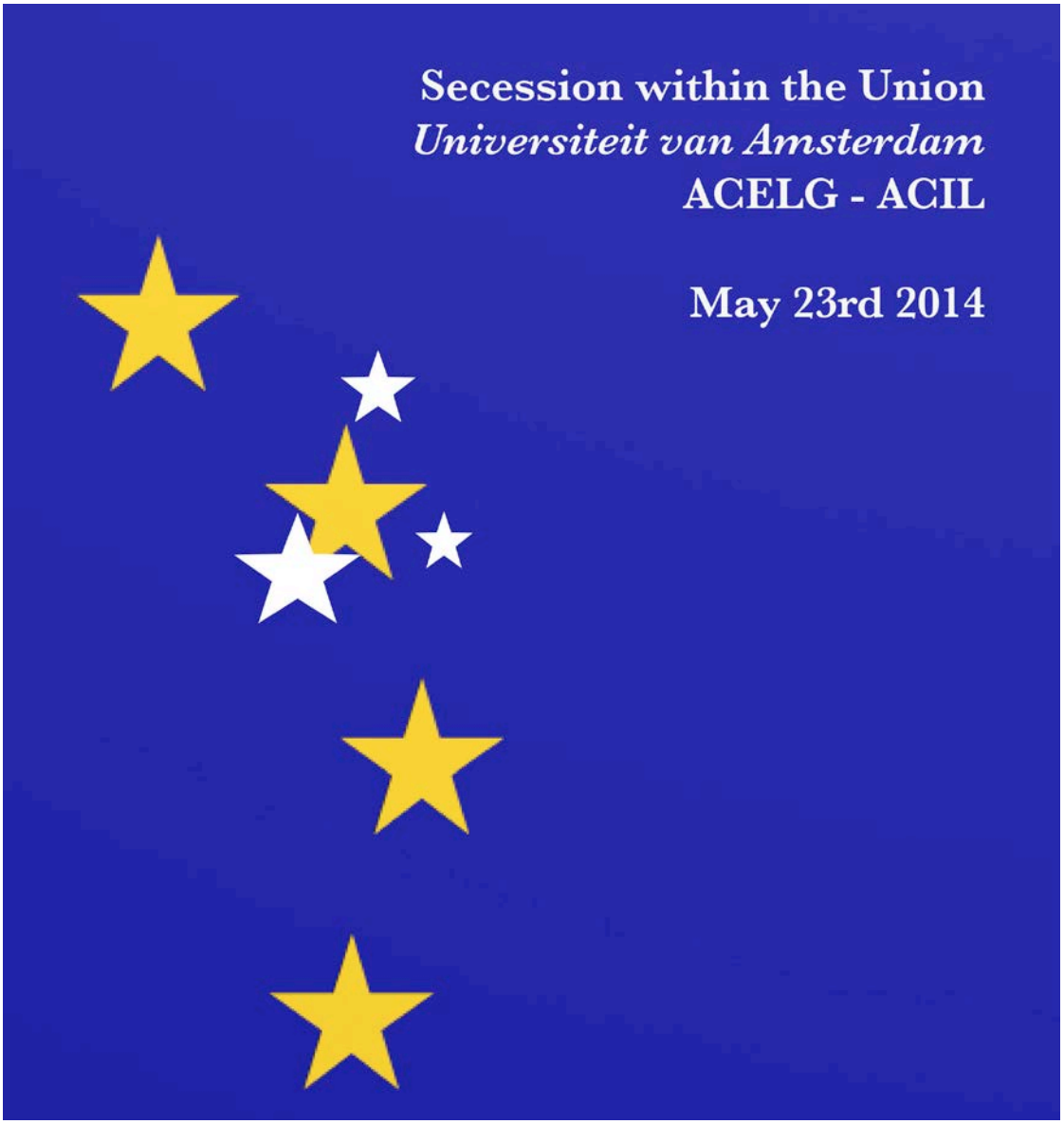

Collected Think Pieces

Secession and Succession in the EU
Fuzzy Logic, Granular Outcomes?
Henri de Waele

Secession within the Union

Intersection points of International and European Law

Catherine Brölmann & Thomas Vandamme (eds.)

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Secession and Succession in the EU Fuzzy Logic, Granular Outcomes?

