

Scotland Europa: independence in Europe?

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There is a question mark over the future of the nation-state in Europe. National monetary sovereignty has been transferred to the European level in most EU states. Over the next ten years the EU will have a stronger role in defence and foreign policy, immigration and law enforcement. The very policies that supposedly define the concept of national sovereignty are no longer the exclusive domain of national governments.

At the same time devolution is accelerating in some parts of the EU. Regional politicians have long dreamt of creating a 'Europe of the regions', in which sub-national governments, in an alliance with Brussels, replace nation-states as the building blocks of an ever closer union. The Maastricht treaty gave regional and local governments a small role in EU policy-making. But by and large, it is the member-states that have determined how to take the views of devolved governments into account. In the UK, the new Scottish parliament and devolved executive will have a modest say over British EU policy positions.

But some nationalist political parties would prefer their nations or regions to be independent states inside the EU. This prospect is particularly attractive since—at least for the time being—smaller member-states within the EU have disproportionate influence. For example Britain with a population of 59 million has ten votes in the Council of Ministers, but Denmark with a population of only 5.3 million has three votes, and Luxembourg has two votes for only 0.4 million people. Hence the slogan of the Scottish National Party (SNP): *Independence in Europe*¹. The SNP, currently fighting the campaign for the Scottish parliament elections, believes that an independent Scotland would automatically become a member-state of the European Union.² But is this correct?

The SNP's claim is based on the assumption that independence for Scotland would require the dissolution of the UK and the creation of two new states—Scotland and "the rest". It would then follow, according to the SNP, that an independent Scotland would automatically take on the rights under international law of the old United Kingdom, including EU membership.

In fact, neither of these assertions stands up under examination. Independence for Scotland would not require the dissolution of the United Kingdom. Instead Scotland would secede from the United Kingdom, just as the Republic of Ireland seceded earlier this century. This would not affect the United Kingdom's legal status in international law. On the contrary, it is an independent Scotland that would have an anomalous position and would have to negotiate entry to the EU and define its relationship with other international organisations such as the United Nations, the International Monetary Fund and the World Bank. It does not follow that because the present UK has a prominent role in each of these organisations, that an independent Scotland would do so automatically. Instead, it could take a number of years for an independent Scotland to define its relationship, if any, with international organisations in international law.

Would Scottish independence dissolve the UK?

The SNP's claim that Scottish independence would result in the dissolution of the United Kingdom appears to be based on the supposed effects of the 1707 union legislation. The Articles of Union—negotiated by commissioners on behalf of the English and Scottish parliaments, and incorporated into two Acts of Union—are, it is claimed, the constitutional foundations of the United Kingdom. Were they to be revoked, such as by Scotland gaining independence, then the UK would be dissolved. Such a view, however, mis-states both the legal effects of the Acts of Union and their status in United Kingdom constitutional law.

Article I of the 1707 legislation states that ‘the two kingdoms of England and Scotland shall “for ever after be united into one kingdom by the name of Great Britain”. Two previously independent states were merged into one. The kingdoms of England and Scotland ceased to exist and a new state, Great Britain, was created. But these arrangements have not remained untouched since 1707. In 1800, by another Act of Union, this time with Ireland, the United Kingdom of Great Britain and Ireland was created. This new union altered the name of the state and the design of the national flag, both of which had been specified in Article I of the 1707 legislation. In 1922, the Irish Free State (as it was then known) seceded from the United Kingdom, which changed its name to the United Kingdom of Great Britain and Northern Ireland. Every provision of the Union with Ireland Act has since been amended or repealed.

So, while it is true that the 1707 Acts of Union were part of the process by which the UK came into being, it is not the case that a change to their provisions would end the United Kingdom's existence. This is due to a fundamental principle of the British constitution, that parliament is sovereign. One parliament cannot bind its successor; what today's parliament does, tomorrow's parliament may undo.

A number of the provisions of the Acts of Union purport to bind parliament in perpetuity. However, as with any other statute, the Acts can be amended or repealed at parliament's pleasure. Indeed, it took a mere four years for that to happen. The Patronage (Scotland) Act enacted by the British parliament in 1711 was in clear breach of the union legislation. There are numerous other examples of legislation being enacted contrary to the provisions of the Acts of Union, and in no case has any such legislation been held by any court, English or Scottish, to be invalid for that reason.³ The Acts of Union have no higher status in UK constitutional law than any other law. If it wishes, parliament can amend or repeal the Acts of Union just as it can any other act. The Acts may have created the UK—or at least the Great Britain part of it—but that does not mean that the UK cannot exist without them.

