Towards a More Effective EU Response to Domestic Sovereignty Conflicts

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Introduction

The European Union has assumed an active role in supporting those regions and nations in its near abroad as they emerge from sovereignty conflicts. However, faced with sovereignty conflicts *à l'intérieur*, especially when these are within, rather than between, member states, the EU response has been found wanting. Instead, EU spokespeople have insisted that these are internal matters for the member states. Article 4(2) of the Treaty on European Union provides a defence for such a stance, enshrining respect for the national identities of member states and 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. But this overlooks the many other parts of the Treaties that suggest that what takes place inside member states ought to concern the European Union, including respect for the EU's fundamental values and the rights of citizens. In addition, sovereignty conflicts within the Union, if they came to a head, would inevitably affect the European Union's interests. Such conflicts could impact the lives and livelihoods of EU citizens and workers, the economic interests of member states, and possibly disrupt the peace and stability of the Union.

Other contributions to this conference will consider the question as to whether the European Union ought to intervene in sovereignty conflicts within its borders. This paper takes that as a given. Instead, I offer some preliminary considerations as to the kind of interventions that may be appropriate and effective. No two sovereignty conflicts are the same, which makes developing a code of practice that can be applicable to all even more challenging. This paper suggests some steps the EU institutions can take upon themselves before engaging directly in sovereignty disputes, to recognise, understand, inform and, where appropriate, accommodate sovereignty claims. Where these conflicts cannot be resolved between the disputing parties, there may be a mediating role for the EU institutions and other forms of 'soft' intervention that can contribute to conflict prevention and resolution.

Conceptualising sovereignty and sovereignty conflicts

What do we mean when discussing sovereignty and sovereignty conflicts? Although its meaning is contested and multi-dimensional, sovereignty is commonly taken to refer to the supreme legitimate authority within a territory, irrespective of whether the locus of sovereignty lies (e.g. a monarch, a constitution, a parliament or 'the people'). A common distinction is drawn between external and internal sovereignty. External sovereignty is reflected in international recognition of the independence and territorial integrity of states, backed by the authority of international law. It ensures that sovereign states are not subject to a higher power outside of the state, and are free from the interference of outsiders when exercising control over their own territory (Philpot, 1995; MacCormick, 1999; Agnew, 2005; Sheehan, 2006). Internal sovereignty concerns the legitimate exercise of that authority within the territorial boundaries of the state.

This external/internal distinction leads to another. Sovereignty has been understood as both legal concept and political practice. The legal concept of sovereignty has a particular meaning associated with the primacy of domestic law and the international recognition of autonomous political authority. Legal sovereignty is enjoyed by the holder or holders of the power to make law as set out in a state's constitution. But as political practice, sovereignty is exercised in the 'world of political action', where it is best understood as a set of claims about the independence and authority of those wielding or seeking power (Sheehan, 2006: 3-4). Political sovereignty thus concerns the exercise of political power and the ability to make decisions and take actions that constrain or shape the lives, well-being and resources of individuals and society (MacCormick, 1999: 127).

Wherever authority ultimately lies in the legal and constitutional sense, there is no single sovereign internal to the state as 'all power holders are subject to some legal or some political checks or controls' (MacCormick 1999: 128). Realpolitik also shapes the relationships between states in ways that effectively modify their external sovereignty. Economic and political power imbalances between states shape the degree to which any individual state can exercise independent authority within and across its territory. Yet, external sovereignty grants states an equality of status in the eyes of the international community, despite these political and economic power imbalances.

These dimensions of sovereignty were further elaborated by Krasner (2001) in a way that can inform understanding of competing sovereignty claims. Krasner suggested that sovereignty combines legitimate authority and control. He identified four distinctive dimensions of sovereignty: international legal sovereignty; Vatellian sovereignty; domestic sovereignty; and 'interdependence sovereignty'. The first two are distinctive dimensions of external sovereignty and concern the authority and standing of a state vis-à-vis other states and the international community. International legal sovereignty establishes the independence of states within international law, in a system of mutual recognition. Vatellian sovereignty (which he has also referred to as Westphalian sovereignty) concerns the authority afforded to states to rule over their domestic affairs, free from the influence or interference of external actors. Domestic sovereignty is focused on internal authority. It refers to the organization and exercise of political authority and control within the territorial boundaries of the state. Finally, what Krasner called interdependence sovereignty, but which will henceforth be termed 'border sovereignty', refers to the authority of agents of the state to control and manage their borders, and the flow of people, goods, services and capital that cross them. In understanding and responding to sovereignty conflicts, it is instructive to consider the extent to which each of these dimensions drive sovereignty claims. As discussed below, those seeking greater sovereign authority for the territorial communities they represent often strive for authority in one or more of these spheres, while willingly compromising on their capacity to exercise sovereignty in the other senses.

Identifying its different dimensions helps to confront debates about whether or not sovereignty is indivisible. The sovereignty norm was most closely associated with unitary states, with centralised political authority, and some scholars argue that it remains a 'unitary condition' (James, 1999). Sørensen suggested that this is the case even in federal and highly decentralised states, where 'powers may have been delegated, but there is one supreme authority' (Sørenson, 1999: 593). Federalism scholars, by contrast, tend to see the division of sovereignty as a distinguishing feature of federations as opposed to other decentralised political systems, while in confederations, ultimate authority lies with each constituent unit. Elazar observed a paradigm shift away from the absolutist view of sovereign statehood to a world of 'diminished state sovereignty' that has forced states into 'various combinations of self-rule and shared rule to enable them to survive at all' (Elazar, 1996: 419). Recalling the distinction between external and internal sovereignty is instructive. States can retain their external sovereignty, with legal independence from other states, while political authority is shared between its constituent units internally (Grimm, 2019: 23). In this sense, external sovereignty may be present even when internal sovereignty - the legitimate political authority exercised within and over a state's territory - is absent (MacCormick, 1999: 129-30).

