination of peoples under colonization (such as UNGA Resolution 1514³) – but they quoted article 1 of the UN Charter, which clearly recognizes the right of self-determination to all people,

¹ ECJ, 21 December 2016, *Council of the European Union v. Front Polisario*, case C-104/16 P, § 88.

² ECJ, 24 November 1992, *Poulsen and Diva Navigation*, case C-286/90 § 9; 16 June 1998, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, case C-162/96 § 45.

³ UN General Assembly Resolution 1514 (XV) entitled “Declaration on the Granting of Independence to Colonial Countries and Peoples”, adopted on 14 December 1960. For information, Security Council Resolutions dealing with Western Sahara, at least one every year since 1971, always refer to UNGA Resolution 1514, not to article 1 of the UN Charter.

without distinction between peoples under colonial rule, other peoples that have not yet achieved independence, or peoples living in their own national State..

In that respect, the ECJ was undoubtedly aware that the International Court of Justice, in its 2010 *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Advisory Opinion)* had taken good notice that “[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation [...]. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.”⁴ Thus the exercise of a right to self-determination within the EU as “one of the essential principles of international law”, leading to a declaration of independence and the emergence of a new State is, at the least, not forbidden by international Law, therefore neither by EU law, which abides to this principle of international law. Could self-determination, further to its non-interdiction, even be recognized as a right belonging to those European peoples within the EU that do not have their own State, such as Basques, Bavarians, Catalans, Flemings, Scots, among many others? This is the question the present Chapter tries to address.

In that perspective, it has to be emphasized that the ICJ, in its *Kosovo Advisory Opinion*, did not expressly pronounce itself on the scope and legal consequences of the right to self-determination⁵, neither confining it to the decolonization process, nor extending it beyond, as for example the Badinter Commission had been envisaging for the dissolution of the SFR of Yugoslavia in the early 1990’s (Pellet, 1992). One of the major difficulty with the

⁴ ICJ, 22 July 2010, *Advisory Opinion about the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Kosovo Advisory Opinion)*, § 79.

⁵ ICJ 2010 *Kosovo Advisory Opinion*, §§ 82 and 83 ; in the later, the Court states : « The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of “remedial secession”, however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).”

implementation of the international Law principle of self-determination is that the potential beneficiaries of this right (peoples) have no commonly accepted legal definition in international law (Moore, 1998; Buchanan, 2007; Hannum, 2011). Further, as regard national self-determination – a people when exercising its right to self-determination through accession to independence become the Nation of a new national State⁶ – there co-exist several underlying concepts of national destinies, leading to diverging requirements to fulfill the national criteria (Greenfeld, 2011). Let us on that delicate issue underline that the current attempts at national projects in Europe – such as Scotland that organized a Referendum on self-determination on 18 September 2014, or Catalonia whose government has announced the organization of a self-determination referendum for the 1st of October 2017 – are not mainly based on an ethnic or cultural concept of nationalism, but rather on a civic/democratic perspective of nationalism (Guibernau, 2004; Jackson, 2014), which does not necessitate the definition of a people as a pre-existing collective entity (Smith, 2010), but will materialize a nation in the process of exerting self-determination (Wellman, 2005; Williams & Jannotti Pecci, 2012). A people constitutes itself as a nation as it expresses its democratic will to self-determine (Sledziewski, 1995).

On that debate about the nature of national projects, in which the critics of civic nationalism are much more numerous and vociferous than its supporters (Young, 2000), please take note that the past exercises of self-determination, especially in the decolonization process, were based on pre-existing territorial delimitations (administrative borders) rather than on the precise definition of a given ethnic or linguistic group, that is a people (Corten, 1999), giving very little practical evidence that self-determination of peoples relies concretely on the pre-existence of a defined people. Therefore and as a matter of fact, most, if not all, States appeared through the decolonization process are still constituted of several peoples or ethnic, religious or linguistic groups, be they recognized as such or not.

The present chapter will thus try to identify, within EU law, whether a right, or elements of a right, to self-determination for those European peoples without a State, within the EU, do exist. We shall thus first examine whether EU law (1) makes references to self-determination (1.1), then identify the references that are made to “peoples” within EU law (1.2), before concluding that if no express provision recognizing the right to self-determination to European “peoples who

⁶ ICJ 2010 *Kosovo Advisory Opinion*, § 79, quoted above note 4.

have not yet achieved independence”, there is neither any provision allowing current member States to rely on EU law to protect their current situation (1.3). In a second part, we shall look at the possible building-up of a democratic right to self-determination, based either on EU citizenship (2.1) or on individual human rights (2.2), or both. We shall in a third part examine the practice of EU member States and institutions as regard the exercise of the right to self-determination in Europe (3.1) and the organization of self-determination referenda within the EU (3.2). As a conclusion, we shall underline the paradoxical relationship between the principle of self-determination and the European integration process.

