Democracy in Question? Direct Democracy in the European Union

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Challenges posed to European integration by exercises of direct democracy at the national or sub-state level – EU response to referendums on internal constitutional matters – Greek, Scottish and Catalan referendum processes – Resilience of state nationalism and the complex pluralisation of identities below the level of the state

Introduction

This article addresses several recent exercises in direct democracy at a state and sub-state level across Europe, each of which poses challenges to the European Union in different ways. Its focus is on referendums that have been held on an internal constitutional issue but which have a significant European dimension, and in this way it adds a new perspective to the rich and increasingly important body of research and debates on referendums and the EU.[1] The EU project is often cast in temporal terms as a move forward from a 'statist' vision of Europe towards a 'post-sovereign' reality. Certainly, the trajectory of the EU has been towards institutional integration and a diminution of the sovereign prerogatives of Member States. But far from offering a new vision of demotic diversity, the EU has in recent times engaged in an increasing process of centralisation which, for critics, does not sufficiently take into account Europe's rich plurinational reality. The dramatic proliferation of the referendum across Europe has served to expose how strong national identities remain both at state and sub-state level and has at

[1] Indicatively, F. Mendez, M. Mendez and V. Triga, *Referendums and the European Union: A Comparative Inquiry* (Cambridge University Press 2014); S. Hobolt, *Europe in Question: Referendums on European Integration* (Oxford University Press 2009).

times also impeded efforts to achieve closer integration within the EU. The failure of the draft Constitutional Treaty in 2005 following rejections of it in referendums held by France and the Netherlands was a shock to the system, while the Brexit referendum result in 2016 was, at least in part, the culmination of growing disaffection within the UK with the pace of EU polity-building.

Referendum democracy is a growing feature of constitutional politics in Europe. We see this when we reflect that of the first 15 states to form or join the European Communities/Union only Denmark and Ireland used referendums as part of the ratification process, whereas, of the ten states that acceded in 2004, only Cyprus did not. In addition, the recent experience of referendums poses a series of challenges to the elite-driven model of EU politics, to its centralising telos and to its narrow approach to national identity, which offers no meaningful space for demotic multiplicity below the level of the state. In order to further explore the relationship between direct democracy and the European project, this article assesses three recent national referendums (or referendum processes) focusing prima facie on an internal constitutional issue: those held in Greece, Scotland and Catalonia. At the same, each of these referendums had a significant European dimension. As will be highlighted, because of this European dimension, these referendums, each in its own way, pose challenges to the demotic certainties at the heart of the European project.[2]

The Greek 'bailout' referendum in July 2015 took place at the peak of the debt crisis and was viewed as a challenge to the pressures placed upon Greece by the austerity measures imposed by its creditors, the European Commission, the European Central Bank and the International Monetary Fund. The issue of how Greece could build a path to economic recovery from an unprecedented financial crisis, led to intense political disagreement between the Greek government and the creditors. After an impasse in the negotiations, Greek Prime Minister Alexis Tsipras announced that the two most recent proposals by the creditors outlining the conditions to be met in exchange for financial assistance, were to be approved or rejected by the Greek people through a referendum. The resort to the referendum was an attempt by a national demos to turn the democratic tables upon the imposition of austerity measures perceived as undemocratic and authoritarian, but can also be seen as a challenge to the EU and the Eurozone policies. As we will explore in the article, it is notable just how involved key EU actors were in trying to procure a result favourable to the European project, attempting to subvert a discrete constitutional moment for the Greek people.

The paper also examines how direct democracy below the level of the state poses its own challenges. We address the independence referendum in Scotland, in 2014 and

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[2] The article, therefore, does not examine referendums where the implementation of a European-wide policy was challenged at the domestic level through a referendum.

the build-up to what was designed to be the Catalan referendum on independence on 1 October 2017, a project that has met with strong and ongoing resistance from the Spanish state. The Catalan independence referendum process originated from a disagreement over the scope and limits that the Spanish constitutional framework provided for Catalan autonomy and its recognition of its status as a minority nation, including the constitutional principle of democracy and the options for direct democratic participation. The failure to reach an agreement that could enable a negotiated referendum led to proposals for holding a unilateral independence referendum for Catalonia on 1 October 2017. Despite the Spanish authorities' attempt to stop it, the vote went ahead in many polling stations, leading to a standoff between both orders of government, and to the suspension of Catalan autonomy.

The Scottish referendum on independence on 18 September 2014 was much less controversial. It was staged by the Scottish Government by way of framework legislation passed by the Scottish Parliament. Crucially, this was with the consent of the UK Parliament which ceded the lawful authority to the Scottish Parliament to hold the referendum and undertook to respect the result.[3]

The challenges for the EU posed by the latter two processes were very different from that presented by Greece: both Catalan and Scottish nationalists see EU membership as key to their 'state' strategies. In addition, the Catalan authorities sought the assistance of the EU Institutions and of the EU legal framework to enable their referendum to go ahead. Nonetheless, the tacit or implicit hostility displayed by the EU towards these expressions of sub-state nationalism, particularly in the case of Catalonia, highlights the extent to which the EU is itself wedded to a dualistic vision of the Union as a binary relationship between the EU as a supranational project on the one hand, and the nation state on the other. But all three referendums are indeed challenges to the EU's centralising project. Just as the Greek referendum[4] challenged the Union's self-confidence about the inevitability of the shift in power from the nation-state to the EU, so too the resilience of sub-state nationalism, albeit for now at least taking on a decidedly pro-EU strategy, serves to highlight the ongoing resilience of vernacular identities and the lengths people and peoples will go to build polities that reflect the national aspirations of their own societies.

In its assessment of these national state or sub-state referendums, and after a brief section on the challenges posed by the rise of the use of referendums in

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[3] 'Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland (the Edinburgh Agreement)', Edinburgh, 15 October 2012 available at <www.webarchive.org.uk/wayback/archive/20170701045319/http://www.gov.scot/About/Government/concordats/Referendum-on-independence>, visited 3 November 2017.

[4] While the Greek referendum, and the referendum outcome, challenged EU economic integration, the Greek government ultimately capitulated and accepted the conditions imposed by the creditors in exchange for access to bailout funds.

Europe, the article considers the following matters in turn: the demos issue raised by the referendums, the issues of legality and interdependence that emerged in relation to each of these exercises of direct democracy and the extent to which the EU itself attempted to influence internal domestic constitutional processes. In doing so we reflect upon the resilience of constituent power and what these examples of direct democracy at the state and sub-state level have to say about the current state of EU integration.

