

**Claiming Sovereignty. States, nations and Self-Determination in the European Context**

**Michael Keating**

**University of Aberdeen and Centre on Constitutional Change**

**Coloquio, *Conflictos territoriales de soberanía*, Bilbao, 202**

## The sovereignty conundrum

Sovereignty has been the foundation of political order in the modern world, defining the ultimate source of legitimate authority within states and underpinning the international order. Yet it has always been an elusive idea. It has, in modern times, been associated with the nation-state to the point that 'nation-state' and 'sovereign state' have, in international relations, become synonymous. In its starkest form, the idea is that the nation-state is vested with absolute sovereignty and that there can be no disputing the matter. The state is sovereign because it is sovereign by definition; or the state is sovereign because, by exercise of its sovereignty, it has declared that it is sovereign. This is, of course, a tautology, a circular argument. Rather than a theory or doctrine, it is an axiom, a proposition that cannot be contested. It is, in the truest sense, a myth, a story whose force is independent of its empirical truth or falsehood. Another way of expressing all this is to say that the sovereign nation-state is a myth, that is a shared belief whose effect is independent of whether it is true or false. As long as people believe in it, it will work and continue to provide the basis of political order. Otherwise, it might go the way of the Divine Right of Kings.

Yet, paradoxically, this is the only defensible doctrine of the absolute sovereignty of the nation-state. This is because, as soon as the state is obliged to produce wider, epistemic arguments to justify its sovereignty, it has to compete with other claims that may be equally convincing and based on the same premises. Elsewhere (Keating, 2021) I characterize these arguments as revolving around *demos* (the definition of the people underpinning popular sovereignty); *telos* (the mission of the nation in the past and the future); *ethos* (the values embedded in it) and sovereignty (the locus of ultimate authority). During the twentieth century, a certain modernist narrative saw all four as embodied in the consolidated nation-state. Rival claims could then be dismissed as backward-looking or reactionary, whether by the British left or Jacobin progressives in France, Spain or Italy.

These intellectual defences of the sovereign nation-state have always been vulnerable. Primordialist and ahistorical ideas that the nation is somehow natural or intrinsic to human nature are taken seriously by few social scientists nowadays. Since the French and American revolutions, the nation-state has based itself less on the primordial *ethnos* and more on the unitary *demos*, which underpins democracy; but its rivals can make similar claims. Historical teleologies tracing the nation-state back either to a founding moment or into the mists of time are also easy to rebut. As Renan showed long ago, we know a lot about how nation-states were really built and nationalists need to forget as well as remember. In any case, rival claimants also have their own history, as we have seen from the fierce historiographical arguments between Spanish and Catalan and Basque historians. Another argument is that the nation and its state are vehicles for higher values (*ethos*) and the realization of desirable ends such as social solidarity and the welfare state, or providing wider markets for the economy. Yet claims that the nation-state is instrumentally legitimated by the tasks it serves are vulnerable to arguments about whether there are other ways of realizing these aims.

The axiom of state sovereignty had a powerful hold over the twentieth-century imagination, to the point that it became the universal form of political order. Since then, the spell has been broken as both state and nation have been demystified and contested. Globalization, whether in the economic, cultural, ecological, social, security or political domains, has revealed the fragility of states as well as the inequalities embedded in the state system. Individualism has questioned old collective identities while multiculturalism has questioned monolithic national imaginations. Functional systems previously encompassed by the state have 'rescaled', that is shifted upwards to the supranational level, downwards to the sub-state level and across to the transnational level (Keating, 2013). This includes matters from economic management, to the environment, social welfare, higher education and culture. As these systems have increasingly moved beyond the nation-state framework, states have lost their capacity for mastering them. This is not a result of binding functional imperatives, as some theories of globalization have suggested. On the contrary, rescaling is a highly contested and political matter, because changing the scale and

boundaries for functional systems can change the balance of winners and losers (Keating, 2017). Some constructions of the emerging regional or 'meso' level of government see it as a space for market competition or a kind of neo-mercantilism in which regions vie with each other for economic advantage. For others, the local and regional levels are a new space for social solidarity. Others again emphasise the cultural dimension. As these different views of the new spaces, from Europe down to the neighbourhood, are contested, they are increasingly politicized. This gives rise to a debate about democratization and the appropriate form of government to allow deliberation and popular control in the face of the weakening capacity of the nation-state.