1. The right to self-determination in EU law

In contrast with international law which embedded the right to self-determination of peoples as a cornerstone of positive contemporary international law, as the ECJ recognized in its 21 December decision, European Law in contrast did not put any explicit emphasis on the right of peoples to self-determination. Neither the Council of Europe, nor EU, specifically recognize the right to self-determination. CSCE in the mid-seventies (Helsinki principles of 1975) and early 1990 (Paris Charter of 21 November 1990 for a New Europe) does refer to the right of peoples to self-determination. However, neither the Helsinki principles nor the Paris Charter are considered as legally enforceable documents (they are not international treaties), and therefore do not constitute positive European Law. This absence of any explicit provision of European law has led to many conjectures and divergent opinions among scholars (Keating, 2004, Weiler, 2012, Crawford & Boyle, 2013, Edward, 2013) and authorities on the possibilities to ground in European Law the right to self-determination.

1.1. EU law recognizes self-determination to peoples constituted as European States

Within the framework of the EU, States (through their authorities) act on behalf of “their peoples” as is mentioned five times in the two Treaties (paragraphs 6, 9 and 12 of the TEU, and paragraphs 3 and 9 of the Preamble of the TFEU)

It may thus be considered that art 49 and 50 TEU (and to some extent art. 48) recognize a right to self-determination for European States, that is to their peoples. According to art. 49 § 1, “any European States which respects the values referred to in Article 2 [TEU] and is committed to

promoting them may apply to become a member of the Union”. Symmetrically, each member State is free to decide whether it accepts sharing membership with a new European State (art. 49 *in fine*). Finally, every member State of the EU retains the right to decide, according to its own constitutional requirements, to withdraw from the Union (art. 50 § 1).

Let’s note that article 50 is the only one to genuinely allow for self-determination– it is a unilateral decision, despite the fact that it does not have immediate full legal consequences, but only produces effect two years after the formal notification to the European Council (art. 50 § 3 TEU). For the cases of article 48 (modification of the Treaties) or 49 (membership of a new State), the legal effect of the exercise of the right of the peoples of member States according to their constitutional requirements are actually subordinated to the equivalent positive choice of other European peoples. If the voters in one member State refuse to validate the collective choice, all the positive votes of other European States remain without legal effect.

Thus, European States that decide to join the EU renounce their right to self-determination, which is replaced by a right to co-determination, since no European State has the right to unilaterally adhere to the EU, or once it is a member to modify the Treaties. Naturally, such restrictions only apply to matters covered by the Treaties, but the development of European integration reaches almost any substantial political decision for member States (Levrat, 2018). Thus, even this rare case in which a right to self-determination by applying for EU membership seems to be recognized by the EU Treaty, it will in fact already be an act of co-determination, since every EU member State has to agree to the choice of the applicant State for its membership to become effective. Thus the paradox for European peoples without a State who would like to fully participate to the European integration process (as is explicitly stated by Catalans and Scottish nationalist parties), and therefore accept co-determination: to be allowed to do so, they first have to exercise their right to self-determination, in order to become a European State (Cuadras Morato, 2016). It is only then that they may then renounce self-determination and their recently earned full Statehood to join the EU in a co-determination process (Avery, 2014). This is what we call the paradoxical relationship between the principle of self-determination and the European integration process; we shall come back on it in a post-scriptum.

1.2. *EU Treaties do make relevant references to other categories of “peoples”*

Further to the above mentioned references to peoples of member States who are represented by the Head of the respective States (whose names appear at the beginning of the preamble), there are also other references to “peoples” in the founding Treaties. Reference is made to: “peoples of Europe” (§ 1 of the Preamble and art. 1 § 2 of the TEU, as well as § 1 of the Preamble of the TFEU); the “European peoples” (art. 167 TFEU);, the “peoples of the EU”(art. 3 § 1 TEU); or, in EU relations to the wider world, to the broadest meaning of the term according to which EU undertakes to promote “mutual respect among peoples” (art. 3 § 5 TEU). However, the most interesting reference for our investigation to a specific category of peoples in EU law is to be found in the preamble of the TFEU, where one can read that the States united within the EU are “calling upon the other peoples of Europe who share their ideal to join in their efforts.” (§ 8 of the Preamble of TFEU).