Nor is the United Kingdom merely some form of joint venture between England and Scotland. The states of England and Scotland no longer exist. Neither is the United Kingdom a federal state where the powers of both federal and local government are defined and delimited by some superior constitutional document. Despite devolution, parliament rests supreme. The United Kingdom remains a unitary state and Scotland an inte-

gral part of the UK, with no higher status under the constitution than any other administrative area. In this sense, Tony Blair was entirely correct when he compared the Scottish parliament to a parish council.⁴

The nature of the British constitution is therefore such that it is difficult to see why Scotland separating from the rest of the UK should mean that the UK ceases to exist. Besides issues of constitutional law, there are also historical and practical reasons why Scottish independence should be treated as a secession from, rather than the end of, the United Kingdom.

The case of the Irish Free State

In 1922 the Irish Free State, comprising 26 of the 34 counties of Ireland, left the UK. Ireland had become a part of the United Kingdom in 1800, like Scotland in an Act of Union. According to the SNP's logic, the United Kingdom should have ceased to exist in 1922. Yet Irish independence was treated as a case of secession, rather than as requiring the dissolution of the UK. Although, strictly speaking, the Irish Free State became a self-governing dominion inside the British Commonwealth, it was treated by the international community as a new state. It did not automatically remain a member of the international organisations that the United Kingdom had been part of; it had to apply for membership of the League of Nations. The United Kingdom, on the other hand, was considered to continue to exist with the same rights and duties as it had had previously.

The view from abroad

To a great extent, issues of state succession depend on the perceptions of the international community. It is the views of the states which have treaty relations with the UK, and which are members of the same international organisations, that count. The attitude of other governments may be shaped by political considerations as much as by reference to historical precedent or international law. There are a number of cogent reasons why other states might wish to see Scottish independence as a case of secession from the UK rather than of the UK's dissolution.

First, the facts and figures. Scotland has a population of 5.12 million. The rest of the United Kingdom has a population of 53.87 million, over ten times greater. A rump UK would retain 68 per cent of the land mass of the former UK and over 90 per cent of its economic wealth. It would include three of the four constituent "nations" of the United Kingdom, and would retain the majority of the instruments of government, most of the civil service and the armed forces and, of course, the United Kingdom's nuclear capacity.⁵ On the face of it, it could be argued that Scottish independence would simply make the UK smaller, rather than terminating its existence.

Some of the world's most powerful states in the world would have a strong political interest in preventing the dissolution of the United Kingdom. If the UK ceased to exist then—presumably—Article 23 of the UN Charter would need to be amended. Article 23 states that:

The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Socialist Soviet Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members.

Existing permanent members of the Security Council would be reluctant to amend Article 23 since it would open up the controversial issue of whether other states should gain permanent membership of the Security Council. To avoid this can of worms it would be far simpler to hold that the UK, although smaller than before, would continue to exist. There is some precedent for this type of approach. On the break-up of the Soviet Union, the Russian Federation came into existence and was held by the international community to be the continuation in international law of the old USSR. In the same way, it seems highly likely that the rump United Kingdom would be held by the international community to be the same legal entity as the old UK. In the case of Russia, the principal motivation of the international community was that, despite its vicissitudes, it remained a nuclear superpower. Although not in the same league, the rump UK would also retain its nuclear capability and its power to project force internationally.

For all of these reasons, it seems that Scottish independence would not result in the dissolution of the United Kingdom. Instead, Scotland would secede from the United Kingdom and would then have to resolve by itself any issues concerning its relationship with other international bodies. What, then, would those issues be?

This, it must be admitted, is not wholly clear. Such issues arise irregularly, and the facts of each case tend to be distinct. Furthermore the attitude of other countries often depends on political expediency rather than what is legally correct. Nevertheless, some principles do appear clear. One is that successor states do not automatically succeed to the membership of international organisations held by their predecessor states. This rule applies with particular force where the predecessor state continues to exist, as was the case with India.

The partition of India and Pakistan

India was an original member of the United Nations. Before the date set for the partition of India and Pakistan, the Secretariat of the United Nations requested an opinion from the Assistant Secretary-General for Legal Affairs on what effect that event would have upon membership and representation in the United Nations. His opinion was that India would continue as a state with all treaty rights and obligations and, consequently, with all the rights and obligations of membership of the UN. Pakistan, conversely, would be a new non-member-state and would have to apply for admission.