This is an important factor in the rise of demands for self-government. These arise in multiple forms and at different levels but they often map onto existing identities and institutions and serve to revive self-determination campaigns. There have been some tendencies to dismiss the new sub-state nationalisms of Europe as 'tribal', 'ethnic' or backward-looking. In so far as these are based on xenophobic or authoritarian impulses (as with the *Lega Nord* of the *Vlaams Belang*) we can dismiss them as not relevant to the concerns of this meeting. Less easy to dismiss are claims that respond to the modern condition and incorporate the new thinking about economy, welfare, culture and democracy. One important feature of these movements is that, rather than emphasising ethnic particularism, they are often based on the same historical, normative and instrumental bases as those of the nation-states themselves. Again, we do not have to take all claims at face-value. The claim to self-determination of Republika Srpska is based on a territorial community that emerged by ethnic cleansing in recent times. Claims in Catalonia, Euskadi, Scotland, Wales or Quebec, however, rest upon universal values. This is what Dion (1991) called de Tocqueville's paradox, arguments about political authority in the face of a convergence of values. It might be thought that the spread of universal values (as happened across Europe during the second half of the twentieth century) would diminish political differences and resolve the nationalities question. The de Tocqueville paradox explains why this might not happen, because rival national projects are competing on the same normative ground as the foundation for political order. This is not, *pace* Kymlicka (2007) and others, a case of cultural differences, which might be resolved by practices of multiculturalism, cultural autonomy or the privatization of culture in the way that religion has effectively been privatised in post-Christian societies. These are, rather, claims to encompassing authority, which are much more difficult to resolve.

### **Managing Sovereignty Claims**

Sovereignty and self-determination have traditionally been identified with the construction of a territorially-bounded, multifunctional state on the lines of the twentieth-century state system. We will relax that definition later but first let us examine the arguments advanced for and against such a right. The literature on secession tends to place the burden of proof on those claiming to separate from an existing state, while assuming that the states themselves are under no obligation to legitimate their continued existence. This creates a big imbalance in favour of the status quo and a high barrier for those wanting to change it. Yet finding a new formula to resolve the right to self-determination, including rights of secession has proved difficult, in spite of the abundant literature on the topic.

Primary right theories attach the right of self-determination to peoples or nations. Some political theorists tend to identify people or groups unproblematically. Yet nearly all sociologists nowadays concur that nations are not natural but socially constructed and often contested. Self-determination claimants themselves have increasingly argued from the basis of democracy and often take pains to eschew ethnic particularism.

Associative or voluntarist theories seek to get around this problem by allowing any group of people to declare themselves a self-determining unit and set up their own polity (Beran, 1998). The public choice literature starts from the premise that democracy is about realizing individual preferences so that institutions must be designed around that. Yet democracy is also about deliberation and considerations of the public good; and it is about mobilizing political power in the face of market or other social inequalities. Self-determination issues do not arise because groups

of individuals spontaneously decide on self-government. Nor do they appear because people make instrumental calculations about the economic benefits of large or small scale political units (as suggested by Alesina and Spoloare, 2002). The making of political communities is an arduous and sometimes long-drawn-out process of social construction, which requires commitment and resources. This explains why there are so few of them, in spite of worries among opponents that they could proliferate endlessly.

A third set of theories hold that peoples or nations have a 'remedial' right to self-determination and secession if they have been oppressed or colonized (Buchanan, 1991). This deals with cases of colonization but does not help with cases such as Quebec or Scotland, in which the population enjoys full democratic rights. Moreover, if remedial right is regarded as legitimate, this may provide an incentive for nationalists to provoke oppression. Most tellingly perhaps, remedial right theory does not justify the statehood of existing nation-states, which are just assumed to have a moral right to determine their own mode of government, while denying rival claims.

There is another problem with all these classic theories of self-determination. Their claims overlap, as different national claims are made upon the same people and over the same territory. Given these contradictory claims, there is no set of lines on a map that could produce the 'right' answer.

It is easy, in fact, to argue that self-determination in the sense of realizing sovereignty claims over a territory in the name of a people is impossible; indeed that has often been said. If a question cannot be answered, however, that is usually a good reason to change the question. We can do this by reframing three key elements: the subject of self-determination or 'people'; the object of self-determination (a new polity); and the territorial framework. The relational turn in ontology allows us to specify the subject of self-determination without falling into the twin traps of reification or pure voluntarism. New understandings of statehood and sovereignty permit us to specify the object in more complex ways. New theories of territory present it as open and weakly bounded and defined in numerous ways. This does not give us a determinate solution of the sort offered by the old nation-state model; but normative theorizing has moved away from seeking ideal and complete solutions towards recognizing the incommensurability of some claims and the acceptability of less than perfect outcomes.