This wording dates from the 1957 Rome Treaty establishing the EEC and has not been changed since. Alas, as for other occurrence of the word “peoples” in the Treaty, the legal doctrine did not comment on this paragraph of the preamble. One may easily imagine that in 1957, it may have referred either to peoples in the Western European States that were not yet in the Communities (UK, Scandinavian countries, ...), to peoples from Southern Europe that were still under military rulers (Portugal and Spain), or to peoples from Eastern Europe. Today however, most of these peoples have joined the EU and despite numerous rewriting of the Treaties, the paragraph remains. Whose peoples is it nowadays aiming at? The Icelanders, the Norwegians and the Swiss? Or could it be European peoples that do not have their own State, thus are unable to join the EU process – since art. 49 TEU clearly limits the capacity to postulate for membership to “European States” – which are being encouraged to create their own national State, in order to be able to join the peoples of EU in their efforts to unite?

It would most likely be far-fetched to defend such interpretation as positive law. Notwithstanding, EU practice as regard European peoples deprived of their own State outside the EU has been, if not encouraging secession, at least to quickly reward independence through the granting of EU membership (think about Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Slovakia and Slovenia). And it would not be surprising that Scots could be supported in their bid to join the EU

after Brexit, were they to become a European State as referred to in art. 49 TEU, after Brexit is completed.

This raises an interesting question. If a nation without a State outside of EU could be called to join the efforts of unification – and Scots would certainly qualify as such a European people after Brexit – as Lithuanian did under USSR or Slovenia under Yugoslavia – would the fact that other European peoples exist within a member State disqualify them as being one of the “other European peoples”? Such situation would be qualified as reverse discrimination, which is the appellation for situations in which the legal subject that enjoy the best status, ends up being treated less favorably than other legal subjects with a lesser statute. Within EU law, the topic has mostly been studied as regard discrimination between nationals and EU citizens, whereas the latter may, through their rights derived from the EU law after they have exerted their right to establish themselves in a third country, benefit from a better treatment than national (Tryfonidou, 2009). If formally plausible under positive law, such situations are always difficult to legitimize in a democracy-based legal order!

1.3. No provision of EU Treaties prevent the exercise of the right to self-determination

In respect of the capacity of “other European peoples” to exercise their right to self-determination while they are under the jurisdiction of an EU member State, it may also be necessary to underline that no provision of EU law would allow a member State to ground its policy to deny such a right in EU law. Despite article 4 § 2 TEU, which States that “the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”, EU law does not protect existing “national identities” and “territorial integrity” of current member States.

As clearly stated by art. 5 TEU, the competencies of EU are bound by the principle of conferral, which means that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.” (art. 5 § 2 TEU).

Therefore, the EU founding treaties may not recognize additional competencies to member States. Art. 4 TEU does not confer any additional competence or legal protection to member States. The EU founding Treaties only confer competences to the EU and its institution. Art. 4 TEU explicitly specify that the issues of national identity and of territorial integrity of the State are fully outside of EU range of competence and remain “the sole responsibility of each Member State.” (art. 4 § 2 TEU *in fine*). It remains thus, contrary to the right to self-determination, matters outside the scope of EU law, as such. In a letter of 7 January 2014 to the President of the Catalan Government, the President of the European Commission, José Manuel Barroso, considered that the attempt at self-determination by Catalonia was “a question of internal organization related to the constitutional arrangements in the member State.” (Kochenov & van des Brink, 2016). It doesn’t however mean that EU member States are free to exert their own competencies as regard their national identity or territorial integrity as they wish; they remain bound by their membership to the EU, and notably by the duty to respect “European values” as they are explicitly enunciated in article 2 TEU.