The rise of the use of referendums and the challenges for the EU

In recent years, the use of referendums has proliferated remarkably across the world, in a trend that shows no evidence of waning.[5] Due to the changing dynamics of contemporary representative government, citizens are increasingly looking to new and often more direct forms of political engagement and participation and the referendum has emerged as the obvious vehicle for popular decision-making. The proliferation in the use of referendums has been significant for the EU, most obviously in processes of accession and treaty revision. More recently, we are witnessing the growth of referendums which focus on a specific policy or decision adopted by the EU within its sphere of action. Examples of this are the Dutch Referendum on the ratification of EU-Ukraine Agreement and the Hungarian Referendum on the EU decisions to introduce agreed mandatory refugee allocation quota, both held in 2016. These represent a new type of referendum and potentially herald a new phase in the deployment of referendums in EU matters. The UK's recent 'Brexit' referendum is also the first case of a Member State holding a referendum on leaving the Union.

Furthermore, the progressive expansion of the EU's sphere of action is leading to the growing interdependence between the legal orders of the EU and its Member States, and therefore in many cases the use of referendums by Member States in seemingly domestic matters will have consequences for, and involve the application of, EU law. These will be the specific focus of this article. In these cases, as a result of the significant EU dimension of the matter to be decided, different sides in the debate may call on individuals to vote as either national (or sub-state national) citizens or as EU citizens, with different consequences resulting from the conferring of primacy on each of these identities. If the primacy is placed on the EU identity of the voters, this may also imply an expectation that the wider EU demos, and therefore the other Member States and the EU institutions, will accept or view the decision adopted favourably and as compatible with the European project. On the other hand, and from the EU's perspective, these cases will often

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[5] S. Tierney, *Constitutional Referendums: The Theory and Practice of Democratic Deliberation* (Oxford University Press 2012) p. 11; Mendez, Mendez and Triga, *supra* n. 1.

put the EU Institutions' responses in the spotlight and generate tensions between the general principle of the EU's non-intervention in internal matters of its Member States and its desire to protect its own general interest in relation to the outcome of the decision subject to referendum. As we will highlight in our analysis, albeit initially framed at an internal state or sub-state level, these referendums also raise many of the issues that are central to the current debates on direct democracy and the EU.

More generally, the EU and its Member States are currently facing serious internal and external challenges, which make demotic fissures even more threatening. These include, among others, the EU's longstanding weak democratic status,[6] the Eurozone crisis and different approaches to austerity,[7] the pressures of migration, the rise of sub-state nationalism and the growth of Russia as a regional power. It is perceived within the EU that a collective response to these challenges, whether initially framed at a sub-state, state or EU level, will require some degree of further cooperation or integration. However, the institutional scope to foster EU-wide citizen deliberation – debating and contesting the EU's responses to these challenges and the direction of EU integration – is weak. Instead, the Member State referendum fills the gap and in doing so, rather than opening a space within which Europeanisation is likely to grow, instead offers one of the clearest and most direct instruments for contesting EU policies and decisions and for entrenching state-based popular attachments.[8] It is in the context of this changing landscape that we will analyse the implications of some of the most significant state and sub-state referendums held recently in the European sphere.

Definition of the demos

In the cases of Greece, Scotland and Catalonia, despite the exercise in direct democracy focusing upon an 'internal constitutional issue', the EU dimension was

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[6] *See* indicatively F. Decker, 'Governance beyond the nation-state. Reflections on the democratic deficit of the European Union', 9 *Journal of European Public Policy* (2002) p. 256; M. Tsakatika, 'Governance vs. politics: the European Union's constitutive 'democratic deficit', 14 *Journal of European Public Policy* (2009) p. 867.

[7] F. Fabbrini, 'Austerity, the European Council, and the Institutional Future of the European Union: A Proposal to Strengthen the Presidency of the European Council', 22 *Indiana Journal of Global Legal Studies* (2015) p. 269; J. Pisani-Ferry, *The Euro Crisis and Its Aftermath* (Oxford University Press 2014); M. Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) p. 521.

[8] F. Mendez and M. Mendez, *Referendums on EU Matters* (European Parliament, Directorate General for Internal Policies, Policy Department for Citizens' Rights and Constitutional Affairs, 2017), available at <www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU (2017)571402_EN.pdf>, visited 16 March 2018, p. 51.

central to the constitutional debate, engaging as it did wider questions that are central to the future of the European project. The first of these is the identity of the demos.

A tension between the resilience of national demoi within the Member States and the incipient demos of the EU has been an ongoing aspect of the use of referendums in relation to the integration process. Treaty revision referendums have become vehicles to articulate and empower national identities and in some cases voters have used them to vent frustrations with the broader constitutional trajectory of the EU.[9] In this sense, these referendums have been criticised from an EU perspective as undemocratic, because they allow the people of a single Member State to block the development of EU integration for the rest of the peoples of the EU. However, they can also be seen as part of a continuous process of multilevel deliberation on the EU integration process, involving citizens, governments at the national level, and the EU institutions.[10] If seen in this way, they are a reflection of the complexity of the development of constitutionalism in the EU and of some form of pan-European public. We also see the complex interconnection between different levels of demotic identity in the three main cases considered in this article, even though the issue to be decided in each, unlike referendums dealing explicitly with European integration, was prima facie a domestic one. As this section will illustrate, different understandings of the scope and significance of membership of the EU can arise even in such referendums on seemingly internal matters.

In the Greek referendum, the underlying issue related to the appropriate economic path Greece should follow to recover from the debt crisis, namely whether it should accept the austerity proposed by its creditors or not. Inevitably, Greece's participation to the Eurozone meant that a seemingly internal matter (shaping internal economic policy to overcome a debt crisis), had a significant European dimension. The government and parties campaigning against the proposed austerity measures (the 'No' side), presented the referendum as an opportunity for Greece to regain economic sovereignty,[11] and for the Greek people to have the power to democratically determine their own economic future.[12] The campaign highlighted that during bailout negotiations, the creditors had failed to treat the Greek delegation 'as an equal and sovereign partner in negotiations'.[13] Therefore, for the 'No' side, a resounding rejection of the

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[9] Tierney, *supra* n. 5, p. 164.

[10] Tierney, *supra* n. 5, p. 164.

[11] V. Triga and V. Manavopoulos, 'The Greek bailout referendum of 2015', in Mendez and Mendez, *supra* n. 8, p. 135.

[12] The real reasons Prime Minister Tsipras sought a referendum at that point in the negotiation process are contested and unclear.

[13] Triga and Manavopoulos, *supra* n. 11, p 135.

creditors' proposals would allow the Greek people to regain their voice in a negotiating process that was faulted for being exclusionary, undemocratic, and overly technocratic. The arguments employed ('No to subjugation, No to the new occupation'),[14] sought to invoke and bolster the Greek, rather than the European, identity of the electorate in order to repudiate what were presented as the transgressions of the creditors.