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1. What is the legal position of regions that venture to secede from an EU Member State?[1] Do they automatically succeed to the rights and obligations that were in place previously, when they were still part of a country that was solidly locked into the Union's legal system? The only answers to these questions that international and European law are able to provide closely resemble the notion of fuzzy logic: no binary, 'true' or 'false' statements seem possible, merely approximate indications.[2] As is undoubtedly also outlined in many of the other contributions to this collection of 'think pieces', the relevant rules are far from fixed, and their application in practise anything but an exact science.

2. A doctrinal position adhered to by some is that, in an actual situation where parts of Member States choose to 'break away', when issues of succession will need to be addressed sooner or later, the solution to every query that might arise has to be principally sought within the EU legal order itself. The latter is, after all, a *new legal order*, and its founding Treaties are to be regarded as undergirding a *sui generis* political structure, differing from conventional international law.[3] However, whether the EU truly stands out so magnificently from 'conventional' international law (in so far as that term is not employed too recklessly to begin with) is debatable.[4] For our purposes though, a

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[1] For our purposes,
the term 'region' means to include, *inter alia*, provinces, communities, or any other self-governing territories capable of surmounting the thresholds for obtaining statehood.

[2] cf Lotfi A. Zadeh, 'Fuzzy Logic and its Application to Approximate Reasoning', in JL Rosenfeld (ed), *Information Processing 74, Proceedings of the IFIP Congress* (Amsterdam/London: North Holland Publishing Company, 1974), 591–594.

[3] Case 26/62 *Van Gend & Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1.

[4] cf only Bruno de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge, CUP, 2012) 19-57.

more important datum is that, when it comes to Member States falling apart, EU law unfortunately offers no guidance whatsoever. We are, alas, confronted here with a vast lacuna – something that could perhaps almost be expected in a structure originally designed as a *traité-cadre*. Still, it is a most remarkable situation when successive Commission Presidents, requested to take a stance, but facing a dearth of principles in this supposedly autonomous and coherent legal construct, can do little more than defer to public international law.[5] Surely this is a harrowing abdication, flying right in the face of the celebrated *Van Gend & Loos* judgment and its progeny. Thus, even when one might want to stress that in actual secession scenarios, the solutions to every query should principally be *sought* within the EU legal order, they can unfortunately not so easily be *found* there.

3. Public international law, then, is not just the relevant framework for (attempts to resolve) the arising issues – it is in reality *shockingly* important, as the founding Treaties only care to pronounce about scenarios wherein Member States *as a whole* decide to break away. Beyond Article 50 TEU, there lies a deafening silence indeed. This should give us pause with regard to the identity of this supposedly autonomous, coherent, post-Westphalian legal construct – is this a deliberate *traité-cadre*, or simply an ill-designed franchise, still surprisingly strongly reliant on external legal sources?

4. That public international law represents the most important frame of reference is all the more problematic, since the rules contained in this frame a) provide no absolute clarity on when secession should be deemed (un)lawful, nor on the consequences a successful secession process necessarily entails; b) in matters of succession, these rules give way to specific agreements agreed upon by the successor(s) and successee(s). In both respects, therefore, the available 'logic' remains inevitably fuzzy. As regards the former, we may only point to the ICJ's ambiguous *Kosovo* Opinion, which has been justifiably labelled as a new petal of the *Lotus* flower.[6] As regards the latter, the extant state practice lacks coherence, and merely a handful of principles has attained the status of customary international law. Moreover, on this topic, there exists no generally accepted codification; while we should of course not overlook the Vienna Convention on

[5] Answer to Question P-524/04 by Eluned Morgan MEP, OJ [2004] C 84E/492; Answer to Question H-1086/06 by Catherine Stihler MEP, OJ [2004] C84E/422; Answer to Question E-007453/2012 by Mara Bizzotto MEP, OJ [2013] C 228E.

[6] PM Eisemann, 'L'avis de la Cour internationale de justice conçernant la declaration unilaterale d'independance relative au Kosovo: une nouvelle fleur de lotus?', in Eva Rieter and Henri de Waele (eds), *Evolving Principles of International Law* (Leiden, Brill, 2011) 281-292.