As an example to be kept in mind, Austria was in 2000 subject to EU sanctions for non-respect of European values, as the leader of the Austrian conservative Party (Wolfgang Schüssel) formed a national government – following national elections that were held in November 1999 and that were clearly meeting the democratic standards for European States – by a coalition agreement with a political Party (FPÖ of Jörg Haider) whose discourse and positions regarding past European history (Nazi legacy) were contrary to European values. At the time, nobody claimed that the right and political motivations to form a national government was falling within EU competences, nor that Austria had violated any specific Treaty provision. No one either pretended that the November 1999 Parliamentary elections in Austria had violated democratic standards or any legal provision. It nevertheless did not prevent all the other EU member States to adopt sanctions against the Austrian government for the breach of European value, by a non-illegal behavior within its own sphere of competence (Levrat, 2004).

Thus, EU membership does not provide any additional “protection” to member States national identity or territorial integrity. Further, as was evidenced by the ICJ in its *Kosovo Advisory Opinion*, “the scope of the principle of territorial integrity is confined to the sphere of relations be-

tween States”⁷. Thus the protection of territorial integrity of the State only applies in relationship between States, and does not deter the right of a people to decide on its national future, even if it is situated within an existing State. Further, EU membership entails for EU member States the duty to respect European values as stated in article 2 TEU, even in the exercise of their own competences. EU law therefore, even in the absence of specific provisions on the right to self-termination, provides a legal framework within which the issue of self-determination has to be dealt with.

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We may thus end this section by concluding that inside EU member States, there may be “other European peoples”, which cannot join the efforts of European unification as such (as a people of its own), except by becoming a European State, that is by seceding from the existing European State in which this “other European people” is encompassed. That is probably what the former European Commission’s President Jacques Delors had in mind when he famously declared that the EU had to become a “Federation of Nation-States” (Ricard-Nihoul & Delors, 2012), implying that the genuine and full participation to the EU project for citizens of European peoples without a State includes the right for these peoples to constitute themselves as European Nation-States, in order to fully participate to the EU as member States, under the terms of art. 49 TEU (Levrat, 1997).

As we see, EU is not indifferent to the rights of European peoples, even though no clear provision of positive law – and even less procedural considerations for the materialization of such peoples’ right – is to be found in EU Law. Further, and as in international Law, a precise definition of those peoples who could claim the right to self-determination will not be found in European Law, making it difficult to effectively implement such right. However, as we have shown in our introduction, the exercise of the right to self-determination based on a civic conception of national self-determination – which is not limited to member of a pre-existing ethnic or cultural group, but is grounded in the democratic rights of citizens to freely decide their own political and socio-economic future – may be grounded in EU law, since in such perspective, the constitution as a

⁷ ICJ, 22 July 2010, *Kosovo Advisory Opinion*, § 80.

European people is consubstantial to the exercise of the right to decide on its own political future within the EU. That is actually what self-determination is all about.

2. Elements for grounding a right to democratic self-determination for EU citizens

EU law is not classical international law, which mainly deals with relationship between States and international organization. Quite on the opposite, it constitutes “a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member States but also their nationals. Independently of the legislation of member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”⁸ As stated by the Court, it is not only States and institutions which derive rights from the Treaties, but also other legal subject, such as individuals, but also local or regional governments, non-profit organizations or businesses (Edward, 2013). In that perspective, the EU founding Treaties, by conferring and recognizing democratic rights to all EU citizens through the EU citizenship, may constitute a European legal base for the democratic exercise of the right to self-determination (2.1). Further, the right to self-determination is grounded in an individual human right exercised collectively (a political, social, cultural and economic right) whose exercise must be respected by EU member States and protected by EU institutions (2.2).

2.1. *The right to self-determination for EU citizens of European nations without a State*

European citizenship is acquired (derived) through the nationality of a Member State, but is distinct from it⁹. It implies specific new political rights; such as the right to participate to the electoral processes at local level in the member States in which you reside, notwithstanding your nationality; the right to participate to the EP elections in the Country where you live; the right to initiate and sign European Citizens’ Initiative, and the more general rights to participate to the democratic life within the EU, as stated in Title II of the TEU (Bellamy, 2008).

Based on this European citizenship as a political right, a strong trend in political philosophy literature defends the idea that the EU constitutes a *demoscracy*, meaning that several *demos* (peoples in greek) co-exist within a single EU polity (Nicolaïdis, 2004, Cheneval & Schimmelfenning,

⁸ ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

⁹ ECJ, 2 March 2010, *Janko Rottmann v. Freisaat Bayern*, case C-135/08.

2013). All these theories are built on the idea that these European peoples are the people of each nation-State; there is however no theoretical argument to consider that among the *demoi* of an EU *demoicracy*, Basques, Bavarians, Catalans, Flemings, Scots or others, as a European peoples, are to be excluded.