In a swift response, Jean-Claude Juncker, the President of the European Commission, highlighted that the referendum had repercussions that would go beyond the interests of the Greek people. Juncker framed the government's decision to call a referendum as a 'self-interested'[15] one driven by populism and tactical gamesmanship. As he stressed 'playing one democracy against 18 others is not an attitude worthy of the great Greek nation'.[16] This, according to Juncker, gave the Greek electorate a dual responsibility in the referendum. Juncker asked voters to be aware of 'the national *and* European role they are playing'[17] when voting. He stressed how the 'other Eurozone Member States have gone to great lengths to accommodate Greece'[18] and connected a referendum outcome rejecting the proposals to 'the Greek people letting down the European Union'.[19] Thus, for Europe, the scope of the question posed in the referendum was different. It was not meant to determine the appropriate economic policies that should be adopted to ensure Greece's economic recovery, but instead, it represented a yes/no to the broader project of European economic integration. In this regard, Juncker highlighted the need for a Europe that 'seek[s] the common interest' and is not 'a stage of confrontations between national interests'.[20] This approach asserted the primacy of the European identity of the voters, essentially asking them to vote not as Greeks, but as Europeans. It also suggested to the Greek people, that the referendum was far from being a 'sovereign act, self-contained within the state'.[21] It was instead, a thinly-veiled referendum on supranational integration, which represented a clear 'contest between an internal conceptualization of sovereignty'[22] (this was promoted by the 'No' side and related to the sovereignty of Greece to determine its own fiscal policy), against an

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[14] Triga and Manavopoulos, *supra* n. 11, p. 134.

[15] 'Transcript of President Jean-Claude Juncker's press conference on Greece' *European Commission Press Release Database*, 29 June 2015, <europa.eu/rapid/press-release_SPEECH-15-5274_en.htm>, visited 3 November 2017.

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*

[21] Tierney, *supra* n. 5, p. 154.

[22] Tierney, *supra* n. 5, p. 155.

'external conceptualisation'[23] of sovereignty whereby the EU increasingly was asserting its position as the 'incipient sovereign'[24] that should have the authority to determine a solution to the economic crisis that would be palatable to all Eurozone members. The latter approach was the key feature of the 'Yes' campaign in the referendum. The campaign suggested unequivocally that 'the electorate should vote as if they were voting for the country's participation in the Eurozone'.[25]

Interestingly, the cases of the sub-state referendum processes in Catalonia and Scotland stand out from other EU-related referendums because of their pro-European approach. In both cases, it was the pro-independence Scottish and Catalan governments that stressed the duality of the demos, and which positioned Scottish/Catalan citizens as European citizens. This was an effort to emphasise a vision of European citizenship and of the European demos as something that was more than merely contingent upon Scotland and Catalonia remaining part of the UK and Spain respectively, and which would therefore endure even in the event of independence. In the Catalan case this understanding of forming part of a wider European demos has also led to an understanding that the Member States and the European institutions have a duty in relation to the citizens of Catalonia, as European citizens, and their desire to hold a democratic referendum on their future within the EU. In contrast, it was the UK and Spanish governments, largely supported by the rest of Member States and EU institutions, which insisted on a much more limited understanding of the role of European citizenship: one entirely conditional upon the Member State. In acceding to this narrow construction of the origins of EU citizenship the EU was perhaps implicitly conceding that in demotic terms it is as yet no greater than the sum of its parts.

The question of the definition of the demos was one of the most contested in the lead up to the Catalan referendum in October 2017. One of the main reasons for the refusal of the Spanish authorities to engage with the process or to allow the referendum to go ahead was a rejection of the very existence of a 'Catalan people' with a right to decide unilaterally on their constitutional future. This fundamental disagreement on whether Spain contained plural demoi manifested itself in the different interpretation by the Catalan and Spanish orders of government of the constitutional provisions that refer to 'national sovereignty', the 'indissoluble unity of the Spanish people' and 'the right to self-government of the nationalities and regions'.[26]

It is notable that the Catalan government, rather than falling back upon generic public international law principles of self-determination, in fact tried to frame

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[23] Tierney, *supra* n. 5, p. 155.
[24] Tierney, *supra* n. 5, p. 155.
[25] Triga and Manavopoulos, *supra* n. 11, p. 131.
[26] Arts. 1 and 2 of the Spanish Constitution of 1978.

their demotic claims, and the salience of these in interpreting the Spanish constitution, by reference to the EU, seeking to make use of relevant aspects of EU principles to bring in the EU institutions as intermediaries between Catalonia and the central state.[27] The framing of the referendum as a European-wide issue occurred first in terms of the political focus of the campaign. This can be seen in the initial street marches, with the main banner of the march held on 11 September 2012 reading: 'Catalonia, new state of Europe'.[28] The message of the pro-independence movement was very clear: they wanted to break away from the Spanish state but strengthen their links with the rest of the EU by acceding to full statehood and participating as an equal with other Member States in all EU institutions, bodies and processes. The European focus of the referendum process can also be seen in the Catalan Parliament's initial Resolutions, firstly urging the Catalan Government, political forces and social and economic agents to build the maximum consensus 'in dialogue with the international community, the European Union and the Spanish government';[29] and secondly, in the adoption of the 'Declaration of Sovereignty and the Right to Decide of the people of Catalonia', where 'Europeanism' was included as one of the main principles for the process, stating that 'The founding principles of the European Union will be defended and promoted, particularly the fundamental rights of citizens, democracy, the commitment to the welfare state and solidarity among the various peoples of Europe (…)'.[30] The Catalan Parliament therefore not only framed the referendum as a European-wide issue, but made explicit reference to EU principles in facilitating the process and providing a more flexible and accommodating legal framework, which would be more responsive to Catalan demands.

The Catalan Government also appealed directly to the EU Member States and institutions for assistance, and for them to act as mediators between themselves and the Spanish authorities in order to enable the referendum to go ahead. In 2014, the Catalan President, Artur Mas, sent letters to the heads of state and government of the 27 EU Member States and to the EU Commission, asking for

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[27] *See* Parliament of Catalonia, (2013), 'Resolució 5/X del Parlament de Catalunya, per la qual s'aprova la Declaració de sobirania i del dret a decidir del poble de Catalunya'. The declaration makes specific reference to defending and promoting 'the founding principles of the European Union particularly the fundamental rights of its citizens, democracy, the commitment to the welfare state, solidarity with the different nations of Europe, and to economic, social and cultural progress'.

[28] I. Salvatierra, 'L'ANC vol una manifestacio massiva l'11-S i adverteix que la pancarta ''que compta'' es 'Catalunya, nou Estat d'Europa' [*The ANC wants a massiva march on the 11th September and warns that the banner 'that counts' is 'Catalonia, new state of Europe*] (2012) available at <www.ara.cat/especials/onze_de_setembre-ANC_0_768523223.html>, visited 26 March 2018.

[29] Parliament of Catalonia, (2012) 'Resolució 742/IX del Parlament de Catalunya, sobre l'orientació política general del Govern'.