Succession of States in Respect of Treaties, it entered into force as recently as 1996, features just 19 contracting parties, and in many respects does not reflect the *communis opinio* on the current state of the law.[7] Consequently, breakaway regions in the EU risk to catapult themselves right in between a rock and a hard place, and would be ill-advised to initiate the process without even attempting to agree terms in a 'devolution compact'.

5. Whatever hard and fast conclusions are ultimately drawn in practice, beforehand, we may at least qualify as legally doubtful the suggestion that secession from an EU Member State leads automatically to a situation of dual succession – ie, the emergence of *two* new states which *both* take on the rights and obligations of the country concerned when it was still in one piece. Rather, most of the established precedents exhibit a keen preference for continuity whenever possible, with the seceding part enjoying a *tabula rasa*, while the 'rump' of the former whole retains the legal position in full of the country in its previous form.[8] Ergo, in the cases of Scotland breaking away from the United Kingdom, Catalonia from Spain, or Flanders from Belgium, the paucity of international law principles do convincingly point out that there will be only one successor to the rights and duties flowing from EU membership: a rump-UK, rump-Spain or rump-Belgium as the continuator state.

6. Granted, we ought to pay due attention here to the argument from Union Citizenship, contending that in the special environment that is the EU, this particular status accruing to all persons with the nationality of a Member State would somehow trigger dual succession. Arguably, a mass deprivation of that status could not possibly be deemed proportional for violating the conditions imposed by the European Court of Justice in its *Rottmann* ruling.[9] The sole means of avoiding this calamity would be to allocate in law *both* the newly emerging *and* the rump state to the position previously held by the former whole. This line of reasoning is intrinsically fuzzy, specious – if not to say thoroughly unconvincing. After all, from a public international law perspective, as long as statelessness is prevented, no obstacle to secession exists, and no deviation from the general presumption of continuity is necessary. From an EU law perspective, lest we forget, even when the ECJ has been tirelessly rehearsing the 'fundamental' character of Union citizenship, Article 9 TEU and Article

[7] Its sibling, the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983, has not entered into force yet.

[8] cf eg Daniel Thürer and Thomas Burri, 'Secession', in *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com> accessed 24 June 2014.

[9] Case C-135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449.

20 TFEU continue to underscore its derivative quality.[10] In addition, the *Rottmann* judgment did not rule out deprivation *per se*. Equally, notwithstanding the staunch dicta of the Court, a provision such as Article 50 TEU, allowing for withdrawal of entire Member States, illustrates that Union citizenship is subject to changes in the political landscape, and not a status that should be preserved at all times. To the mind of this author, inhabitants of seceding regions that nevertheless cling on to the latter argument risk to find themselves in a completely different place – cloud cuckoo land – already.

7. Let us next consider another excruciatingly fuzzy argument, predicated on the spirit of Article 50 TEU, that militates in favour of a legal duty for both the seceding part and the rump-state to engage in pre-independence negotiations and reach an amicable settlement prior to separation.[11] In brief, the underlying reasoning holds that if a situation of withdrawal of (more or less sizeable) constituent parts of the Union *is* explicitly regulated, then roughly the same legality standards and procedural rules of thumb should be adhered to in cases where sub-national entities decide to 'release' themselves from the larger whole. Indeed, were we to regard the Union as an autonomous, coherent, post-Westphalian legal construct, the drawing of such analogies would seem perfectly obvious – yet, doubts were expressed already on whether the contemporary EU can indeed lay claim to such a stature, even when in some respects, its constitutional architecture can be adequately defined in federal terms.[12] Moreover, talk of the 'spirit' of a Treaty provision that necessarily guides the process carries more than a whiff of *Van Gend & Loos*. Eventually, it might give rise to a kindred political mythology (or rather: theology). A very first troubling point may be how the true 'spirit' of said article could be persuasively divined. More importantly perhaps, for the black-letter lawyer, a pivotal question is how the Court may be seized to shed its light on the matter. A comparable – but comparably fuzzy – case can be made in favour of interpreting Article 4(2) TEU with regard to the required respect for regional and local identities; certainly,

[10] See eg Case C-184/99 Grzelczyk [2001] ECR I-6193; though cf Henri de Waele, 'The Ever-Evolving Concept of EU Citizenship. Of Paradigm Shifts, Quantum Leaps and Copernican Revolutions', in Leila Simona Talani (ed), *Globalisation, Migration and the Future of Europe. Insiders and Outsiders* (Abingdon, Routledge, 2011), 191-207.