Actually, art. 1 of the Treaty on the European Union, as it reads after Lisbon's modification, recognizes the right to "peoples of Europe" to participate to the process "creating an ever closer Union between the peoples of Europe" (art. 1 al. 2 TEU). In this First article of the Treaty on the EU, a very fundamental one as a systematic analysis of the Treaty evidences, "peoples of Europe" are clearly considered in a distinct way from European States, who are referred to in the 1st paragraph of this article 1, as the High contracting Parties (Van Gerven, 2005).

As a matter of fact, paragraph 2, deals with the "peoples of Europe" and European citizens, whereas paragraph 3 deals with the legal foundation of the EU. This article 1 is thus clearly referring to fundamental rights of legal subjects within the EU, and peoples and citizens are treated separately from member States and EU as such, and do have specific rights. In article 1 § 2 TEU are recognized, for the citizens, the right to have decisions "taken as openly as possible and as closely as possible" and for European peoples, the right to be part of the "process creating and ever closer Union between the peoples of Europe". So the right of European peoples within the EU are systematically linked to citizen's right, not to member States' rights. In that respect, it is worth underlining that in its 1963 *Van Gend & Loos* ruling, the ECJ did not only recognize rights directly stemming from EU law to individuals and other non-state actors, but even specified that "[t]hese rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."¹⁰

Taking these elements into consideration, one has to acknowledge that the participation to the European *demoicracy* is not satisfactorily materialized for EU citizens of a European people (living within the EU) without a Nation, since these EU citizens would only be directly represented in the EP (art. 10 § 2 TEU), but not, as expressly required by the TEU, indirectly through their national government within the Council and European Council (art. 10 § 2 al 2 TEU). As for ex-

¹⁰ ECJ, 5 February 1963, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62.

ample appears more and more clearly through the ongoing and developing political conflict between the Catalan government and the Madrid government, Catalan EU citizens could legitimately claim that they are no more represented in the Council of the EU by Madrid government as being their “national government”. The same is certainly true for Scots as regard Downing Street’s government in the era of Brexit. Such situation does violate their right, as EU citizens, “to participate in the democratic life of the Union” (art. 10 § 3 TEU), and their right to an equal treatment, as EU citizens, by EU institutions (art. 9 TEU). This means that the current institutional arrangement of the EU in which, these EU citizens, members of a European people without a State, do not enjoy full participation to the democratic life of the Union (art. 12 § 3 TEU), is in violation of the value of democracy, on which the EU is founded (art. 2 TEU), and by which it is bound.

This legal analysis however demonstrates that the democratic rights do not belong to any European people as such – as the logic of self-determination of peoples as commonly understood in international Law implies. Under the European legal framework, each people will be self-determined and self-constituted by the democratic exercise of the individual right of its members to decide on their own common political future, their own national project. A European people cannot thus be defined from the outside (which is quite coherent with the concept of self-determination), neither on ethnic, linguistic, historic or other “objective” factors. Being grounded as a citizens’ right to participate in the democratic life of the Union, which would be violated by the denial of the expression of self-determination within the EU for the European people to which s/he belongs – especially as regard representation in the Council of Minister of the EU (according to art. 10 § 2 TEU) – the right to self-determination within the EU has to be understood as a collectively exercised individual human right.

2.2. *The right to self-determination as collectively exercised individual human rights*

EU law, until very recently, did not incorporate provisions for the protection of Human rights. In a form of “division of labor”, the protection of Human rights was left to the Council of Europe¹¹. Within the framework of this organization was adopted in November 1950 in Rome, the *European Convention for the Protection of Human Rights and Fundamental Freedom*, which not only

¹¹ A European organization based on a Statute adopted in London on the 5th of May 1948. Based in Strasbourg, it actually has 47 member States.

guarantees a series of Human Rights, but also institutes a European Court of Human Rights, based in Strasbourg.

In the late 1960s and early 70s, the European Court of Justice (of the EU, based in Luxembourg), recognized that the EU legal order included Human Rights, as general principles enshrined in European Community Law¹², or as “constitutional traditions common to the Member States”¹³. It is however only in 1992, with the Maastricht Treaty, that a requirement for Member States of the EU to respect fundamental Human Rights, the Rule of Law, etc (more or less the values nowadays listed in current art 2 TEU) was explicitly included in EU law (Treaty of Maastricht, art. F). And only in 2000 was adopted the Charter of Fundamental Rights of the European Union, which is since the entry into force of the Lisbon Treaty “recognized by the European Union [...] and shall have the same legal value as the Treaties” (art. 6 § 1 TEU).