The gap between competence in the juridical sense and capacity to govern in practice is at the heart of many sovereignty conflicts between and within states (Loughlin, 2003). These conflicts also emerge from challenges to the sovereignty norm, linked closely to the emergence of the modern state. That norm associated with the Westphalian sovereign state has never been an accurate description of real-world statehood (Krasner, 2001: 17), but it has supported sovereignty claims, especially among those who defend the territorial integrity of existing states, as well as some of those who seek statehood. Linking the boundaries of the state to the boundaries of the nation has also supported claims to legitimacy in the exercise of ultimate authority. The doctrine of popular sovereignty, in particular, led the sovereign political community to be equated with a national community (Yack, 2001). Appeals to the shared identity and mutual belonging that underpin and reinforce nationhood support claims to domestic and border sovereignty in particular. Nationhood lends legitimacy to the actions of public authorities, enabling states to exercise their authority in the name of the people. Nationalism thus became the key

political device that reinforced the relationship between the sovereign 'people', the territory, and the constitutional order of the state (Tierney, 2005: 167).

Yet, the linking of sovereignty and nationhood also exacerbated the problem of sovereignty in practice. It introduced to the sovereignty norm the idea that the territorial boundaries of 'authentic states' should match the territorial boundaries of nations, while 'authentic nations' should have their own states (Sheehan, 2006: 9). But the boundaries of states and nations are often contested. At least some of the 'people' deemed to be the source of popular sovereignty may question the legitimacy of the state's authority to govern when the boundaries of the nation with which they most identify do not match the boundaries of the state.

Sovereignty claims and minority nationalism

Sovereignty claims have been appropriated into the politics of sub-state nationalism. These movements tend to regard the locus of sovereignty to be 'the people', used synonymously with 'the nation'. In line with the nationalist doctrine of self-determination, it is for the people to determine how and by whom they should be governed.

Not all sovereignty claims are articulated as a demand for independent statehood. Indeed, most sub-state nationalists claim control over areas of domestic sovereignty involving a change in the constitutional structure of the existing state through decentralisation or federalisation, rather than separate statehood. Müller-Rommel developed a four-point classification applied specifically to nationalist and regionalist parties, according to the degree of self-government they seek. 'Protectionist' parties seek recognition of their nation's distinctive character within the political community. 'Autonomists' demand more constitutional competences to enhance self-government. 'Left-libertarian federalists' demand more radical constitutional reform, implying an overhaul of the state structure and considerable decentralisation or federalisation. 'Separatist' parties, his most radical category, demand 'full sovereignty' and reject the prospect of ceding autonomy to the European Union (Müller-Rommel 1994: 186-7). Others have used similar classifications to distinguish between those with cultural, federalist, autonomist and independentist ambitions (Sorens 2008; Lluch, 2014).

Tierney suggested that the sovereignty claims of sub-state nationalists for enhanced authority within the state represented a bigger challenge to Westphalian sovereignty than 'full-blooded secessionism' (Tierney, 2005). Whatever its impact on the state from which it is sought, secession as a goal would see minority nations join the community of sovereign states upholding the international state system. By contrast, the unitary assumptions associated with Westphalian state sovereignty are challenged by the shared sovereignty models advocated by many sub-state nationalists, including claims to enhanced domestic political autonomy, international representation and co-decision over state-wide issues (*ibid.*: 180-82).

The form of political independence advocated by the most successful European sub-state nationalists also challenges the Westphalian sovereignty norm (Keating, 2001). While some secessionist parties advocate 'a complete rupture with the majority nation' (Lluch, 2014: 151), most seek a form of independent statehood that is embedded within a wider set of economic, institutional and political relationships. This includes membership of supranational and international organisations such as the European Union, NATO or transnational trading blocs, with an acceptance of the limitations on domestic, border and Vatellian sovereignty that this might entail. Such sovereignty claims recognise and respect the deep interdependence between national economies, and the decision-making authority of international and supranational bodies, most notably the EU.

The development of transnational interdependence was celebrated in MacCormick's thesis on 'post-sovereignty'. For member states of the European Union, MacCormick suggested, the supremacy of Community law and the authority of EU institutions means that EU member states do not possess unconstrained sovereignty, legally or politically, but nor has the EU acquired sovereignty independent of its member states. MacCormick embraced these developments. He viewed such transnational

interdependence as enhancing rather than undermining the authority of member-states especially by their collective engagement in external affairs (MacCormick, 1999: 133). Thus, the sovereignty claims of sub-state nationalists, whether directed at a radical overhaul of the constitutional framework within states, or in pursuit of independent membership of the European Union alongside those states, may be better understood as a 'post-sovereigntist' rejection of Westphalian sovereignty norms.