## **The Subject**

Nations or peoples are now rarely defined according to objective criteria as earlier generations of nationalists sought to do. Nor can they be reduced to purely subjective feelings. For me to be a national, it is necessary for other people to share the sentiment. Nations are, rather, socially constructed, intersubjective entities, based on mutual recognition and shared understandings. Nations or peoples are never homogeneous or clearly bounded, their claims often overlap, and they are rebuilt over time and often contested. The language we use to refer to political communities can be infuriatingly vague and contested but that is because it is necessarily normatively loaded. If a political movement shifts from the language or region to nation (as Catalanism did in the early twentieth century) it is making claim to be the holder of original rights. In cases such as Brittany, the use of nationalist and regionalist terminology reflects different aims in relation to the French state. To show how nations are discursively constructed in this way, however, does not mean that these communities do not constitute realities in a sociological sense.

Knowing this does not give us the answer to the question of the subject but it does make it a researchable question. We can discount the claims of Padania, imagined by the Lega Nord as a national community, not because it is 'artificial'. All nations and all social entities are artificial in the sense of being created at some time. It is rather that Padania never commanded the allegiance of more than a small minority of its inhabitants in spite of the effort put into making it, including a retro-fitted history and culture (Oneto, 1997). Padania was not destined to fail, but it

did so. Quebec and Scotland, on the other hand, need to be taken more seriously, not because they exist in any absolute or primordial sense, but because they have been constructed and, critically, reconstructed in modern times, so as to constitute political communities.

In other cases, the nation contested, internally, with no agreement on the nature of the common political community, or externally, by neighbouring states and communities staking claims for its territory or people.

### **The Object**

In the classic theories of self-determination, the object has usually been assumed to be the creation of a nation-state. Yet as the meaning of statehood itself has changed over time, so have the objectives of nationalists. In the late nineteenth century, nationalists in imperial systems, whether in Ireland or the Habsburg domains, aware of their exposure in a world of big powers, often aimed at domestic self-government within a federal or confederal arrangement. Only with the collapse of the central empires in the First World War did nationalists swing behind independence became the universal goal. In Ireland, where the central power did not collapse, independence was a gradual and often ambiguous process, lasting until the proclamation of the Republic outside the Commonwealth in 1949.<sup>1</sup>

The mid-twentieth century was the heyday of the nation-state, which, in the process of decolonization, was extended to the whole world. By the end of that century, however, the model was coming into question. The nation-state was penetrated by global economic influences (even if the term 'globalization' was over-done). Transnational economic and political orders, including the European Union and NAFTA, constrained independent states. It was widely assumed that this would entail a diminution in the power of nationalism and a waning of secessionist movements because, if even large states were losing effective powers, small states had even fewer prospects. In practice, matters turned out differently. The emergence of transnational regimes provided a framework for the survival of small states by ensuring access to wide markets and security guarantees. So, although the content of independence is diluted, the threshold for independence is lowered. This has allowed self-determination movements to pursue strategies of self-government within Europe, picking up on the early twentieth century arguments about transforming the empires into democratic federations of peoples. The idea that independence-seeking movements should be pro-European integration has mystified some critics (and some of their supporters) but, as some early twentieth century minority nationalists were aware, the doctrine of absolute sovereignty is of much more use to large and powerful nations than to small nations with large and potentially aggressive neighbours.

As the meaning of independence in a functional sense has changed, so has the normative principle of sovereignty. As they adapt to an interdependent world, many nationalist movements have abandoned the idea that sovereignty is indivisible and located only in the nation-state. Post-sovereignists (MacCormick, 1999; Keating, 2001) see sovereignty as shared and negotiated. This, too, reflects shifts within both political science and law, to seeing sovereignty less as a thing that a nation possesses but rather a relationship that is continually negotiated (Loughlin, 2003). It is no coincidence that such ideas have found an echo in places where sovereignty has always been contested and in which rival traditions of pactism and negotiated order are familiar. Such traditions include the Basque historic rights or *fueros*, the Catalan tradition of pactism and complex authority (Herrero de Miñon, 1998), the Scottish doctrine of limited sovereignty and the Canadian 'two nations' theory of confederation, now expanded to include the rights of indigenous peoples (Keating, 2001). Such theories oppose the state, not with a rival claim to absolute sovereignty, but with a different way of thinking about sovereignty itself. Sovereignty is not a thing

---

<sup>1</sup> Irish republicans assumed that full sovereignty meant leaving the Commonwealth, although Indian nationalists had just established that it did not.

to be established by playing the trump card of the supremacy of the nation-state. Rather, it involves a complex epistemic search and some necessarily conflicting interpretations.