As we’ve seen above, the right to decide about its political future for a European nation without a State, is not expressly granted as a human right in European law. This is a strong contrast with International Human Rights Law which, through both 1966 UN Covenants, on Economic, Social and Cultural Rights on the one hand, and on Civil and Political Rights on the other, have a Common article one guaranteeing the right of all peoples to self-determination. On the contrary, European Human Rights law remain silent on this issue. However, all the 28 EU member States have ratified both 1966 UN Covenants, therefore recognizing as a binding rule of positive international law the right of all peoples to self-determination as a fundamental human right.

Further, EU, as all its member States, being “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (art. 2 TEU), it means that any restriction of individual rights, and even more so for fundamental human rights, may not be exercised arbitrarily, but only on the ground of a clear legal basis. Therefore, any limitation to the individual democratic right to exercise, collectively through a democratic process, self-determination, would have to be grounded in Law. We do not have sufficient space in the present chapter to examine possible limitations stemming from international or national law, and shall therefore remain focused on European law. As we have seen above (1.3), in the absence of

¹² ECJ, 12 November 1969, *Erich Stauder v. City of Ulm*, case 29/69.

¹³ ECJ, 17 December 1970, *Internationale Handelsgesellschaft v. Einfuhr Vorattstelle für Getreide und Futtermittel*, case 11/70. The formula is nowadays written in art. 6 TEU.

any specific provision in European Law, no right may under European law be claimed by a State to limit the collectively exercised individual human right to self-determination of individuals belonging to a European people without a State within the EU.

EU citizenship rights, and more generally political rights of Europeans, are recognized and protected by European law. Among others, the exercise of the Freedom of expression (art. 10 ECHR) and of the Freedom of assembly and association (art. 11 ECHR) gave rise to an interesting case-law. Both these freedoms may be, according to the ECHR, limited by State authorities; however, “no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.” (art. 11 § 2 ECHR). Would then the prohibition of the exercise of the democratic right to self-determination by an existing EU member State meet these requirements set by the ECHR?

In a 2001 Decision revising the legality of the interdiction of a political party in Bulgaria, that was openly calling in its program for the secession of part of Bulgaria to join Macedonia, the European Court of Human Rights stated that « the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes – cannot automatically justify a prohibition »¹⁴. This ECtHR ruling means that such call for secession is not *per se* contrary to national security or public safety – as the ICJ also seemed to acknowledge in its 2010 *Kosovo Advisory opinion* – and therefore may not be invoked, in a democratic society, to prevent the expression of such will, nor to prevent the assembly of peoples in order to exercise such right. Thus art. 10 (freedom of expression), and 11 (freedom of association) of the ECHR protect the right – within limits – to democratically and collectively decide on its political future through a national project, based on collectively exercised individual freedoms (Corretja Torrens, 2016; Tudela Aranda, 2016), as enshrined in the ECHR.

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¹⁴ ECtHR, 2 October 2001, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (application numbers 29225/95 & 29221/95).

There is thus both a remedial and individual dimension to the recognition of the right to national self-determination within the EU for citizens of all European peoples without a State. The remedial dimension is based on European values and EU citizens' rights (non-discrimination, full democratic participation to the EU) of members of these other European peoples that do not already have their own national State. The individual dimension is grounded on the free collective exercise of individual rights as guaranteed by European Human Rights Law. However and as in conclusion of the first section, one may wonder whether leaving it to each European nation without a State to constitute itself as a European State through the perilous collective exercise of individual human rights, before formally acknowledging the legitimacy of its national claim (art. 49 TEU), is wiser than envisaging a specific procedure, within EU law, to deal with the legitimate claim of European peoples within EU which do not yet have their own European State. It may well be an issue to be envisaged in a future Treaty revision.