Sub-state nationalists advancing secessionist sovereignty do, however, lay claim to international legal sovereignty to enhance their voice and their ability to speak for territorial interests internationally. Irrespective of the power dynamics that condition international relations, international legal sovereignty is regarded as a means to achieve an equality of status with other independent states, and recognition of what is regarded as their nation's legitimate right to participate directly in transnational and supranational bodies.

International legal sovereignty combined with pooling and sharing sovereignty in supranational institutions tends also to be sought alongside continued association, institutional ties and partnership with the residual state (McEwen and Brown Swan, 2021). For example, the Basque Ibarretxe Plan proposed the creation of a Basque state 'freely associated' with Spain, with maximum domestic sovereignty alongside co-decision arrangements within a Basque-Spanish bilateral commission, overseen by a bilateral 'special court' of the Constitutional Court (Keating and Bray, 2006; Basque parliament, 2004). The Scottish National Party's advocacy of independence in the 2014 referendum also emphasised a new partnership with the UK, including a currency union, shared labour markets, and shared governance of key sectors including social security, energy and broadcasting (Scottish Government 2013; Keating and McEwen, 2017). The white paper produced by the Advisory Council on the National Transition ahead of the 2014 referendum likewise envisaged independence within the EU coupled with broad cooperation with the rest of Spain, including in customs and taxation, monetary and fiscal policy, energy and the environment, law enforcement, defence, health, education, agriculture and fisheries, overseen by a Catalan-Spanish inter-governmental council (Generalitat de Catalunya, 2014: 105-118). This emphasis upon, and desire for, independence to be associated with a new relationship – a new partnership – with the residual state has been presented by independence advocates as a route to achieving the kind of influence in these nations' relationship with the larger state that has proven difficult to secure while sharing the same state.

Of course, any partnership requires a willing partner. It is not immediately clear why the residual state would acquiesce to such a relationship with the territory that had seceded from it, especially given the compromises such a relationship might entail for its own domestic sovereignty. Nonetheless, in considering whether and how the European Union should respond to sovereignty conflicts, it is important to appreciate the nature of the claims. We are, by and large, not talking about 'separatism', in the sense of a territory wishing to cut itself off from its neighbours. The independence advocated by the most prominent European sub-state nationalists is not anathema to the project of European integration. Rather, sub-state nationalists' claims to sovereignty are about renegotiating relationships with the state from which secession is sought as well as within the international community, and reflect the acceptance and desirability of pooling and sharing sovereignty.

State and international responses to sovereignty claims: the UK experience

Faced with sovereignty claims from minority nations, most states will make some effort to try to accommodate these without compromising their territorial integrity. Accommodation strategies might include territorially-focused policy concession, elite accommodation within state-wide political parties, bureaucratic or clientelistic networks, or the territorial restructuring along federal lines (Rudolph and Thompson, 1985; Brancati, 2006). The hope is that such a constitutional reallocation of power can ease secessionist pressures. Multinational federations, in particular, aim to provide a territorial and constitutional framework 'that can accommodate and as far as possible resolve some of the most intractable political conflicts of our time: those that stem from competing national visions, whether within or between established states' (Pinder, 2007: 1). However, as Erk and Anderson (2009) observed, they can also paradoxically sow the seeds that generate new pressures for further self-government, by

miscalculating the degree of authority to be conceded, by creating new constitutional asymmetries that may trigger 'catch-up' demands elsewhere, and by institutionalising and reinforcing territorial differences and providing sub-state nationalist parties with greater electoral and governmental opportunities.

These strategies are all means to resist secessionist pressures and to maintain the territorial integrity of the state. Secession itself is rarely accommodated, and secessionist processes rarely facilitated. The United Kingdom is relatively unusual in the extent to which it has recognised and facilitated secessionist processes. Under the devolution settlements, the competence to legislate for a secession referendum lies with the Westminster parliament.

However, in the case of Northern Ireland, following decades of sectarian conflict, the Good Friday/Belfast Agreement made provision for the Secretary of State to initiate a border poll 'if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'. Ambiguity remains, however, over what evidence would inform that decision. If such a border poll was to produce a majority in favour of a United Ireland, UK law commits the Secretary of State to 'lay before Parliament such proposals to give effect to that wish as may be agreed between Her Majesty's Government in the United Kingdom and the Government of Ireland' (DFA, 1998).

In the case of Scotland, the pro-independence Scottish National Party won a parliamentary majority in 2011, with a manifesto commitment to hold an independence referendum. Then, the UK Government accepted that the SNP's election victory constituted a mandate for a referendum. The two governments, after lengthy deliberations, negotiated a temporary transfer of power to the Scottish Parliament to enable it to pass the necessary legislation setting out the rules for the vote. The UK government also gave a commitment to negotiate Scotland's independence if 'more than half' of the voters chose to vote Yes to the question: 'Should Scotland be an independent country?' (Keating and McEwen, 2017). This was not indicative of a constitutional right to secession; the UK constitution neither prohibits nor facilitates secessionist claims. Rather, its infamous flexibility permitted a negotiated agreement. This was also a political decision, to which the UK government's confidence that independence would be defeated in the referendum likely contributed. Successor administrations have thus far rejected demands for a new referendum, not on constitutional grounds or because the idea of independence is anathema. Rather, the rejection is on the basis that 'now is not the time' (Theresa May) or that the decision was already made in 2014, when independence advocates said it was a 'once in a generation' opportunity (Boris Johnson). Again, political calculations are at play, since a defeat for the independence option in such a referendum no longer seems a sure thing.