[30] Parliament of Catalonia, (2013), 'Resolució 5/X del Parlament de Catalunya, per la qual s'aprova la Declaració de sobirania i del dret a decidir del poble de Catalunya'.

support for a 'peaceful, democratic transparent and European process'.[31] In 2017 the new Catalan President, Carles Puigdemont, was more emphatic in a speech given at the European Parliament building leading up to the referendum, arguing that the Catalan conflict is 'a European problem – and Europe cannot look the other way'; 'Europe' he insisted, 'should be part of the solution'.[32] He and other important political figures in Catalonia, such as the Mayor of Barcelona, called again on the EU to intervene in the conflict after the significant use of force by the Spanish riot police against Catalan and therefore European citizens on the day of the vote, the suspension of Catalan self-government and the imprisonment of the main Catalan political leaders.[33]

On the other hand, the proposals for a Catalan independence referendum were also characterised as an affront to the values of the EU and to the process of European integration. The best-known exponent of this argument is Joseph Weiler, but the Spanish Prime Minister, Mariano Rajoy, and members of the Spanish Parliament put forward similar arguments.[34] In response to the Catalan authorities' attempts to 'Europeanise' the referendum process, the Spanish Foreign Ministry also intensified contacts with other Member States and with the EU institutions to explain the Spanish Government's position and request their support in dealing with what they defined as an internal constitutional issue.[35] As a result, the European Member States and EU institutions received pressure to

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[31] Ara, (2014), 'Mas demana en una carta als líders europeus suport a la consulta' [*Mas asks for the support of European leaders in letter*], <www.ara.cat/politica/Mas-liders-europeus-suport-consulta_0_ 1058894222.html>, visited 26 March 2018.

[32] 'Puigdemont: 'Europe cannot look the other way', *Catalan News Agency*, 25 January 2017 <www.catalannewsagency.com/politics/item/puigdemont-europe-cannot-look-the-other-way>, visited 26 March 2018.

[33] S. Jones and S. Burgen, 'Catalan leader calls for mediation with Spain over independence', *The Guardian*, 2 October 2017, <www.theguardian.com/world/2017/oct/02/catalan-government-emergency-meeting-spain-independence>, visited 26 March 2018 and C. Camps, 'Barcelona mayor proposes EU dialogue platform on Catalan conflict', *El Nacional*, 5 October 2017, <www. elnacional.cat/en/news/colau-dialogue-platform-eu-catalonia_199119_102.html>, visited 26 March 2018.

[34] J. Weiler, 'Catalonian Independence and the European Union', *European Journal of International Law Blog*, 20 December 2012, <www.ejiltalk.org/catalonian-independence-and-the-european-union/>, visited 26 March 2018; C. Alvarez de Toledo, 'Europe cannot afford to give in to the separatists', *FT.com*, <www.ft.com/content/bf93a536-988a-11e3-8503-00144feab7de>, visited 26 March 2018. Contra these positions *see* N. Walker, 'Hijacking the Debate' *UK Constitutional Law Blog* (18 February 2014), available at <ukconstitutionallaw.org/>).

[35] 'Margallo convoca a los embajadores de los países de la UE acreditados en Madrid en plena ofensiva para frenar el soberanismo' [*Margallo meets the ambassadors from EU countries based in Madrid in full attack to stop the sovereignist movement*] *La Vanguardia*, 19 September 2013, <www. lavanguardia.com/politica/20130919/54387754857/margallo-convoca-embajadores-ue-madrid.html>, visited 26 March 2018.

intervene from both sides of the conflict, each asserting their respective positions to be a more faithful understanding of the European project.

The EU was also a central focus of the 2014 independence referendum campaign in Scotland ahead of the September vote. Since the 1990s the Scottish nationalist movement had campaigned under the banner 'Independence in Europe', to position the Scottish independence movement as one which was cosmopolitan in outlook and hence fully engaged with the new supra-national realities of the continent. It is notable that a central part of the debate was citizenship. The Scottish Government saw a direct and salient link between citizenship in an independent Scotland and EU citizenship. The Scottish Independence Bill, which set out the Scottish Government's plans for an interim constitution to take effect upon independence in March 2016, reasserted Scotland's commitment to the EU, its law and the notion of European citizenship.[36] The Bill sought to link Scottish citizenship to EU citizenship in the period after independence, meaning EU citizenship rights would be engaged, at least in Scots law, upon 'independence day' under the provisions of the Bill.[37] Of course, this in itself would not have secured EU citizenship if Scotland was not a Member State at this point. But even if the accession of Scotland as a Member State had not been concluded, there would be a domestic template in place to allow EU citizenship rights to continue for Scottish citizens in an independent Scotland either by their holding dual nationality (if UK citizenship had not been removed from Scottish citizens at that point), or by virtue of the provisional effect of any draft accession treaty that could possibly have been activated in EU law in the interim period before formal accession of Scotland as a new Member State.[38]

The very fact that the interim constitution which would have founded Scottish self-government set out to define citizenship in avowedly European terms highlights the extent to which EU membership was woven into the independence campaign and how much the Scottish nationalist notion of the Scottish demos focused upon Scots as part of a wider EU body of citizens. In this respect the notion of nationalism reviving below the level of the state needs to be contextualised by the fact that in both Scotland and Catalonia, at least at the elite level, the vernacular national identity was being put forward as very much a mixed identity which shared the EU vision of an integrating European demotic space. In this way both processes brought the wider

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[36] 'The Scottish Independence Bill' s 24, contained in The Scottish Government, 'The Scottish Independence Bill, A Consultation on an Interim Constitution for Scotland', 16 June 2014.

[37] 'The Scottish Independence Bill' s 18.

[38] S. Tierney and K. Boyle, 'An Independent Scotland: The Road to Membership of the European Union', ESRC *Scottish Centre on Constitutional Change*, Briefing Paper: 20 August 2014, <www.centreonconstitutionalchange.ac.uk/publications/research-briefings/independent-scotland-road-membership-european-union>, visited 26 March 2018.

EU and its citizens into the referendum conversation at least as interlocutors and potentially, in a longer-term sense, as part of a wider determining demos.

As in the case of referendums in relation to the EU integration process, therefore, in these domestic referendums a tension arises. Are they to be understood as instruments that contribute to multilevel deliberation and decision-making in a developing EU constitutional framework? Or are they simply vehicles to articulate and empower resilient national identities in a state-based system?

In the end something of a paradox is at work. The EU faces a series of crises concerning the coherence of its integrationist project: Euroscepticism, financial crisis, migration and now also the response to sub-state nationalism. Is it feasible to look for a Union-wide process of democratisation that will facilitate wide deliberation upon these issues and the identification of solutions that are legitimate and sustainable across the EU? As will be further confirmed in the following sections, the EU seems to lack the institutional means and the political will to foster this type of initiative. Instead, the referendum has emerged in a way that seems to be re-nationalising European politics, leading individual territories to reassert their national prerogatives and in this way distance themselves further from the very idea of a pan-EU solution.