The argument has been elaborated most fully with regard to the European Union and to plurinational states such as the United Kingdom, Spain and Canada. Indeed, we can say that in these cases there have in recent decades been two doctrines, coexisting in greater or lesser harmony. One is the classic nation-state doctrine, according to which there is the nation-state, which lends power upwards or downwards in a variety of ways but remains the fundamental source of authority. The other is the view that these polities are plurinational unions in which ultimate authority is dispersed. There was, arguably, no need to resolve this contradiction; indeed it would be futile to try. Given their history and reliance on formal constitutionalism, the Spanish probably worried about it more than the British, with their long tradition of informal union. The British had never in fact contested the existence of multiple nations within the state, but had denied that this had any political implications. From time to time, the issue emerged in the EU but a way was usually found around it, including for the British and for the German constitutional court.

The most elaborate rehearsal of the post-sovereignty position was in the Northern Ireland Good Friday Agreement. This was negotiated between two states and two communities within Northern Ireland. It suspended disagreement on the final destiny of the province, whether as part of the United Kingdom or of the Republic of Ireland. Unionist and nationalist voices were guaranteed legitimacy and equality of respect. Citizens were free to identify as British, Irish or both and institutional recognition was given to that. Symbols of nationality were largely removed from the public domain – although they continued to be contentious.

## **Territory**

Self-determination claims are typically focused on a territory – it is part of the central question of this colloquium. Territory may itself be part of the definition of the nation; states are territorially bounded; political control is usually exercised on a territorial basis. Yet territory, too, has been redefined in a constructivist mode to see it as more than a mere a topographical category (lines on maps); it is also a sociological one (Keating, 2013). Territory can be imbued with social and political meaning and serves to mould political and social structures and cleavages. Borders and boundaries can be rigid, separating spaces from each other, or they can be open and flexible, including zones of transition (*marches*), or frontier areas and zones of transition, penetrated by influences from both sides. Different spatial scales and boundaries might be relevant for different social, economic, cultural, and political systems. Drawing boundaries defines who is in and who is out of the community and can influence who wins and who loses in political exchange. Territory also carries symbolic meaning, in the form of historic sites and places.

Many national claims have indefinite borders. The Basque Country can be defined in multiple ways, depending on how historical, cultural, linguistic, identitarian or jurisdictional criteria are used. The Autonomous Community of the Basque Country is the focus of most political claims but the historic rights pertain to its constituent territories. Beyond are Navarre and the three Basque provinces in France and further out still are other symbolic references. Catalanism may reference the historic territory and Autonomous Community or the broader *Països Catalans*. There are arguments about the boundaries of Quebec and the rights of indigenous peoples and Anglophone communities within it. Fernand Braudel (1986) charted the numerous meanings of Gascony. Flanders has various historic shapes with the present region merely the latest definition – and even there Brussels is disputed. Scotland is unusual in having unchallenged territorial boundaries.

One response to this is personal or 'national cultural' autonomy which allows communities to organize their own affairs on a non-territorial basis (Nimni, 2005) . The principle is applied in a few places (such as Brussels) for education or social services but mostly public services are

inescapably territorial. Territory, moreover is often an intrinsic part of the national claim. So reifying territory and setting fixed boundaries does not work, but nor does eliminating territory altogether. A flexible and constructivist conception of territory can avoid the rigid topological definition and allow for multiple territorial imaginations while providing territorially-provided services. The Northern Ireland settlement includes both territorial autonomy and consociational elements, as well as allowing the two internal communities to connect both imaginatively and functionally with the United Kingdom and the Republic of Ireland respectively. Recent Basque proposals envisage stronger self-government for the Autonomous Community of the Basque Country, along with cultural recognition and cooperation with the wider Basque territories. Recognition of dual citizenship in various forms beyond the core national heartland can help satisfy some national claims without moving borders (as in Ireland) but in some contexts can be a cover for irredentism.

### **The return of sovereignty**

An observer of the European Union at the end of the twentieth century might reasonably, if cautiously, have concluded that the issue of national sovereignty was being managed, although by no means everyone joined Hobsbawm (1990) in pronouncing the end of nations and nationalism. There was hope that, even in eastern Europe and the Balkans, the European model of accommodation could finally win out. Twenty years later, however, sovereignty claims have proliferated, whether in the form of demands for independence in Scotland and Catalonia, or in the vote of England and Wales to leave the European Union.