Where, then, does the European Union feature in these discussions? With respect to Northern Ireland, the European Union has long taken an active interest in the peace process, not just in funding peace programmes and cross-border cooperation, but in its engagement with local authorities and civil society organisations (Lagana, 2020). Following the Brexit referendum, successful mobilization by the Irish government ensured that the commitment to maintaining an open border on the island of Ireland was front and centre in the EU's Brexit negotiation priorities. The negotiations that led to withdrawal also underlined the importance to the EU of maintaining the integrity of the internal market. The corollary of the absence of border checks on goods crossing between Northern Ireland and the Irish Republic is their requirement between Britain and Northern Ireland (Hayward, 2020). The path towards Northern Ireland rejoining the European Union may also have received a boost when, as Taoiseach, Enda Kenny secured a 'united Ireland clause' at a special Brexit summit of the European Council in 2016 to approve the EU's negotiating mandate (McEwen and Murphy, *forthcoming*). The guidelines state:

> "The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means. In this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union".

This again reflected the lobbying influence of the Irish government and betrays a defence of the interests of existing member states rather than a willingness to intervene in a sovereignty conflict. German reunification serves as the model. Just as it did not alter the legal identity of Germany as a member state under EU law, so too Irish unity, were it ever to materialise, would be expected to maintain Ireland's legal status as an EU member state whilst expanding its territorial scope.

In the context of the 2014 Scottish independence referendum, both sides of this sovereignty debate sought to use the resources of EU law to support their competing claims (Armstrong, 2017). The 'Better Together' campaign and the UK Government argued that an independent Scotland would automatically be out of the EU and have to join the queue in applying for membership, with no guarantees. The Yes campaign and the Scottish Government argued that Scotland's independent membership of the EU could be negotiated from within, in parallel with independence negotiations. Legal scholars also contested the process through which an independent Scotland could negotiate membership of the European Union. In an opinion provided for the UK government, Boyle and Crawford concluded that an independent Scotland would have to apply for membership via a standard Article 49 accession process (Boyle and Crawford, 2012). In as much as the European Union held a view, it came closest to this one. For example, in a letter to the House of Lords Economic Affairs Committee, President Barroso noted 'it is not the role of the European Commission to express a position on questions of internal organisation related to the constitutional arrangements of a particular Member State', indicating that it would not comment on future scenarios until such time as requested to do so by a member state. But, echoing a parliamentary question by Romano Prodi in 2004 (European Parliament, 1 March 2004), he noted:

> "If part of the territory of a Member State would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory" (Barroso, 2012).

As the referendum drew nearer, however, Barroso went much further, suggesting that it would be 'extremely difficult, if not impossible' for an independent Scotland to join the European Union (BBC, 2014). Both of these positions were disputed. Douglas-Scott argued that there was sufficient provision within the Treaty articles concerning the principle of sincere cooperation, EU citizenship rights and EU values, including democracy, to justify a principled and practical route via the Treaty amendment procedure of Article 48 (Douglas-Scott, 2016). In a prescient analysis, Edward drew upon the provisions within Article 50, which permit an extended period of negotiation prior to EU withdrawal to unravel the highly complex set of reciprocal rights, obligations and relationships, to suggest that negotiation would be necessary before independence took place to agree the necessary amendments to the existing Treaties 'to avoid the disruption that would otherwise ensue' (Edward, 2013: 1167).

What these debates indicated was the lack of clarity within the Treaties over whether or not there could be a process of internal enlargement for seceding members of existing states, beyond the normal accession process. Of course, if a future Scottish independence referendum were to take place after Brexit, Scotland would not be part of a member state, and the process would become at least a little clearer. If Scots voted yes and the Scottish Government proceeded to negotiate independence from the United Kingdom, the only route available would be to seek membership of the European Union via an Article 49 accession. The timing and duration of such a process, any interim arrangements, and implications for issues from currency to the free movement of goods, services and people across the Anglo-Scottish border, are difficult to ascertain.

How Might the EU Intervene in domestic sovereignty disputes?

The European Union has appeared ill-equipped, or unwilling, to engage meaningfully in recent sovereignty disputes within EU member states, displaying an attitude of 'prudential minimalism' (Walker, 2017: 40-1). Faced with such disputes, the EU's preference has been to treat them as internal

matters of EU member states, and to place as little as possible in the public domain. Limited interventions have been made, for example, in Scotland in 2014 and at various times in relation to Catalonia and the Basque country. The remaining uncertainties resulting from a lack of clarity in the process and prospects of 'internal enlargement' have been exploited by campaigners and institutions, in particular those defending the integrity of the existing states.

Certainly, Article 4(2), by emphasising respect for the territorial integrity of the state, discourages meaningful intervention, and may impose some legal constraints on the opportunities available for EU intervention in sovereignty disputes. Piris suggested that the Article's respect for member states' national identities and their authority to determine their own constitutional and political structures prevents recognition of a territory that unilaterally secedes from another EU member state and, indeed, places a legal obligation on member states to refuse to recognise that territory's independence (Piris, 2017: 89). This seems to go beyond the Barroso/Prodi stance as, without recognition of statehood, such a territory would be unable to have its application for EU membership legally considered. Even in the more consensual Scottish case, where the independence referendum was conducted within the constitutional framework of the UK and with the consent of the UK government, Walker argued that the EU's approach inherently empowered member states. It emphasised domestic constitutional norms on secession that favoured protecting the territorial integrity of the state, as well as the 'equally state-centred slant of its own European procedures on accession' (Walker, 2017: 41).