Referendums, legality and visions of Europe

The ongoing process of European integration has transformed the EU from an international to a constitutional order, with a growing interdependence between the legal orders of the EU and its Member States.[39] Indeed, references to the EU as a form of multilevel and/or plurinational federation are now commonplace. However, this process has not gone uncontested and has involved constant struggles over constitutional sovereignty between the EU and its Member States. Many of the treaty revision referendums and in particular their outcome, are a reflection of these struggles and of the resistance of the citizens of certain Member States to the pace or nature of EU integration.[40] They also reflect different competing visions about the current state and future of the European project, which are also very much present in debates across the different Member States today: that of the EU as a developing post-sovereign entity versus that of the EU as primarily a union of sovereign states.

In all three of the main cases considered, despite the fact that the central issue to be decided was primarily a domestic one (how to best overcome an austerity crisis

[39] J. Shaw, 'The European Union and global constitutionalism', in A. Lang and A. Wiener (eds.), *Handbook on Global Constitutionalism* (Edward Elgar Publishing 2017); N. Walker, 'Federalism in 3D: The Reimagination of Political Community in the European Union', *Catolica Law Review* (2016) p. 67; M. Keating, 'Europe as a multilevel federation', 24(4) *Journal of European Public Policy* (2017) p. 615.

[40] Tierney, *supra* n. 5, p. 156–161.

in Greece, and the drive for independence in Scotland and Catalonia), the decision was also going to have a clear impact on the EU legal order. Furthermore, in the three cases, much of the focus of the internal debates was on what the consequences of the decision would be, and in particular, the legal consequences of the referendum outcome at the EU level. While the decision on the referendum question was in the hands of the people of the state or sub-state, the legal consequences at the EU level were out of their hands and would be decided by the EU institutions and Member States in accordance with their supra-national procedures. Again, there is an interesting contrast between the Greek referendum and the Catalan and Scotland referendum processes.

In the case of Greece, following the withdrawal of the creditors' proposals, there was concern that the referendum was left devoid of any meaning. This 'vacuum' generated two competing narratives on what the referendum was in fact about. The Greek government stressed that the withdrawal of the creditors' proposals did not upend the need for a referendum. For the Greek government, the referendum was an opportunity to receive a renewed mandate to continue the contentious talks with creditors on an anti-austerity platform. The arguments employed by the 'No' campaign, focused on the perceived loss of national sovereignty[41] with regards to the appropriate policies that would guarantee exit from the crisis, a loss that was a consequence of Greece's disadvantaged position at the negotiating table.

The opposition, aided by commentary by senior EU officials proposed and argued for a different interpretation of the referendum question. For the 'Yes' campaign, the referendum had little to do with the specific bailout conditions included in the creditors' proposals. Instead, in their view, the referendum was an opportunity for Greek voters to provide a clear affirmation of continued European economic integration. In pushing this narrative, central to the 'Yes' campaign was the argument that a 'No' vote would jeopardise Greece's continued participation in the Eurozone. In the days leading up to the referendum, authoritative voices across Europe underscored the point that the outcome of the referendum was inextricably linked to Greece's future as a member of the Eurozone. French President Hollande stressed that the referendum was 'about whether the Greeks want to stay in the Eurozone or take the risk of leaving',[42] while Italy's Prime Minister Matteo Renzi similarly noted that the referendum 'was not a question of the Commission versus Tsipras' but of 'the euro versus the drachma. This is the choice'.[43] A key initiative in Greece supporting the 'Yes' vote, tellingly named 'Menoume Evropi' (We Remain in

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[41] Triga Manavopoulos, *supra* n. 11, p. 135.

[42] L. Elliott et al., 'Europe's big guns warn Greek voters that a no vote means euro exit', *The Guardian*, 30 June 2015, <www.theguardian.com/business/2015/jun/29/greek-crisis-referendum-eurozone-vote-germany-france-italy>, visited 26 March 2018.

[43] *Ibid.*

Europe),[44] highlighted the European dimension of the referendum stressing the economic hardships that would inevitably follow a 'No' vote, while also extolling the benefits of continued EU participation.[45]

On the other hand, in the cases of both Catalonia and Scotland, the referendum processes were both framed within an understanding of the EU as something more than a union of states. In this sense, both processes were designed to maximise the possibilities offered by the integration of the legal orders of the EU and its Member States in relation to the legal aspects of a sub-state independence referendum and its consequences. Their basic premise was that these were not matters to be resolved taking into consideration the domestic legal order and the position of the national authorities alone, and that the European framework offered better options for the sub-state units than those presented by their corresponding state. By contrast, it was the affected Member States, the UK and Spain, that were defending classical and exclusive forms of state sovereignty to the effect that all matters resulting from the referendum processes should be addressed and resolved within the domestic constitutional framework, which the EU legal framework should then respect and follow.

The Catalan referendum process raised questions regarding its legality at both the state and European level. At the state level, together with the questions regarding the demos, the central issue was whether the Catalan institutions of self-government had the competence to legislate for an independence referendum or analogous consultation process.[46] The Spanish authorities argued that they did not and challenged any measures to this end before the Constitutional Court, whose decisions ultimately supported their position. This led to the escalation of the conflict, with the Catalan institutions proceeding with the 2017 referendum in open defiance of the Court's rulings. The Spanish authorities then justified their severe response on the basis that the referendum was clearly unconstitutional, and that the Catalan institutions had to return to the sphere of legality.[47]

At the European level, the debate on the legality focused on whether, and if so, how, an independent Catalonia could remain part of the EU. The Catalan Government published an expert report that highlighted that the EU had

[44] Y. Palaiologos, 'Will Greece's Government fall?', *Politico.com*, 7 March 2015, <www.politico.eu/article/will-greeces-government-fall/>, visited 26 March 2018.

[45] Triga and Manavopoulos, *supra* n. 11, p. 132.

[46] Institut d'Estudis Autonomics (2013), 'Informe sobre els procediments legals traves desl quals es ciutadans I ciutadanes de Catalunya poden ser consultats sobre llur future politic collectiu', <collectiupraga.cat/wp-content/uploads/2013/09/Informe-consultes-IEA-11.03.2013.pdf>, visited 26 March 2018.