There are two elements to these sovereignty claims: the subject and the object. The first is what Herrero de Miñon (1998) calls the 'right to be'. Given the reluctance of states and international organizations to grant rights or recognition to entities that are not states, there is a premium on establishing that a given group is a self-determining people or nation. The other claim concerns the object, that the group should be sovereign and independent. This has been described as a difference between ontological (subject) and a teleological (object) claim (Keating, 2021). Walker (2018) has usefully distinguished between 'reflexive nationalism', which focuses on nation-building and is flexible about constitutional forms, and teleological nationalism, which pursues a specific aim, which is typically independence.

One explanation for the renewed demands for sovereignty may stem less from the teleological (object) claim than from the ontological (subject) one. Where recognition of nationality and of the right to negotiate a territory's place within the over-arching unions in which it is nested has been denied, then the sovereignty claim seeks to put this beyond doubt. A great deal of the effort of Basque, Catalan and Quebec nationalism has been devoted to convincing the state to accept its plurinational nature as a union rather than a state, federal or otherwise. This has been less important in Scotland and Ireland, where the ontological claim to be a nation has hardly been contested, even at a time when the UK was refusing them legislative autonomy.

This ontological or subject claim itself does not necessarily entail any specific object or teleological claim. Nations can remain in the realm of culture and history as was the case for a long time with Scotland and Wales. Even the teleological one does not necessarily lead to absolute sovereignty on the nation-state model. It could mean, rather, insertion of the nation as a distinct unit within larger plurinational systems. This has, historically, been an important strand in Basque, Catalan and Scottish nationalism and the predominant one in Welsh nationalism. Successive Quebec referendums have been fought on the concept of sovereignty-association or sovereignty with partnership. Most Catalan nationalists, until recently, eschewed independence in favour of more autonomy within Spain and links with Europe. Now the idea is independence but within the EU. The Basque Nationalist Party, having passed through a radical phase, has returned to ideas of negotiated autonomy within a reformed Spain. Scottish nationalists, in the independence referendum of 2014, presented an attenuated form of independence which critics dubbed 'independence lite'. They argued that Scotland was currently in six unions (political, monarchical, monetary, security, European and social) and proposed to withdraw only from the

political one. As their opponents promised more autonomy, the two sides converged. Opinion polling in stateless nations has regularly suggested that the electorate is more attracted by these 'third way' formulas than by sovereignty in the traditional sense, whether of the state or the smaller nation. There is evidence from Scotland and Northern Ireland that starts from, the hypothesis that insertion into multi-level unions is the first preference of majorities in both places, not merely a second-best option to secure co-existence (Keating, 2021). The Welsh Nationalist Party, Plaid Cymru has, not for the first time in its history, returned back to the idea of independence but in a post-sovereigntist Europe

Brexit, on the other hand, is based in a classic state-nationalism, which brooks no shared authority or limits.

### **Plurinational Democracy**

The territorially bounded, sovereign nation-state was never more than an ideal type or perhaps an aspiration. As we have shown, the idea is intellectually incoherent and impossible in practice. This represents a challenge not merely to nationalist movements seeking separation from existing states; it applies to many existing states which, logically, should be subjected to the same tests as putative states in the making. The plurinational and post-sovereigntist perspective removes this straitjacket and sees sovereignty and self-determination as a series of claims to be managed and reconciled. This does not mean that anything goes and that all assertions are to be given equal value. It does mean that setting the boundaries of a polity should be regarded as a key aspect of democracy, and not merely the conduct of politics within those boundaries. Fears that this will give rise to rent-seeking or 'vanity secessions' find little empirical support. The number of self-determination conflicts in Europe is actually quite small as for most people it is not a main preoccupation. While there is no scientific way of defining who is a 'nation' or 'people' we can recognize intersubjective communities of identity where we see them. Equally important, we can recognize places where common identity is lacking or there is a social division over nationality. There is no point in resorting to fictional entities like the 'international community' to apply a re-formed grid of criteria to apply top-down to self-determination claims (Kymlicka, 2007). More appropriate is a form of non-hierarchical mutual recognition among groups (Tully, 1995). One place where this might potentially be tried is within Europe, including the European Union, the Council of Europe and other transnational spaces within the continent.