There is among some EU officials, and also some influential EU legal scholars, a normative sense that secession as an outcome of a sovereignty conflict is anathema to the project of European integration. Among the most forthright theses was that articulated by Joseph Weiler. Secessionist projects, in his view, are 'diametrically contrary to the historical ethos of European integration', and he suggested that it would be 'hugely ironic… if the prospect of Membership in the European Union ended up providing an incentive for an ethos of political disintegration' (Weiler, 2017: 17-19). There is a moral superiority to this argument. Betraying a fundamental misunderstanding of contemporary sovereignty conflicts, Weiler assumed that these are founded on historical nationalist grievances that run contrary to the Christian ethic of forgiveness and enlightened political wisdom that drove the EU's founding fathers to build a structure founded on reconciliation and integration (*ibid.)*. There is also a utilitarian argument, too. He suggested that co-decision based on shared solidarity was already difficult for the EU, and enlargement through fragmentation would make it more so: 'Why would there be an interest in accepting into the Union a polity such as an independent Catalonia predicated on such a regressive and outmoded nationalist ethos which apparently cannot stomach the discipline of loyalty and solidarity which one would expect it would owe to its fellow citizens in Spain?' (*ibid.*: 18).

Yet, far from 'betraying the very ideals of solidarity and human integration' that Weiler suggested are the bedrock of the European Union, secessionist and non-secessionist nationalists within the stateless nations of the EU have been amongst the biggest champions of European integration and solidarity. Many secessionist nationalists accept and even welcome the compromises to sovereignty that would come from maintaining economic, institutional and political relations within a supranational context, and seek continued cooperation, including shared governance of cross-border concerns, with the state from which they aspire to secede. There is recognition that accession to the European Union as new, independent, member states would involve a system of co-decision that limits the autonomy of (especially small) states, thus conceding some domestic and border sovereignty. Acceptance of the primacy of EU law and the oversight of the European Court of Justice also reflects a willingness to cede what Krasner referred to as 'Vatellian sovereignty', as it would mean external institutional actors could intervene in the governance of the state. What it offers is an opportunity to influence these processes directly – to have a seat around what is regarded as the 'top table', where key decisions are made that in any event will affect these territories and their competences. The case advanced by sub-state nationalists often suggests that maximising the self-government of a territory that is currently subsumed within a larger state would generate a more effective and accountable government. This arguably aligns with core principles and values of the European Union, namely subsidiarity and democracy. Likewise, as David Edward put it, there is no *a priori* reason why the EU should 'hold its doors open to the small nations of Middle and Eastern Europe whose very existence as independent states is due to the break-

up of greater entities, while slamming them shut against the aspirations of those who regard themselves as “stateless nations” in Western Europe’ (Edwards, 2013: 1154).

Criticising what they viewed as partial interventions in defence of existing member states, Kochenov and van den Brink argued that EU law and the ethos of European integration requires EU institutions to remain neutral in the face of sovereignty disputes within member states. They suggest that there are no legal grounds for the EU to take sides in debates or processes within member states that might lead to a reconfiguration of their territorial structures or boundaries, potentially including the secession of part of their territory. Moreover, assuming these debates and processes are lawful and non-violent, maintaining a neutral position is ‘crucial for the success of democracy and the rule of law in the context of the strict observance of the principle of good neighbourly relations in Europe’ (Kochenov and van den Brink, 2016: 68). Remaining neutral does not, however, mean there is no role for the EU in domestic sovereignty disputes.

What, then, practically, could the EU institutions do when faced with these challenges? Five potential steps are suggested here: (i) recognition; (ii) understanding; (iii) procedural clarification; (iv) mediation/soft intervention; and (v) accommodation. The first two are steps that the EU institutions can take upon themselves. The others would require the explicit consent and cooperation of the member states, including the one that is a party to the sovereignty dispute.

(i) Recognition

A first step would be to recognise that sovereignty disputes within the boundaries of the EU are not only matters that are internal to, and of concern for, the member state in question. They are also matters that concern the EU. As Bauböck argued, secession within a multi-level arena such as the European Union is not something that takes place only within one territory or one state, but is set within ‘a wider constellation of polities’ (Bauböck, 2019). For Bauböck, the European Union represents a complex constellation of polities. As such, it involves horizontal relationships between member states enjoying equal legal status, as well as vertical relations between nested polities, including those sub-state territories involved in sovereignty disputes. That carries with it a responsibility to engage. The fate of such disputes affect EU interests directly, including the rights, wellbeing and future of EU citizens living in the territory, free movement within and across the disputed territory, the health of the European economy, and potentially peace and stability in Europe.

(ii) Understanding

Viewed from Brussels or from the comfort of a national capital with authority over large areas of public policy and a voice in those policy decisions where authority is shared, the centrifugal ambitions of sub-state nationalists can appear as a violation of the integration and reconciliation that underlies the European dream. From that perspective, secession leads to fragmentation, and is the antithesis of integration. This is naïve at best, arrogant perhaps, but in any event betrays a lack of understanding of the dynamics that drive demands for self-government. These are less about nativist, identity-driven, desires to separate the territory from its neighbours and more about a desire for gaining more policy autonomy and influence over the decisions that affect them.