When Pakistan became independent, the Security Council took the view that it should be admitted as a member of the UN. The recommendation was transmitted to the General Assembly, which agreed to Pakistan's admission. However, the General Assembly also considered that there was a wider issue that needed to be determined: what were the legal rules that should be applied when a new state was formed by the division of an existing United Nations member? This question was referred to the General Assembly's legal committee, which adopted the following general principles:

That as a general rule, it is in conformity with legal principles to presume that a state which is a member of the organisation of the United Nations does not cease to be a member simply because its constitution or its frontier have been subjected to changes, and that the extinction of the state as a legal personality recognised in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

That when a new state is created, whatever may be the territory and the populations which it comprises, and whether or not they formed part of a state member of the United Nations, it cannot under the system of the Charter claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.⁶

Although expressly confined to membership of the UN, these rules seem to have been applied by most international organisations. And in each case, the rationale behind the adoption of the rules seems to have been the same: membership of an international organisation gives rise to "rights and obligations of voting, with specific quotas of votes, and obligations of contributing to the organisation, with fixed quotas of contributions".⁷ A member-state has a right to participate in the direction of the organisation and an obligation to contribute to its expenses (a contribution which, rather than being a fixed sum payable by each member *pro rata*, is usually based on its ability to pay). As a general rule, therefore, a new state must be formally admitted to membership of an international organisation, precisely because these matters have to be negotiated and agreed with the existing member-states.

The 1978 Vienna Convention

The SNP meanwhile argues that an independent Scotland would inherit the treaty obligations of the UK, including the obligations entered into under membership of the European Union. It bases this assertion on the 1978 Vienna Convention on Succession of States in Respect of Treaties, which was negotiated under the auspices of the UN. The relevant section of the Convention is Article 34 which deals with the succession of states in cases of the separation of parts of a state. This Article says that any treaty covering the entire territory of the predecessor state, which is in force at the time the new countries are formed, continues in force in respect of each successor state.

However the Vienna Convention does not immediately appear to be relevant in this instance. Although it came into force in 1996, neither the UK nor any EU member-state is party to it. Indeed at present only 16 states are party to it. It follows, therefore, that in the specific case of an independent Scotland the issue would instead be governed by customary international law. And in the words of the International Law Commission, which drafted the Vienna Convention,

In many [international] organisations membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new state is not entitled automatically to become a party to the constituent treaty and a member of the organisation as a successor state, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organisation.⁸

Although the International Law Commission's researches were largely concerned with issues of state succession arising from decolonisation, more recent events also support their conclusions. On the disintegration of the Soviet Union and Yugoslavia, and the separation of Czechoslovakia, the successor states did not automatically become members of the United Nations but had to apply for membership.

Even if the UK and other EU member-states were signatories to the 1978 Vienna Convention, that would not necessarily mean that Article 34 would apply. The reason is that Article 4 of the same treaty states that the Convention applies without prejudice to the membership rules of the international organisation in question. Therefore, since the EU already has treaty rules in place to determine its membership, it could be argued that Article 4 of the 1978 Vienna Convention means that EU treaties that applied to the old UK would not automatically apply to a newly independent Scotland.

Scotland and the European Union

The European Union is often, however, not considered to be one international organisation amongst others but something uniquely different. Given this, are the general conclusions set out above applicable to the specific circumstances of the EU? Two questions, in particular, arise. Is the conclusion that an independent Scotland would not automatically become a member of the EU, but would instead have to apply for membership, borne out by the terms of the constituent treaties and the practice of the EU? If it is, then under what conditions would Scotland be admitted?

Membership of the European Union is governed by Article O of the Treaty on European Union (the Maastricht treaty), which states that:

Any European State may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the member-states and the applicant state. This shall be submitted for ratification by all the contracting states in accordance with their respective constitutional requirements.

The second paragraph is very significant. When a state becomes a member of the United Nations, the UN Charter does not require amendment. But when a country joins the EU, the various constituent treaties do need to be changed. This is because those treaties specifically refer to the member-states of the European Union. Under the Treaty of Rome, the accession of another state to the EU would necessitate, *inter alia*, the amendment of the provisions specifying the number of representatives in the European parliament elected in each member-state; the number of weighted votes held by each member-state when the Council is required to act by a qualified majority; the number of members of the Commission; and the numbers of judges of the Court of Justice, of members of the Court of Auditors, of members of the Economic and Social Committee and the Committee of the Regions from each member-state.

Amendment of a provision of a treaty cannot take place without the consent of all signatories to the treaty, unless the treaty itself provides otherwise. So it is clear that the EU's constituent treaties themselves do not permit a state to succeed to membership of the Union.

Greenland—a precedent?

The SNP appears to argue that the case of Greenland shows that, once in the European Union, a country cannot get out. Scotland forms a part of the territory of the European Union and, says the SNP, it would remain such even following independence. As with Greenland, it could only withdraw from the EU by negotiation and with the consent of the other member-states.