### **The European Framework**

The EU might be a propitious location for such ideas because its origins lie in the historic effort to overcome sovereigntist nationalism and incompatible claims to the same territory. Of course, European integration is not a single project with a single aim but different strands within the process might offer hope for managing self-determination and sovereignty issues. Economic integration could, according to neo-functional theory, diminish the importance of territorial boundaries and open up national systems of exchange. To a degree, this has happened but we know now that there is no automatic spillover from economic to political integration. National identities are resilient, although they are more complex and malleable than some recent literature suggests. Economic integration has also exacerbated territorial disparities, provoking opposition both in poor regions that fear marginalization and in wealthy regions that resent the burden of transfers to their less fortunate compatriots. European efforts for territorial cohesion have so far fallen short of the measure of the problem.

During the 1990s and 2000s, there were protracted debates on the ideas of 'Europe of the Peoples' and 'Europe of the Regions'. Neither was ever clearly specified but the general idea was that a political and institutional space might be created within the European architecture for entities other than sovereign Member States. There were some responses but they were rather minor. Under the Maastricht Treaty, a Committee of the Regions was set up. Its weaknesses were twofold. It only had a consultative role, and it included all manner of territorial entities below



the state level, from municipal governments to federated regions, to stateless nations. Another mechanism was a provision whereby sub-state governments could, under certain conditions, represent their Member State (but not themselves) in the Council of the EU. Some regions sought a distinct place with coalitions such as the Constitutional Regions or Regions with Legislative Powers but the momentum faded. By contrast, the role of the Member States was enhanced with the rise and constitutional recognition of the European Council of heads of state and government. This provides an incentive for stateless nations to become sovereign states as the way to share sovereignty in European space. In all of these initiatives, however, care has been taken to avoid the delicate question of national sovereignty and to preserve the principle of the territorial integrity of Member States.

Beyond a functional capacity, the EU also encompasses a set of values or *ethos*, notably a commitment to democracy and freedom. These have been embedded in the criteria for admitting new Member States. The provisions for securing continued compliance with these norms after accession, however, have been severely tested recently in the cases of Hungary and Poland. The long debates about the democratization of the EU itself have revolved around the rival claims of a putative European *demos* against national *demoi*, defined by reference to Member States. There is little about the democratic right to determine the form of the polity and its boundaries, perhaps not surprisingly given that the EU is an association of independent states guarding their own prerogatives. Joseph Weiler (2012, 2014) has even sought to argue (and even to convince some people) that if Catalonia or Scotland were to become independent, this would morally disqualify them from membership of the European Union and violate European values.

There are provisions for the protection of national minorities, enshrined in the Council of Europe, notably the Framework Convention for the Protection of National Minorities. This has several weaknesses, notably that it is up to states to define their own national minorities. Some states are not even part of it. France has not signed the convention and Belgium has signed but not ratified. Protection of national minorities is one of the Copenhagen Criteria for accession to the EU but there is no obligation to continue adherence after admission; existing Member States realized that this would also have to apply to them. Another weakness of the national minorities approach is that it restricts itself to rights of individuals belonging to national minorities, usually in matters of culture rather than to groups as such, and certainly does not encompass either territorial or non-territorial autonomy.

European institutions have also proved ineffectual in responding to cases of secession. Responses to the break-up of Yugoslavia in the 1990s were inconsistent and uncoordinated, starting with the German decision on recognition of Croatia. There is still a division among Member States on the recognition of Kosovo and no official EU position. EU institutions and leaders have stayed out of the debate in Catalonia, which was not surprising although some of the Catalan leaders believed that they would intervene. During the Scottish independence referendum of 2014, Commission and European Council presidents Barroso and Van Rompuy committed themselves and their institutions to the No side and threatened that Scotland would, by voting for independence, put itself outside the EU. Barroso even declared that it might be 'impossible' for Scotland to be within the EU, although there is no legal, procedural or normative justification for such a view. Indeed, had an independent Scotland applied to join the EU, the role of Barroso, as President of the Commission, would have been confined to certifying that it met the accession criteria – which it would have.<sup>2</sup> This goes well beyond the Catalan case in suggesting that even a secession accepted by the state in question and by other Member States<sup>3</sup> would rule

---

<sup>2</sup> Unless we count some technical considerations that have never been applied to existing Member States or accession countries.

<sup>3</sup> Even the Spanish Foreign Minister José Manuel García-Margallo had declared that: 'España no trabaja sobre hipótesis. Lo que sí le digo es que sería determinante a la hora

out EU membership. The only case in which the EU has laid down criteria for secession and accepted the result is Montenegro.