Part of the EU’s engagement with sovereignty disputes *à l’interieur* ought to involve an effort to understand them. This may involve supporting research to identify any underpinning grievances or ambitions that drive sovereignty demands, and the implications of alternative outcomes for the disputed territory, the member state and the wider Union. Such research could also inform any decision-making process that may be initiated as part of the processes of territorial management. To its credit, the UK government-funded Economic and Social Research Council initiated such a process ahead of both the Scottish independence referendum and the Brexit referendum, generating impartial academic analysis to inform these sovereignty debates and processes.

(iii) Procedural clarification

The European dimension is an inherent part of domestic sovereignty disputes, with claim and counterclaim about what secession of part of a member state would mean for its status and relationship with the EU. Having clarity on these procedural dimensions of secession would not prevent protagonists from selectively using EU legal resources to 'amplify and resonate' their domestic political narratives, choices and claims (Armstrong, 2017). But it would provide a clearer framework against which to evaluate these claims, and a clearer backdrop to inform the choices facing citizens in sovereignty-laden electoral or referendum contests.

Reflecting on the debates of the 2014 Scottish independence referendum, Walker lamented the many uncertainties that were left unresolved by the lack of engagement of the EU institutions on the procedures that an independent Scotland would face if seeking to negotiate its inclusion as a member state in its own right. Would it have benefited from an Article 48 Treaty amendment, as the Scottish Government, backed by some EU lawyers, claimed, or would it be required to follow a normal accession process as set out in Article 49? If the latter, could it be fast-tracked? Would it be a seamless process or a high-risk venture? Would it require adoption of the acquis in full, from the outset, or would there be a realistic expectation of some derogations, for example, on the currency or Schengen? How would the obligations of sincere cooperation and solidarity that underpin the horizontal relations between Member States sit alongside the vertical framework of rights and responsibilities that underlie the social contract between the EU institutions and EU citizens? (Walker, 2017: 33-4; see also Piris, 2017).

None of these questions was satisfactorily addressed by the response of the European Commission, given only ever to hypothetical cases of secession from a member state: that on independence, the EU treaties would cease to apply to the newly independent state, but it would be free to apply for membership provided it respected the EU's core principles. In the case of an EU member state that dissolved as a result of a secessionist conflict (as might be the case in Belgium were Flanders to adopt a secessionist goal), there would be no successor state to inherit EU membership, and thus, the consequence of the Barroso/Prodi perspective would be that both Flanders and Wallonia would find themselves outside of the Union at the point of independence. Where a seceding territory would not be afforded that status, as would likely have been the case with Scotland in 2014, assuming an abrupt end to the Treaties on independence, without prior negotiation, would have such a disruptive effect for businesses, create uncertainty for EU citizens, workers and students who had taken advantage of freedom of movement, and give rise to a raft of security, human rights, political and economic challenges, that some form of pre-negotiation appeared inevitable (Edwards, 2013). The Brexit process has revealed the complexity involved in extricating a territory from the European Union, a process that would likely have been even more complex without a Treaty provision to act as a guide to negotiations for withdrawal and future relationships. And just as the existence of Article 50 had no bearing on the decision of UK electors to leave the EU in 2016, experimental evidence suggests that Treaty clarification would have only a limited impact on public decision-making in a sovereignty process (Muro and Vlaskamp, 2016).

In an ideal world, procedural clarification would include an addition to the Treaties to guide the European dimension of a secession process and the future relationship of a seceding territory vis-à-vis the European Union. This could sit alongside, or be embedded within, Treaty provisions on amendment (Article 48), accession (Article 49) or withdrawal (Article 50). Where a seceding territory is required to apply to rejoin, Fasone suggested that the EU might provide clarification within the Treaty of the minimum requirements, in line with the values of the Union, required to facilitate such an application (Fasone, 2017: 65). However, Treaty change is highly unlikely, especially in the context of live sovereignty debates, given the political interests of existing member states in protecting their territorial integrity and sovereign authority. Nevertheless, a more open perspective on the variations in accession processes and the flexibilities that the European Union has already demonstrated in response to the particular circumstances of applicant countries, as well as the constraints upon such flexibilities, would contribute to informing those most affected by the sovereignty dispute. It would also provide a firmer foundation for EU neutrality than the current holding line.

(iv) Mediation/soft intervention

Any intervention by EU authorities in sovereignty disputes is likely to underline the importance of operating within the rule of law. The EU response to the Catalan referendum of 1 October, rather than comment on the disruptions and state-sanctioned brutality that accompanied what was principally a democratic process, focused on condemning the illegality of the vote. It also reiterated its position that the situation in Catalonia was an 'internal matter for Spain that has to be dealt with in line with the constitutional order of Spain' (European Commission, 2017). Notwithstanding the contested interpretations of the Spanish constitution, it is reasonable to conclude that the constitutional order of Spain would prohibit secession under any circumstances, even in the face of an (as yet hypothetical) overwhelming demand from Catalonia or another stateless nation within Spain. The likelihood for such a scenario to create instability and mounting tension within the borders of an EU member state, with potential spillover and wider repercussions, would make the 'internal matter' stance of the European Commission appear like a dereliction of duty. Its failure to intervene in response to the imprisonment of elected politicians and civil society activists has already undermined some of the core values the Union purports to uphold.