Certainly it is true that the European treaties contain no provision for the withdrawal of a member-state. Indeed, Article Q of the Maastricht treaty states that '[t]his treaty is concluded for an unlimited period', suggesting that a state cannot unilaterally leave the Union.

It may well be illegal for a member-state to leave the European Union, but that does not apply to Scotland. If it were to gain independence it would no longer form part of an EU member-state. The case of Greenland saw one member-state—Denmark—negotiating the withdrawal of a part of its national territory from the scope of the European treaties. It was not an example of a member-state (still less a state that had seceded from a member-state) being unable to withdraw from the EC without the consent of the other members.

Greenland joined the EC in 1973 with Denmark, of which it was an integral part. Following the granting of home rule in 1979, the Greenlanders decided by referendum in 1985 that they wished to leave the European Communities. Denmark consequently negotiated Greenland's withdrawal. It was the very fact that Greenland remained a part of Denmark that made it necessary that its withdrawal from the EC be a negotiated one. The situation is therefore not analogous to that of an independent Scotland.

The principle of moving treaty boundaries

If Scotland were to become independent then the principle in international law of 'moving treaty boundaries' would apply. This principle applies in the case of treaties that relate to a state itself rather than to a part of its national territory. It says that a state's borders may change, but providing it remains in being, the state benefits from the rights and must comply with the obligations under the treaty. The principle of moving treaty boundaries would normally apply to treaties that constitute international organisations since they generally apply to the state, rather than to specific parts of its territory.

In fact, it is a principle which the European Communities have already applied, if in rather different circumstances. The unification of Germany did not see two states merging to become another new state. Rather, it saw the extinction of the German Democratic Republic and the absorption of its territory into the German Federal Republic. In response to this situation, the European Commission held that Community law would apply in its entirety to this new territory on the basis of the moving treaty boundary principle. This view was accepted by the European Council and the other EU organs. None of the member-states objected. On this basis, if Scotland seceded from the United Kingdom, the rump UK would remain a member of the European Union, but European law would cease to be applicable in the territory of the newly independent state of Scotland.

Independence in Europe?

An independent Scotland would therefore have to apply for membership of the European Union in compliance with the procedure set out in the Maastricht treaty. There is no reason to think that Scotland's application would be refused, but the situation may well not be ideal from their standpoint. For a start, since membership is only conferred on an applicant by a unanimous vote of the European Council, then the rump United Kingdom may threaten to veto Scotland's application, even if the threat were not carried out in practice. Even once it had the unanimous support of the existing EU members, Scotland would have to negotiate the terms of its accession to the European Union. Given that an independent Scotland would have considerably less political clout in Brussels than the UK has had to date, Scotland may well lose some of the benefits that it enjoyed as part of the United Kingdom.

Scotland would almost definitely lose its share of the United Kingdom's budget rebate, negotiated so tortuously by Margaret Thatcher in the 1980s. It might also lose the generous EU structural funds for the Highlands and Islands that were negotiated against the odds by Tony Blair at the Berlin summit of March 1999. On top of that, EU entry may well take time and would need to be ratified by national parliaments in all EU countries.

And all this would take place in a political climate that has not yet fully prepared for the institutional changes that are necessary to accommodate an expanded EU. Scotland could well find itself jostling with countries like Poland, Hungary and Estonia for priority attention.

Much of this discussion is speculation. But the tentative conclusion that can be drawn from an analysis of the applicable law and practice is that an independent Scotland's position in Europe cannot be taken for granted. Were Scotland to gain independence, it would be the rump UK, not Scotland, that would inherit membership of the EU. Scotland's subsequent route to EU membership could well be a tortuous one. The SNP's use of the phrase *Independence in Europe* seeks to persuade the Scottish electorate that it can have its cake and eat it, that Scotland can have both the benefits of independence and the security of membership of the European Union. However, the real situation is that an independent Scotland might end up with all the insecurities of independence and none of the benefits of EU membership.

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The views expressed in the paper are the author's own and do not necessarily reflect those of the British Institute of International and Comparative Law.

¹ See *Election Manifesto* (SNP, April 1999).

² See *The Legal Basis of Independence in Europe* (SNP, February 1997).

³ See Colin R. Munro, *Studies in Constitutional Law* (London, 1987) ch. 4.

⁴ *The Scotsman*, 4 April 1997.

⁵ It is SNP policy not to retain those elements of the UK's nuclear capability based on Scottish territory.

⁶ See *Yearbook of the United Nations* (1947-48) pp.39-40.

⁷ See DP O'Connell, *State Succession in Municipal and International Law* (Cambridge, 1967) vol. II, p. 183

⁸ See *Yearbook of the International Law Commission* (1974) vol. II, pt 1, pp. 177-178.