[47] S. Jones, 'Catalonia weighs up declaration of independence' *The Guardian*, 22 October 2017, <www.theguardian.com/world/2017/oct/22/spain-calls-on-catalans-to-respect-decision-to-impose-direct-rule>, visited 26 March 2018.

traditionally taken a flexible and pragmatic approach in finding solutions to unforeseen problems arising in relation to changes in the territorial organisation of the Member States.[48] On this basis, the report concluded that the most persuasive options for both the EU and its Member States would be either Catalonia remaining in the EU after independence, or its rapid accession after a transitional regime.[49] The Spanish Government, on the other hand, argued that a newly independent Catalonia would be automatically excluded from the EU and would have to reapply as a third country. It published its own report where it stated that EU law was 'explicit, clear and conclusive' in this sense in relation to a unilateral declaration of independence. It based its position on the EU's obligation to respect the national identities of the Member States and their essential State functions, including ensuring the territorial integrity of the State (Article 4(2) TEU).[50] In the months leading up to the 2017 vote, the Spanish Government also stressed that the rule of law was one of the fundamental values of the EU, and that a referendum held in violation of the Spanish Constitution would be in violation of the EU legal framework and values, and should therefore not receive any EU recognition or support.[51]

The main contrast between the Scottish independence referendum in 2014 and the ongoing Catalan debate is that the legality of the Scottish process was not in question. In 2012 the Scottish and UK Governments arrived at the 'Edinburgh Agreement', the terms of which provided that the two governments would work together in the best interests of the people of Scotland and of the rest of the UK following the referendum.[52] On that basis, the Scottish Parliament was empowered by the UK Parliament to pass legislation framing the franchise, the date of the referendum, the question and the funding and spending rules.[53]

The issue of EU membership did however remain contentious. The Edinburgh Agreement did not expressly commit the UK Government to helping facilitate Scotland's membership, but it was widely viewed that the mutual interests of both peoples would be best served by Scotland's membership of the EU. This still left

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[48] Government of Catalonia, (2014) 'Paths for Catalonia's integration in the European Union'.

[49] *Ibid.*

[50] Gobierno de Espana, Ministerio de Asuntos Exteriores y de Cooperacion, (2014) 'Cataluna en Espana. Por la convivencia democratica'.

[51] J. Casqueiro, 'Rajoy sobre Cataluna: ''La alternativa a cumplir la ley es nada, por no decir la selva' [Rajoy on Catalonia: "The alternative to complying with the law is nothing, not to say the jungle]', *El Pais*, 26 March 2017, <politica.elpais.com/politica/2017/03/25/actualidad/1490441745_594333.html>, visited 26 March 2018.

[52] 'Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland', 15 October 2012, para. 30.

[53] Scottish Independence Referendum (Franchise) Act 2013; Scottish Independence Referendum Act 2013.

open a debate as to how this might happen. It is no surprise that in the course of the campaign a major point of dispute concerned the relative ease or difficulty with which an independent Scotland would be able to accede to the EU.[54]

It was the intention of the Scottish National Party Government in Scotland[55] that, were it successful in winning a Yes vote on 18 September 2014, negotiations would begin to bring about an agreement with the UK Government as to the terms of Scottish independence, leading to a declaration of independence in March 2016.[56] The Scottish Government intended that negotiations would take place simultaneously with the EU during this interim period to bring about Scottish membership of the EU on the same date as independence from the UK was achieved.[57]

But it was clear that for the main Yes campaign, as with Catalan nationalists, the strategy was for an independent Scotland to find itself in early course within the EU. Indeed, there were those who attempted to argue that Scotland would gain easy accession to the EU, or that it would in fact 'remain' in the EU by way of a seamless transition. Aidan O'Neill for example argued that the European Court of Justice might be expected to intervene to ensure that Scotland would in fact succeed to membership of the EU automatically on the basis of citizenship rights.[58] In both Scotland and Catalonia, the attempt to co-opt the cooperation of the EU in independence plans was, of course, an attempt to persuade them as to the lawful credentials of these processes, but more than this it was an effort to put forward both territories as good European nations who would bring to the EU full compliance with the law and spirit of the EU as well as bodies of citizens already steeped in the European process of integration.

In all three cases, the wider consequences of the decision subject to a referendum would necessarily involve a legal response at the EU level which, because of its significance, had the potential to significantly influence the outcome

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[54] S. Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', 9 *EuConst* (2013) p. 359.

[55] The Scottish Government, 'Scotland's Future', *Scotland.gov.uk*, 26 November 2013, <www.scotland.gov.uk/Publications/2013/11/9348>, Part 4 'Transition', p. 338, also p. 51–52, visited 26 March 2018.

[56] Scotland's Future, *supra* n. 55, p. 20, 51, 338.

[57] 'In the period between a vote for independence on 18 September 2014 and independence day on 24 March 2016 agreements will be reached with the rest of the UK, represented by the Westminster Government, and with the EU and other international partners and organisations'. *Scotland's Future*, *supra* n. 55, p. 338. *See also* 'The UK and Scottish Governments, along with the EU institutions and Member States, will have a shared interest in working together to conclude these negotiations to transfer Scotland's EU membership from membership as part of the UK to membership as an independent Member State.' *Scotland's Future*, *supra* n. 55, p. 53.

[58] A. O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', *Eutopia Law Blog*, 14 November 2011, <eutopialaw.com/2011/11/14/685/>, visited 26 March 2018.

of the national vote and therefore of the Member State's (or sub-state unit's) sovereign decision-making. This would seem to confirm a high level of integration and of constitutionalisation within the EU system, where even the answer to domestic constitutional matters subject to referendum will involve a coordinated response across the national and supra-national levels of government. However, we have also seen that in these cases the formation of a separate EU-wide position on the issue to be decided was not necessarily requested or supported by the affected Member State. In these domestic referendums, therefore, the tension over constitutional sovereignty between the EU and its Member States and between competing visions of Europe also arises, putting the role and intervention of the EU institutions and representatives in these processes clearly in the spotlight. While a more federal understanding of the EU would seem to require a coherent EU based legal response to these questions, a more state-centred one would favour the EU showing deference to the legal position of the Member State(s) involved. Furthermore, because these were essentially domestic referendums, the dangers of Member State resistance and of EU actions being perceived as an excessive or unjustified encroachment on national sovereignty in a context of existing Euroscepticism were highly significant political factors in informing decisions about the extent to which the EU ought to be involved.

Just as referendums assert the resilience of national demoi therefore, the logical next step is for them also to become vehicles through which national sovereignty itself comes to be reclaimed.