It is not for the EU to give instructions to either party in a sovereignty dispute, or to pick a side. But it could play a part in helping to avoid escalation, for example, through offering to facilitate dialogue between parties to the dispute, or support initiatives that specialise in conflict resolution. The EU has had a role in supporting peace and reconciliation in other disputed territories with deep societal divisions, both within and beyond the Union. Its interventions in Northern Ireland, for example, helped to Europeanise the peace process, through programme funding, support for civil society organisations to engage in cross-border cooperation, and by providing an overarching framework within which to embed and partially depoliticise conflicting territorial identities.

(v) Accommodation

As noted previously, when states are confronted with sovereignty claims, they often develop strategies to try to accommodate or counteract these claims to avoid escalation and to preserve unity. The European Union has, overtly at least, refrained from developing strategies of territorial management and accommodation when issues emerge within member states, preferring instead to cede this ground to the state in question. Yet, the European Union may have encouraged such sovereignty claims. The promise of a new kind of political community in which sovereignty is shared and strength combined to enhance the collective presence and influence of Europe's nation-states in the international community is an attractive option for Europe's stateless nations. As well as downplaying the status and authority of individual nation-states, it offers the potential to reduce some of the costs and risks of secession. The gradual enlargement of the EU has reduced the average size of member states given a voice within key decision-making fora; 10 member states are smaller than Scotland and 13 are smaller than Catalonia and Flanders. Although decision-making institutions may still favour larger states, the opportunities offered to smaller member states to influence EU decision making is notably greater than the opportunities that sub-state governments have to shape the EU policies of their member states.

Fasone suggested that the EU could also be viewed as a destabilising force in the relationship between its member states and their constituent territories after the Lisbon Treaty promoted their integration into EU decision-making structures. Article 5(3) of the Treaty now brings sub-state regions and localities into play in the application of the principle of subsidiarity, while regional parliaments have been given an opportunity to be included in the 'early warning system' that acts as a check on subsidiarity. 'By impacting on the national division of competence between State and regions, on their institutional design, and on the way these institutional actors participate in EU policymaking, the EU cannot claim to remain neutral and indifferent to secession within its Member States' (Fasone, 2017: 67).

While not disputing Fasone's conclusion, arguably, the responsibility to engage may derive less from the EU's achievements in bringing regions into its decision-making forums, but rather from its failure to provide a meaningful role for its stateless nations and regions. The legislative powers in the Lisbon

Treaty have, in practice, provided very limited opportunities for regional influence (Borońska-Hryniewiecka, 2013), while the Committee of the Regions remains the weakest of the EU institutions. It is a far cry from the 'Europe of the Regions' that once inspired Europe's stateless nations and regions to envisage an alternative to Westphalian sovereign statehood, either while remaining part of the state they were in or as a state they could theoretically become, embedded within the European polity (Elias, 2008).

Whatever steps it takes, or fails to take, in recognizing, understanding, informing, or mediating sovereignty disputes, the EU may one day have to confront the outcome of such a dispute. How it chooses to do so can be expected to be coloured by the constitutionality of the process, the strength of feeling demonstrated by citizens in the disputed territory and the rest of the member state, and a strategic calculation of its own interests. Continuing to remain detached from disputes it regards as internal matters for member states overlooks the blurring of the boundaries between the domestic and European sphere that is the result of the integration process. Even were we to assume that these are wholly domestic affairs and that the EU has no authority to intervene, it could not avoid being affected by a prolonged sovereignty dispute within a member state. It may therefore be in the EU's interests to play some part in resolving it. Should a sovereignty dispute result in a new state whose citizens express the will to remain part of the European Union, Kochenov and van den Brink argued that the EU should employ all available political and legal tools to ensure the continuation of EU membership, protecting the rights it affords to citizens and companies against the effects of even a temporary disapplication of the acquis (Kochenov and van den Brink, 2016: 78). To do otherwise would be contrary to the EU's historic ethos of inclusion and integration.

References

Agnew, J, 2005, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics', *Annals of the Association of American Geographers*, 95:2, 437-461

Armstrong, K A, 2017, 'The Reach and Resources of European Law in the Scottish Independence Referendum', in Closa, C (ed), *Secession from a member state and withdrawal from the European Union : troubled membership*, Cambridge University Press.

Basque Parliament, 2004, *Political statute of the community of the Basque country*, Available at: https://web.archive.org/web/20071012030228/http://www.nuevoestatutodeeuskadi.net/docs/dictamencomision20122004_eng.pdf

Bauböck, R, 2019, 'A Multilevel Theory of Democratic Secession', *Ethnopolitics*, 18:3, 227-246

Borońska-Hryniewiecka, K, 2013, Regions and Subsidiarity after Lisbon: Overcoming the "Regional Blindness"? *LUISS School of Government Working Paper Series* SOG-WP3

Brancati, D. 2006. 'Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism'. *International Organization*, 60(3): 651–685.

BBC, 2014, *Scottish independence: Barroso says joining EU would be 'difficult'*, 16 February 2014. https://www.bbc.co.uk/news/uk-scotland-scotland-politics-26215963

Crawford, J and A Boyle, 2013, Annex A Opinion: Referendum on the Independence of Scotland – International Law Aspects. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf

Department of Foreign Affairs, 1998, The Agreement. Agreement reached in the multi-party negotiations. Available at: https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf

Douglas-Scott, S, 2016, 'Scotland, secession and the European Union', in McHarg, A, T Mullen, A Page and N Walker, *The Scottish Independence Referendum: constitutional and political implications* Oxford University Press.