3. Recognition of the right to self-determination through EU practice

In international Law, as in EU law, States and international organizations may be bound by legal norms which emerge out of their practice (customary law). One shall thus ask two questions in that respect: First, whether the threshold for creating an EU or an international Law customary norm has been reached by the past practice of EU member States and institutions. And second, if the answer to this first question is potentially positive, one should check whether the current situation of European nations without a State within the EU is similar enough to these precedents for which a customary rule has emerged. For identifying the emergence of a customary norm, international law requires two elements: a practice and an *opinio iuris*. The practice seems to be existent and consistent as we shall see below. Relevant *opinio iuris* in such cases is both the one of the EU institutions, who according to article 49 TEU decide on the acceptance of the candidacy for membership, and the one of EU member States, since each State ratify the new member State adhesion according to its "respective constitutional requirements". As regard EU member States' practice in the present case, it is all the more relevant since it shall not only be the government that express the State's *opinio iuris*, but all the State organs and components which, according to the national constitutional requirements, have to ratify the accession treaties (art. 49 TEU). In that respect, examination of the arguments put forward during the national debates on accepting new

member States did not reveal any significant position against national self-determination as exerted by these European peoples or nations.

The result of such investigation may thus amount to identify a common constitutional tradition of Member States in favor of the recognition of the emergence of new European States through the exercise of self-determination. The ECJ has been known to complete EU Law by incorporating legal rights as “result from the constitutional traditions common to the Member States”¹⁵, especially in the field of Human Rights. So if the constitutional practice from member States as regard recognition of the results of national self-determination processes within the EU context is sufficient to constitute a constitutional practice common to the member States, the ECJ may consider that this common practice has given birth to a proper EU right, as a general principle of EU Law.

From all these elements, it appears that EU member States may well have already recognized a right to national self-determination to European peoples through their practice.

3.1. Recognizing the result of exercised self-determination by European peoples

If no formal right to democratic self-determination in Europe can be identified in EU law, the practice of recognizing the results of referenda of self-determination has been continuous and consistent, at least for peoples outside the EU that have been allowed to join shortly after their democratic self-determination process allowed them to become States under international law. The adhesion to the EU in 2004 of the Czech Republic, Estonia, Latvia, Lithuania, Slovakia and Slovenia – none of which was a European State before 1990, but all emerged as such following referendums of self-determination organized in the years previous to their adhesion of the EU¹⁶, before being admitted as EU member states – are all examples of self-determination practices of European people or nations, unanimously approved by EU member States. Even though the independence referenda were held in the early 1990s, the relevant practice from EU institutions and Member States dates from the early 2000 as regard the six mentioned States, and was expressly

¹⁵ ECJ, 12 November 1969, *Stauder v. Ulm-Sozialamt*, case 29/69; 28 October 1975, *Rutili v. Ministre de l'Intérieur*, case 36/75; 19 November 1990, *Francovich et al. v. Republic of Italy*, case C-6/90 & C-9/90.

¹⁶ Referendums on independence were organized: On the 23 December 1990 in Slovenia, on 9 February 1991 in Lithuania, and on 3 March 1991, both in Estonia and in Latvia. The case of the Czech Republic and Slovakia is technically different since these two new European States came to life through a constitutional arrangement within Czechoslovakia, which may thus not be formally considered as a self-determination referendum process.

repeated in 2013, when Croatia was allowed to join the EU¹⁷, showing a clear continuity in the EU practice.

There is therefore a long lasting and consistent practice of EU member States on the recognition of self-determination processes, notably outside any decolonization context and within Europe, that binds EU and its member States, which shall thus be called to act consistently with their past practice. One may argue that the situation of a national self-determination process on the territory of an EU member State is different from those on which the examined practice is based. In that respect, we shall show in the next paragraph (3.2.) that self-determination referenda within the EU (or EEC) have already taken place, and neither their organization, nor their results have been challenged as illegal.

3.2. *A consistent practice of self-determination referenda within EU member States*

A consistent practice of European States shows the acceptance of self-determination referendum for infra-State territorial units within the EU territory (Saarland, 1955 and Greenland, 1982, Scotland 2014), and the acceptance of the outcome of such self-determination referenda performed by infra-State entities.

First, the 1955, 1982 and 2014 referenda held on the territory of EU member State did not give rise to any legal dispute as regard their conformity to EU Law. The 1955 Saarland referendum, which was clearly linked to the European integration process, even though without a legal base within the EEC Treaty, recognized the right to Saarlander to determine their own political status, within the EU (Patterson, 1958). The fact that Saarlanders chose to join Germany has no influence on the fact that they effectively did exert a right to self-determination¹⁸. In 1982, Greenlanders were also recognized the right to self-determination as regard their belonging to the EEC, and allowed to hold a referendum on the issue. The result of their referendum was recognized by the

¹⁷ Croatia had organized an independence referendum on 19 May 1991; it joined the EU on the 1st of July 2013.