[11] Advanced by Sir David Edward, former Judge at the European Court of Justice, in a post on the SCFF weblog: <http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx> accessed 24 June 2014.

[12] Robert Schütze*, From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, OUP, 2009).

in similar vein, from that proviso a duty *could* be distilled for the Union institutions, offices and bodies to duly recognise and involve in further negotiations a newly independent region. Again though, attractive as this position may appear *in abstracto* to proponents of a smooth post-secession transition phase, no such outcomes can be guaranteed *ab initio* without an authoritative elucidation from the Union's judiciary.

8. Does there then not exist some way in which such an elucidation might be procured, so that the EU legal order *would* actually be able to offer solutions to all arising queries itself, whether related to secession or succession, either as regards substance or procedure? Interestingly, ex Article 218(11) TFEU, the Court can be involved when it comes to assessing the compatibility with the Treaties of a Member State's withdrawal agreement – since, in conformity with Article 50 TEU, this would concern an international treaty to which the Union itself is a party. Conversely, accession agreements, as dictated by Article 49 TEU, are concluded between the applicant country and the Member States – a treaty to which the Union is *not* a party, hence rendering it impossible for the ECJ to be approached on the basis of Article 218(11) TFEU. Of course, *tertium datur* in the form of Article 267 TFEU: for it is far from unthinkable that preliminary reference questions are submitted to the Court, offering it a splendid opportunity to speak out on the terms of withdrawal of seceding countries or regions, the methods by which these were agreed, and the remit and function of Articles 4, 49 or 50 TEU. In such a scenario, it is not unlikely for the argument from Union Citizenship to serve as a linchpin, coming back to haunt the continuator state after all (imagine eg a Scottish, Catalonian or Flemish person also in possession of the nationality of another Member State, not acquiescing in her being stripped of a British, Spanish or Belgian passport pursuant to the secession of Scotland, Catalonia or Flanders).[13]

9. Alternatively, without intending to embark on a different trail leading straight to cloud cuckoo land, it can at this stage not be ruled out that the International Court of Justice would be engaged, if only because some of the secession scenarios prompt a rethink on the current composition of the UN Security Council (whereby it should be noted that the Vanguard class submarines that carry the UK's current nuclear arsenal are currently stationed at the Faslane naval base in Scotland).[14] The most intriguing upshot of ICJ involvement could be a reverse *Kadi* – the UN's most prominent judicial

[13] Arguably, if such a preliminary reference was to be submitted after a referendum in which a majority speaks out in favour of independence, but before the actual enactment of the separation, questions on eg the deprivation could not be considered manifestly hypothetical by the Court under its *Foglia/Novello* doctrine.

[14] The incredulous reader is also referred to the Kosovo precedent.

body pronouncing on, and possibly censuring, the EU's handling of key international law precepts.[15]

10. Just as hard cases make bad law, it will by now have dawned on the reader that fuzzy logic produces granular outcomes. In fact, the singularity of constituent parts of a EU Member State 'breaking away' from their surroundings constitutes a veritable litmus test for both the European and the international legal order. In matters of secession, nor of succession, do the extant rules provide answers other than by proxy. Seceding regions retaining the rights and obligation enjoyed previously within the Union? Essentially doubtful. Dual succession of both the newly independent and the remainder state? Most improbable. Treaty articles imposing legal obligations on parties to ensure an orderly transition? Conjecture. Supranational and/or international courts proffering some much-needed guidance? Not implausible. Evidently, considering the sluggish progress in agreeing on additional principles and theorems thus far, no firmer answers are to be expected from public international law in either the short or the medium term. At forthcoming instances though, at least on the occasion of a revision of the Treaties to accommodate one or more new Member States, preferably some sharp baselines are drawn in EU law for the conundrums that were only very briefly touched upon here. To be sure, no opulence of pointers is called for, and neither can an ever closer union in any way be bound to dispense a recipe for its incremental fragmentation. At the same time, in light of the contemporary EU's sheer incapability to offer parameters for determining the veracity of many of the opinions expressed, in political as well as academic circles, its legal order seems hardly worthy of the autonomous epithet it was so happily endowed with over fifty years ago.

[15] cf Joined Cases C–402/05 P and C–415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I–6351.