## Prospects

In an ideal world, there might be agreement on the principle of self-determination and its application. We are not in that world. The concept of sovereignty is, itself, incoherent, as I have argued above. The circumstances of territorially-concentrated peoples are so different that, even if we did come up with a set of criteria, individual cases would probably not fit. It might be possible, however, to think about general principles. One is that sovereignty can never be absolute and untrammelled, since there is not space in the world for all possible sovereignties. If Brexit has taught us anything, it is that the principle of absolute sovereignty is a chimera, difficult to define and impossible to apply. Sovereignty cannot be treated as purely axiomatic, as in the Spanish and Westminster doctrines, but always requires a justification .

Linked to this is the consideration of democracy. It is striking that, in contemporary Europe, claims to self-determination are almost always presented on the basis of democracy rather than ethnic particularism. This might be disingenuous, when the *demos* is defined by boundaries which themselves were imposed by force or manipulation, but it is an important principle nevertheless. This is where the Supreme Court of Canada (1998) starts its reasoning. Such reasoning, however, can rarely result in a definitive conclusion. The Canadian court was aware of this. It concluded that there is not a right of secession in the Constitution but that the Constitution itself must be interpreted as resting upon democratic premises. Accordingly, if any province voted for secession by a clear referendum majority on a clear question, Canada would be obliged to negotiate. It then handed the issue back to the politicians, giving them the task of defining what a clear question and clear majority were. In the event, the Canadian federal Parliament decided (in the Clarity Act) that it would do this, unilaterally, itself, which rather undermined the spirit of the judgement.

The judgement on Quebec secession and other jurisprudence of the Canadian Supreme Court have shown a willingness to go beyond the letter of the Constitution and employ a broader range of epistemic arguments and foundational principles (Schertzer, 2016). This allows for an exploration of the many ways in which competing claims can be understood and negotiated. Take, for example, the current debate on whether Scotland is entitled to stage another independence referendum. The UK Government, drawing on the Westminster doctrine of sovereignty and the wording of the Scotland Act (1998), insists that it alone can decide the matter and that it has chosen to say no. A broader epistemic argument would go that successive UK Governments have conceded that the United Kingdom is a voluntary union and that, ultimately, the nations could go their own way. Given the rule of democracy, such an issue can only be decided by referendum. The most democratic way to determine whether a referendum should happen is through an election conducted by proportional representation in which supporters of a referendum gain a majority. Similar arguments can be deployed in Spain. Central governments and courts have insisted that there is nothing beyond the text of the 1978 Constitution (although a few have sought to go back to the Constitution of Cádiz as a founding moment but this does not change the argument). Others, however, have argued that there are other pre-constitutional sources of legitimate authority, including historic rights. They have also argued that even the 1978 Constitution allows for different readings.

Another key principle of consent. This does not mean majority support, as there is always a majority in a referendum with a single question. It means, rather, consent of all affected and, particularly, the consent of losers. The combination of majoritarianism with the absolutist doctrine

---

de decidir nuestro voto cuál fuese la actitud del Reino Unido', *La Vanguardia*, 16-12-2013.

of sovereignty would vest complete power in one part of the community and just perpetuate the grievance that gave rise to the conflict in the first place, albeit reversing the pattern of winners and losers. The Northern Ireland Good Friday Agreement provides for protection for the minority there. It is understood that, should Northern Ireland secede from the United Kingdom and join a united Ireland, the same protections would be available to the former Northern Ireland majority, now a minority in the new state. By contrast, a feature of Brexit is that a narrow referendum majority has been taken as a binding mandate to pursue the most extreme interpretation of sovereignty, with the losing side gaining no recognition whatsoever. This is compounded by the fact that two of the constituent peoples, the Scots and the Irish-identifiers in Northern Ireland, voted to remain by large majorities. The effect is distorted further by the majoritarian electoral system which delivered an absolute parliamentary majority to the exponents of a hard Brexit at the General Election of 2019.

With the exceptions of Kosovo and Northern Cyprus, the countries of western Europe have generally accepted accessions in other European states after they have happened.<sup>4</sup> Even in the Caucasus, they have tended to leave matters alone until they explode into violence. This is doubtless a matter of Realpolitik but it does mean that European institutions do not intervene to prevent matters escalating to the point of secession in the first place by encouraging territorial autonomy and accommodation. There is a pervading fear that doing so would encourage fragmentation and secession. Arguably, the opposite is true, that coming to terms with secessions (albeit belatedly) encourages national movements to move in that direction as the only way of gaining recognition. In spite of seventy years of peace among the states of western Europe, there is still a lack of self-confidence as politicians in France, where the only secessionist challenge is in Corsica and even that is not a serious one, insist that the nation is in danger. Their Spanish counterparts insist that, even to allow Catalonia to call itself a 'nation' entails a denial of the Spanish polity and union.