¹⁸ See UN General Assembly Resolution 2625 (XXV) of 24 October 1970 clearly states “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”.

EEC member States, through a subsequent modification of the EEC Treaty, recognizing the choice of Greenlanders to withdraw from the EEC full regime¹⁹.

Identically, the 2014 self-determination referendum of Scotland did not raise concerns about its legality under EU-law. This referendum was based on a political agreement between the UK and Scottish governments, formally embedded in legal acts of the legislative institutions both at the UK and the Scottish levels. It was thus indisputably legal from the domestic point of view (Tierney, 2013). And if many discussions arose about the future status of Scotland as regard EU after the referendum, no commentator (Crawford & Boyle, 2013, Edward, 2013, Tierney, 2013, Avery 2014), nor the European Commission as “guardian of the Treaties” raised the issue of the legality under EU law of such practice. There is therefore no possible doubt that such practice of self-determination referenda within EU is not forbidden by EU Law and an accepted practice by EU member States.

Now the question whether a European people without a State may organize such democratic self-determination process without the consent of the State on which territory it lives on, is obviously a different issue. None of the three mentioned referenda inside the EU was organized against the will of the home state. On the other hand, the new European States that became members of the EU all (with the exception of Czech and Slovak Republics) emerged through a self-determination process exerted against the will of the home state. The question has therefore no clear legal answer based on past practice of the EU. Without being able in such a short chapter to answer it thoroughly, a quick survey of international practice about self-determination referenda organized in the past 20 years (Lineira & Cetrà, 2015; Mendez & Germann, 2016) is informative. 26 out of 55 independence referenda have been held without the consent of the parent State. And more than half of them (18 out of 26) led to the emergence of a New State. As the ICJ stated in 2010 in its Kosovo Advisory Opinion, there is no rule of international Law forbidding, in any context – except a specific interdiction by a Security Council Resolution – the exercise of the right to self-determination (Anderson, 2016).

* * *

¹⁹ “Brussels Treaty on Greenland” of 13 February 1984, *JOCE* n° L 29 of 1st February 1985.

TO CONCLUDE THIS CHAPTER, let us observe that in the absence of a clear legal answer in positive EU law to the existence of a right to national self-determination within the EU, a clear beam of practices, legal provisions and judicial decisions nevertheless points to the recognition of such a right, even if the precise conditions of its exercise remain unclear.

POST-SCRIPTUM:

This conclusion is however not very satisfactory, because it does not take into account the specific nature of the European integration process, in which the right to national self-determination appears as a paradox.

The European project was initially imagined as an anti-national project (Rougemont & Girardet, 1971), or at least a post-national project (Scharpf, 1996; Habermas, 1998; Bellamy, 2003). Requesting for European peoples without a State the right to achieve a national project and to become a State, through self-determination, in order to be later able to join this post-self-determination process that is the EU – to which they already were, albeit incompletely, part – is an unsustainable paradox (Chamon & Van der Loo, 2014). EU, as a revolutionary post-national polity is based – contrary to international law coexistence between sovereign national States – on a co-determination process based on pooled sovereignties. EU member States have renounced their sovereign rights in order to join this polity of a new type, not based on national self-determination of each European people, but on a co-determination process through “an ever closer union among the peoples of Europe”. No single European people exert self-determination anymore within the EU, but all European peoples – that is presently those who had the historical opportunity to constitute themselves as a national States – co-determine their common future, not as a new European nation, but as an original polity, in which co-exist national projects constrained by co-determination within the EU. In that context, looking in EU law, for peoples which do not yet have their own national State, for a right to self-determination in the classical sense, is a historical nonsense. What European people without a State are calling for – at least as regard Catalonia and Scotland for the time being – is a possibility to fully participate to this co-determination of our common European future. Asking them to first become Nation-States in order to achieve this goal is nonsensical.

I nevertheless realize that understanding such fundamental leap into post-national Europe is not yet possible, as political leaders are not ripe to grasp the genuine nature of the already existing EU. Political leaders and peoples still believe they can develop their own national project in Europe, as the pathetic attempts at Brexit shows. So instead of being able to imagine procedures for all European peoples to participate to the ever closer Union of the people of Europe, national self-determination projects will continue to flourish within the EU. And as shown, EU law does not oppose them.

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