EU's entanglement in domestic direct democracy

In a number of treaty-revision referendums, for example in relation to the Treaty of Nice, the draft Constitutional Treaty or the Treaty of Lisbon, the EU itself has a history of intervening in the referendum process, supporting the campaign for pro-integration votes.[59] This is largely unsurprising, as the decisions concerned an EU-wide issue, would have an EU-wide impact and, as has been seen, there was no possibility for the EU to hold its own referendums on ratification. However, it can also be seen as an interference in a Member State's domestic affairs and even, taking into consideration the EU's democratic legitimacy problems, an illegitimate attempt to subvert the exercise of direct democracy. More controversially, the EU has also intervened after negative votes in referendums, showing an unwillingness to accept the outcome as an obstacle to further integration.[60]

The story of intervention is much more nuanced and complex in the three central cases we have considered. In particular, we see a significant contrast

[59] Tierney, *supra* n. 5, p. 161–163.
[60] Tierney, *supra* n. 5, p. 165.

between the EU's intervention in the Greek referendum on the one hand and its approach to the Scottish referendum and Catalan referendum processes on the other. The most fervent intervention was reserved for the Greek case. EU leaders and representatives of EU institutions unequivocally lent their support to the arguments that a victory of a 'No' vote would provide an even more painful alternative to austerity. Juncker, was particularly unambiguous in guiding Greek voters as to the preferred referendum outcome. As he stressed:

> 'I will be asking the Greek people to vote "yes", regardless of the question that is ultimately put to them. Indeed, the question may change over the next few days [...] You have to vote "yes", whatever the question put to you. The rest of Europe, the people of Europe do not know what this question will be. You have to vote "yes", whatever the question because responsible, honourable Greek citizens, who are justly proud of themselves and their country, must say "yes" to Europe'.[61]

A parallel can be drawn with its approach to referendums on Nice, Lisbon etc. It seems clear that when the referendum is concerned directly with an EU treaty or EU policy the EU does not consider the referendum to be a domestic matter. In the Scottish referendum and the Catalan process, however, the EU institutions took a step back and largely refrained from intervening, declaring that this was an 'internal constitutional issue'. Furthermore, when they did make some comments regarding both processes, their positions seemed to defer to the constitutional and political preferences of the affected Member States (more permissive in relation to Scotland, more restrictive in the case of Catalonia), and to the collective concerns across the existing Member States that this would lead to further sub-state independence movements. Therefore, despite these processes also potentially having a significant EU impact in the case of a Yes vote, involving as they did territories who aspired to full membership of the Union as Member States, the EU representatives seemed unwilling, or unable (due to the strong positions of its existing Member States) to provide a united response based on the principles of EU law.

The EU's responses to the claims and requests coming from Catalonia focused consistently on sending out two messages. The first was that the conflicts between the Spanish and Catalan authorities over the holding of the referendum were an internal constitutional issue, and that therefore the EU remained neutral and would not intervene. For example, in 2013 the president of the European Commission, Jose Manuel Barroso, thanked the Catalan President for his letter, but added that he would make no comments 'on a question of internal organisation related to the

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[61] Transcript of President Jean-Claude Juncker's press conference, on Greece, *supra* n. 15.

constitutional arrangements in the Member States'[62]. Similar positions were put forward by other representatives throughout the process. The second message was more controversial. Despite claiming that the EU remained neutral on the conflict, various representatives of different EU institutions did intervene on the issue of whether a newly-independent Catalonia could remain in the EU. For example, in response to a question posed by a Catalan MEP, Jose Manuel Barroso stated that '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'.[63] Other EU representatives also repeated different versions of this statement.

These messages showed clearly that the EU and its Member States were not going to assume the role of intermediaries in the conflict, as the Catalan authorities were requesting. This was confirmed when they refused to intervene even after the Spanish authorities used force to try to block the 2017 referendum, and then suspended Catalan self-government and imprisoned its main political leaders.[64] Furthermore, these messages also bolstered the position and arguments of the Spanish Government, highlighting a clear EU position against internal secession for reasons of democratic choice. In this sense, for example, various quotes from Barroso and Prodi were included in the Spanish Government's report to support its position on the impossibility of an independent Catalonia remaining in the EU.[65] In the months leading up to the 2017 referendum, and as the conflict escalated, the EU's support for the Spanish state's position became more explicit, with several of its representatives stressing the need to respect the Spanish constitutional framework and the rule of law.[66]

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[62] L. Fores, 'Barroso respon a Mas que no es el rol de Brussel.les pronunciar-se sobre la legalitat de la consulta' [Barroso answers Mas that is it no Brussels' role to take a position on the legality of the consultation], (2014) <www.ara.cat/politica/Mas-Barroso-carta-referendum-consulta-independencia_0_1062493888.html>, visited 26 March 2018.

[63] La Vanguardia (2013), 'Barroso asegura que una Catalunya independiente dejaria de pertenecer a la UE' [Barroso confirms that an independent Catalonia would no longer belong to the European Union], <www.lavanguardia.com/politica/20131203/54394771025/barroso-asegura-catalunya-independiente-dejaria-ue.html>, visited 3 November 2017.

[64] M. Peel, 'Brussels ducks Catalonia crisis mediation calls', *Financial Times*, 11 October 2017, <www.ft.com/content/385c48f8-ae9c-11e7-aab9-abaa44b1e130>, visited 26 March 2018.

[65] Gobierno de Espana (2014) *supra* n. 50. A quote from Martin Schulz, President of the European Parliament, was also included to highlight that the EU considered the conflict between Catalonia and the Spanish authorities an internal issue and would not intervene.

[66] P.R. Suanzes, 'Aviso de Europa a Cataluna: "Cualquier accion contra la Constitucion es contra el marco legal de la UE" [*Warning from Europe to Catalonia: "Any action against the Constituiton is against the legal framework of the EU"*], El Mundo, 7 September 2017, <www.elmundo.es/espana/2017/09/07/59b11f71ca474160068b4655.html>, visited 26 March 2018; and El Confidencial, 'Jucker defiende la unidad de Espana: Respeto al Estado de derecho' [*Juncker defends the unity of Spain: I respect the rule of law*], 20 September 2017, <www.elconfidencial.com/espana/cataluna/2017-09-29/juncker-unidad-espana-respeto-estado-derecho_1452223/>, visited 26 March 2018.

The EU's position on the Catalan referendum process (which was to some extent mirrored in its similar scepticism for the much less controversial independence referendum in Scotland) has been criticised on two grounds. Firstly, for not intervening to protect the rights of Catalan European citizens when force was used against them during an attempt to exercise their right to vote in a referendum, or in response to the repressive measures adopted by the Spanish authorities in the weeks that followed it.[67] More generally, the EU's position on internal enlargement in the case of the independence of an EU sub-state unit has led to accusations that it attempted to hijack the debate on an internal constitutional issue and to inappropriately influence the outcome.[68] Many scholars have convincingly argued that a democratic secession process is fully compatible with the principles and values of the EU, and the sui generis EU legal order contains the necessary resources to allow a newly-created state to remain part of the EU, or to re-join it, without temporarily having to leave.[69] In comments made after the 2017 Catalan referendum, Jean-Claude Juncker highlighted that in this response the EU is protecting its own interests, stating that 'If we allow … that Catalonia becomes independent, others will do the same …. I would not like a European Union in 15 years that consists of some 90 states'.[70]

In the Scottish referendum, EU actors tended to refrain from involvement in the campaign, although conflicting signals did appear. Former President of the European Commission, Jose Manuel Barroso, said it would be 'extremely difficult, if not impossible' for an independent Scotland to join the EU.[71] This may well

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[67] B. Fassbender, 'Catalonia and the crumbling façade of the European "citizen's union"', *University of St. Gallen*, 20 October 2017, <www.unisg.ch/en/wissen/newsroom/aktuell/rssnews/hintergrund/2017/oktober/hintergrund-fassbender-katalonien-eu-20oktober2017>, visited 26 March 2018.