The ontology of territory, people, nations and sovereignty are so complex these days that there is no prospect of returning to the classic territorial grid or spatial fix, in which function, identity, polity and sovereignty could be contained within a single set of spatial boundaries. At the other extreme, we do not have to fall revert to platitudes about interdependency or multilevel governance, which provide no normative guidance for the design of institutions. Instead, we need to see constitutionalism as a form of politics, or at least, metapolitics and thus a contested field. Finally, we need to recognize the importance of power. Arguments about sovereignty can become abstruse and almost metaphysical but they are embedded in social, economic and political relationships and systems of social stratification. There is no 'optimal' way of addressing the organization of government, because every way it is done will create winners and losers and so generate another round of political contestation.

## References

- Alesina, Alberto and Enrico Spolaore (2003), *The Size of Nations*, Cambridge, Mass.: MIT Press.
- Beran, Harry (1998), 'A democratic theory of political self-determination in the new world order', in Percy Lehning (ed.), *Theories of Secession*, London: Routledge.
- Braudel, Fernand (1986), *L'identité de la France. Espace et Histoire*, Paris: Arthaud-Flammarion.
- Buchanan, Allen (1991), *Secession. The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*, Boulder: Westview.
- Oneto, G. (1997), *L'invenzione della Padania. La rinascità della comunità più antica d'Europa*, Ceresola: Foedus.
- MacCormick, 1999;
- Dion, Stéphane (1991), 'Le nationalisme dans la convergence culturelle. Le Québec contemporain et le paradoxe de Tocqueville', in R. Hudon and R. Pelletier (eds), *L'engagement intellectuel. Mélanges en l'honneur de Léon Dion* Sainte-Foy: Presses de l'Université de Laval.

---

<sup>4</sup> Crimea and eastern Ukraine are in another category, given Russian expansionism and aggression.

- Herrero de Miñón, Miguel (1998), *Derechos Históricos y Constitución*, Madrid: Tecnos.
- Hobsbawm, Eric (1990), *Nations and nationalism since 1780. Programme, myth, reality*, Cambridge: Cambridge University Press.
- Keating, Michael (2013), *Rescaling the European State. The Making of Territory and the Rise of the Meso*, Oxford: Oxford University Press.
- Keating, Michael (2021), *State and Nation in the United Kingdom: The Fragmented Union*, Oxford: Oxford University Press.
- Keating, Michael (2001), *Plurinational Democracy. Stateless Nations in a Post-Sovereignty Era*, Oxford: Oxford University Press.
- Kymlicka, Will (2007), *Multicultural Odysseys. Navigating the New International Politics of Diversity*, Oxford: Oxford University Press.
- Loughlin, Martin (2003), 'Ten Tenets of Sovereignty', in Neil Walker (ed.), *Sovereignty in Transition*, Oxford: Hart.
- Nimni, Ephraim (2005), 'Introduction: the national cultural autonomy model revisited', in Ephraim Nimni (ed.), *National Cultural Autonomy and its Contemporary Critics*, London: Routledge.
- Schertzer, Robert (2016), *The Judicial Role in a Diverse Federation. Lessons from the Supreme Court of Canada*, Toronto: University of Toronto Press.
- Supreme Court of Canada (1998), *Reference re Secession of Quebec*, file 25506, Ottawa: Supreme Court of Canada.
- Tully, James (1995), *Strange multiplicity. Constitutionalism in an age of diversity*, Cambridge: Cambridge University Press
- Walker, Neil (2019), 'Teleological and reflexive nationalism in the new Europe', in Jacint Jordana, Michael Keating, Alex Marx and Jan Wouters (eds), *Changing Borders in Europe. Exploring the Dynamics of Integration, Differentiation and Self-Determination in the European Union*, Abingdon: Routledge.
- Weiler, Joseph (2012), 'Slouching towards the Cool War; Catalanian Independence and the European Union; Roll of Honour; In this Issue; A Personal Statement', *European Journal of International Law*, 23. 4 909–913.
- Weiler, Joseph (2014), 'Scotland and the EU. A Comment', *Verfassungsblog*, <https://verfassungsblog.de/scotland-eu-comment-joseph-h-h-weiler-2/>