Edward, D, 2013, ‘EU Law and the Separation of Member states’ Fordham International Law Journal, vol 36, Issue 5/2

Elazar, D J. 1996, ‘From Statism to Federalism: A Paradigm Shift’ International Political Science Review, Vol. 17, No. 4, *New Trends in Federalism*. pp. 417-429

Elias, A, 2008, ‘Introduction: Whatever Happened to the Europe of the Regions? Revisiting the Regional Dimension of European Politics’, *Regional & Federal Studies*, 18:5, 483-492

Erk, J and L Anderson, 2009, 'The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?', *Regional & Federal Studies*,19:2,191 — 202

European Commission, 2017, Statement on the events in Catalonia. https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_3626

Fasone, C, 2017, ‘Secession and the Ambiguous Place of Regions Under EU Law’, Closa, C (ed), *Secession from a member state and withdrawal from the European Union : troubled membership*, Cambridge University Press.

Generalitat de Catalunya, 2014, *White paper on the National Transition of Catalonia*. Barcelona: Government of Catalonia.

Grimm, D, 2019, Post-Sovereignty? In B. Leijssenaar & N. Walker (Eds.), *Sovereignty in Action* 17-30). Cambridge: Cambridge University Press.

Hayward, K, 2020, ‘Why it is impossible for Brexit Britain to ‘take back control’ in Northern Ireland’, *Territory, Politics and Governance*, 8(2): 273–278

James, A, 1999, `The practice of sovereign statehood in contemporary international society', *Political Studies*, 47: 457-73

Keating, M, 2001. *Plurinational Democracy: Stateless Nations in a Post-sovereignty Era*. Oxford: Oxford University Press.

Keating, M & Z Bray, 2006, Renegotiating Sovereignty: Basque Nationalism and the Rise and Fall of the Ibarretxe Plan, *Ethnopolitics*, 5:4, 347-364,

Keating, M. and N McEwen, 2017, The Scottish Independence Debate in Keating, M. (ed) *Debating Scotland.* Oxford: Oxford University Press.

Kochenov, D and M van den Brink, 2016, ‘Secessions from EU Member States: The Imperative of Union’s Neutrality’, *European Papers*, Vol. 1, 2016, No 1, pp. 67-92

Krasner, S D, 1999, *Sovereignty: Organized hypocrisy*. Princeton: Princeton University Press.

Lagana, G, 2020, *The European Union and the Northern Ireland Peace Process*, Palgrave.

Lluch, J, 2014, *Visions of Sovereignty: Nationalism and Accommodation in Multinational Democracies*, University of Pennsylvania Press

Loughlin, M, 2003, 'Ten Tenets of Sovereignty' in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003), 55-86

MacCormick, N, 1999, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press).

McEwen, N and C Brown Swan, 2021, ‘Embedded Independence: Self-Government and Interdependence in the Scottish National Movement’, in Lecours A, N Brassard-Dion and G Laforest (eds) *Constitutional Politics in Multinational Democracies* McGill-Queens University Press.

McEwen, N and M Murphy, ‘Brexit and the Union: Territorial Voice, Exit and Re-entry Strategies in Scotland and Northern Ireland after EU Exit’ (currently under review)

Müller-Rommel, F. 1998. *Ethnoregionalist parties in Western Europe: theoretical considerations and framework of analysis*. London: Routledge.

Muro, D & M C Vlaskamp, 2016, 'How do prospects of EU membership influence support for secession? A survey experiment in Catalonia and Scotland', *West European Politics*, 39:6, 1115-1138

Philpot, D, 1995, 'Sovereignty: An Introduction and Brief History', *Journal of International Affairs*, 48 (2), 353-368

Piris, J-C, 2017, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (II), Closa, C (ed), *Secession from a member state and withdrawal from the European Union : troubled membership*, Cambridge University Press.

Rudolph, J. and Thompson, R. 1985. 'Ethnoterritorial Movements and the Policy Process: Accommodating Nationalist Demands in the Developed World', *Comparative Politics*, 17: 291-311.

Scottish Government, 2013, *Scotland's Future: Your Guide to an Independent Scotland*. Edinburgh: Scottish Government.

Sheehan, J.J., 2006, 'Presidential address: the problem of sovereignty in European history', *The American Historical Review*, 111(1), 1-15.

Sorens, J. 2008. 'Regionalists against secession: the political economy of territory in advanced democracies', *Nationalism and Ethnic Politics* 14, 3: 325-360.

Sørensen, G, 1999, 'Sovereignty: Change and continuity in a fundamental institution' *Political Studies*, XLVII, 590-604.

Tierney, S. 2005, 'Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State.' *International & Comparative Law Quarterly* 54, 1: 161–183.

Walker, N, 2017, 'Internal Enlargement in the European Union: Beyond Legalism and Political Expediency', in Closa, C (ed), *Secession from a member state and withdrawal from the European Union : troubled membership*, Cambridge University Press.

Weiler, JHH, 2017, 'Secessionism and Its Discontents', in Closa, C (ed), *Secession from a member state and withdrawal from the European Union : troubled membership*, Cambridge University Press.

Yack, B, 2001, 'Popular sovereignty and nationalism' *Political Theory*, 29(4): 517-36