[68] Walker, *supra* n. 34.

[69] S. Douglas-Scott, "How easily could an independent Scotland join the EU?" University of Oxford Legal Research Paper Series. Paper No XXX/2014, (2014) available at <gallery.mailchimp.com/3d8f589fda4fb7526a70254d4/files/e3c82843-2a9f-41af-a4e3-de3eeec55737.pdf>, visited 26 March 2018; and (2014b). "Why the EU should welcome and Independent Scotland", Scottish Constitutional Futures Forum Blog. available at <www.scottishconstitutionalfutures.org/Opinion andAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4041/Sionaidh-Douglas-Scott-Why-the-EU-Should-Welcome-an-Independent-Scotland.aspx>, visited 26 March 2018; S. Tierney, 'Legal Issues Surrounding the Referendum on Independence for Scotland', 3 *EuConst* (2013) p. 359; and I. Merrilees, 'Excluding Scotland from the EU: Definitely Difficult; Probably Impossible', *Scottish Constitutional Futures Forum Blog*, (2014), available at <www.scottish constitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/4234/Ian-Merrilees-Excluding-Scotland-from-the-EU-Definitely-Difficult-Probably-Impossible.aspx>, visited 26 March 2018.

[70] 'EU Spain: Juncker does not want Catalonian independence', *BBC News*, 13 October 2017, <www.bbc.co.uk/news/world-europe-41610863>, visited 26 March 2018.

[71] 'Scottish Independence: Barroso says joining EU would be difficult', *BBC News*, 16 February 2014, <www.bbc.com/news/uk-scotland-scotland-politics-26215963>, visited 26 March 2018.

have been with an eye to Spain which, concerned about Catalonia, was generally hostile to the notion that a sub-state territory could secede from a Member State and gain easy access to the EU.

On the other hand, Jean-Claude Juncker, who in 2014 had succeeded Mr Barroso as President of the Commission, was reportedly 'sympathetic' to an independent Scotland joining the EU.[72] Although Mr Juncker has taken the general view that there should be no further enlargement until 2019, EU officials in the course of the independence campaign indicated that this 'ban' on further enlargement did not apply to an application for membership by a newly independent Scotland which would be treated as a 'special and separate case' as it already meets 'core-EU requirements'.[73] If so, it marks a stark contrast between Juncker's position on Scotland and that in relation to Catalonia, which may demonstrate that issues of political calculation rather than principle were driving the response to each process by senior EU actors.

The Scottish situation fostered an internal debate as we have seen about the relative ease or difficulty of joining the EU. But it is interesting how the EU on the one hand felt it better generally to keep out of the referendum but in other ways dropped hints based upon perceptions of its own self-interest. That it was far less vocal in relation to Scotland is perhaps largely a consequence of the different political needs of the Member State concerned. The general approach in both cases was of deference to the position of the affected Member States in these cases, rather than a clearly developed EU position of principle on these matters.

Sub-state independence referendums pose a particularly complex challenge for the EU. On the one hand, and as has been seen, these processes have been stimulated by the opportunities offered by the process of constitutionalisation of the EU, and are notably favourable to the EU project, in contrast with a number of other recent examples of referendums to which we referred. At the same time, both the Scottish and Catalan processes were carefully framed to ensure they were consistent with EU principles and values. From this perspective, it might seem that as legitimate exercises in democratic engagement they should be looked on sympathetically, rather than rejected out of hand, by the EU. On the other hand, the fact that these sub-state units are aiming to establish themselves as full EU Member States can also be seen as a failure of the wider multi-level EU constitutionalisation project, which has not managed to provide any meaningful voice and representation for sub-state units in the working of its institutions and

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[72] S. MacNab, 'Juncker bans any new EU member for 5 years', *The Scotsman*, 15 July 2014, <www.scotsman.com/news/politics/top-stories/independence-juncker-sympathetic-to-scots-eu-bid-1-3482266>, visited 26 March 2018.

[73] *Ibid. See also* A. Whitaker, 'Independence: Juncker "sympathetic" to Scotland EU bid', *The Scotsman*, 20 July 2014, <www.scotsman.com/news/politics/top-stories/row-as-juncker-bars-any-new-eu-members-for-5-years-1-3477066>, visited 26 March 2018.

procedures. Resistance to secession at the level of the EU also reflects of course the resilience and power of Member States themselves within the European project, many of which are concerned that a favourable EU position on these matters would encourage their own sub-state national movements to follow suit. This has led the EU adopting a position on these matters that Walker has described as one of 'conservative neutrality', which ultimately (re) empowers the Member States.[74]

Conclusions

The article has attempted to examine the challenges posed to European integration by exercises of direct democracy at the national or sub-state level. We have tracked how the interplay between the national-constitutional and EU level has affected our understanding of the demos question. Appeals to either the national or European identities of the voters were crucial to both sides of the referendum campaign in Greece, with the EU openly asking voters to participate in the referendum as members of the broader EU family. Conversely, in the Scottish and Catalan referendums, EU citizenship and the concept of a European demos was underplayed by the EU which treated these referendums as an internal constitutional matter. In all three of the referendums, the result would necessarily require a legal response at the EU level. For Greece the key issue was whether a 'No' outcome would pave the way for a 'Grexit' from the Eurozone, while in Scotland and Catalonia the debate centred around whether they would be able to re-join (or remain in) the EU as independent state entities. The fact that EU matters were at stake in all three referendums, led us to further examine how the EU intervened in the referendum process. While the EU took a hard-line approach in the Greek referendum, its presence was more discreet in the sub-state referendums. But nonetheless it did enough to demonstrate scepticism with the Scottish process and strong discouragement of the referendum in Catalonia.

The EU is beset by problems both internally and externally. After a rapid process of expansion it is now focused upon further integration as a solution to these problems. It is evident, however, that it has no clear strategy for a process of centralisation that can cope with the resilience of state nationalism and the complex pluralisation of identities below the level of the state and the forms of popular resistance to its austerity regime that are increasingly emerging. The referendum as a proliferating form of vernacular popular engagement has served to expose these problems and may in time come to frustrate the European project's wider ambitions.

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[74] N. Walker, 'Beyond Secession? Law in the Framing of the National Polity', in S. Tierney (ed.), *Nationalism and Globalisation* (Hart Publishing 2015).