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INDEPENDENCE IN EUROPE: SCOTLAND'S CHOICE?

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INTRODUCTION

In a in **Süddeutsche Zeitung** interview of 21 January 1997 the British sociologist and the Prime Minister's intimate counsellor Anthony Giddens prophesied that in the near future Scotland will gain full autonomy from England. The Scottish Nationalists would have been delighted, though their demand is not only autonomy but a sovereign Scottish state as a member of the European Union. In this article I do not want to deal with the question whether Scotland's independence could be an answer to the present problems of the country.[1] My interest is to deal with the issue of independence with regard to British, European and international law.

One could object that this is mostly an academic question without relation to reality. Politics is what counts, not law.

However, the main instrument of politics is law. Further, an independent Scotland would represent a small state at the edge of Europe that would be dependent on partners, especially England and the other European countries. To gain independence by a breach of treaties and obligations and by disregarding national, European and international law would mean loosing such imperative support. Therefore it seems plausible that Scotland would

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[1] *See I Lindsay 'The SNP and the Lure of Europe' T Gallagher (Ed)* ***Nationalism in the Nineties****, Polygon, 1991, p. 84.*

seek for independence only by consent. This makes a juristic approach justifiable.[1]

THE DEMAND FOR INDEPENDENCE AND INTERNATIONAL LAW

Before arguing about the importance of European law in the context of Scottish independence from the United Kingdom, we first must ask whether Scotland possibly could refer to the right of self-determination as a provision of international law that might support such a demand. The following questions have to be addressed:

- Is there a right of self-determination of peoples?
- If so: Who is subject of the right of self-determination?
- Does the right of self-determination substantiate the right of secession?

In Europe the Organisation for Security and Cooperation in Europe (OSCE) is also of some relevance to the issues in question here. We must clarify whether this context produces a different result. We ask whether the Scottish position is strengthened by the provisions in international law related to the OSCE.

Is there a right of self-determination of peoples?

At the beginning of the 19th century the third President of the United States of America, Thomas Jefferson, claimed the right of self-determination of peoples.[2] His target was to emphasise the legitimacy of the American claim for independence from the British colonial empire. However, for the rest of the century it was of very little importance for international relations and also international law. The Great Powers expanded their authority throughout the world notwithstanding any possibility of a right of self-determination of the indegenious peoples. In 1918, another American President, Woodrow

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[1] *See W G Grewe* ***Außenpolitik und Völkerrecht in der Praxis****, Archiv des Völkerrechts 38 (1998), p. 4.*

[2] *In Jeffersons argumentation this right was closely connected to the democratic principle of popular sovereignty. S Oeter* ***Selbstbestimmungsrecht im Wandel****, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1992) p. 744.*

Wilson, reinvented the idea of such a right in his famous (and notorious[1]) Fourteen Points - again with little success. The colonial powers managed to prevent such a formula becoming codified in the League of Nations Covenant for reasons related to their interests overseas.

Only in 1945 was the right of self-determination adopted in the UN Charter, though it was restricted to a few special cases. During the following years the Security Council occasionally referred to it.[2] It was also adopted by the Helsinki-Declaration of the CSCE of 1975 and by the Charter of Paris.[3] Thus, the right of self-determination developed from an idea to international customary law that is also codified in several relevant documents of international law.

Conclusion: Self-determination is effective by contract and by customary law[4], although there is disagreement whether as a right or just as a target.[5]

Who is subject of the right of self-determination?

The subject of the right of self-determination of peoples might appear to be, as the term tells us, the people. However, this is the point where problems start. What is a people?

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[1] *See L C Buchheit* ***Secession. The Legitimacy of Self-Determination****, Yale University Press, 1978, pp. 64f. See also D Thürer Das Selbstbestimmungsrecht der Völker und die Anerkennung neuer Staaten, in H Neuhold and B Simma (Eds)* ***Neues europäisches Völkerrecht nach dem Ende des Ost-West-Konfliktes?****, Nomos, 1996, p. 43 and S Schieren* ***Vom Weltreich zum Weltstaat. Philip Kerrs (Lord Lothian) Weg vom Imperialisten zum Internationalisten (1905 - 1925)****, Lothian Foundation Press, 1996, p. 137.*

[2] *Resolutions 366 (1974) and 385 (1976).*

[3] *Europa Archiv 30 (1975), D 437 (D442); Europa Archiv 45 (1990), D 656.*

[4] *See D Frey 'Selbstbestimmungsrecht, Sezession und Gewaltverbot', I Seidl-Hohenveldern and H J Schröter (Eds)* ***Vereinte Nationen, Menschenrechte und Sicherheitspolitik. Völkerrechtliche Fragen zu internationalen Konfliktbegrenzungen****, Carl Heymanns Verlag, 1994, p. 36;, W Ofuatey-Kodjoe* ***Self-Determination****, United Nations Legal Order, Vol. 1 (1995) , pp. 349 - 384 and G J Simpson 'The Diffusion of Sovereignty. Self-determination in the Post-Colonial Age' M Sellers (Ed)* ***The New World Order. Sovereignty, Human Rights, and Self-Determination of Peoples****, Berg, 1996, pp. 37ff.*

[5] *M Leder* ***Das Selbstbestimmungsrecht der Völker - Recht oder Ziel? Eine Untersuchung unter Berücksichtigung der deutschen Frage und der Anerkennung neuer Staaten im ehemaligen Jugoslawien****, Peter Lang, 1997, pp. 17f, 93f.*

The UN Charter gives no definition, but it seems to suggest that nations and states are identical. That makes the determination of what a people is quite simple. During the process of decolonization, however, it became obvious that such a defintion could not match the changed circumstances any longer. Now it was recognized that also peoples within a state eventually could be entitled to refer to the right of self-determination.[1]

As a consequence of this development this right ran into conflict with its own original intention - to preserve the territorial integrity of any nation state. Suddenly it almost turned into the opposite.[2] The right of self-determination became a fundamental threat to the territorial integrity, not by an agressor from outside, but through separatist movements within it. There are many states which fell apart for reasons like these. Not surprisingly many ex-colonies were hardly independent when they put into question a wide-ranging interpretation of the right of self-determination. They had good reasons to fear for their territorial integrity faced with the fact that their citizens were heterogeneous in many respects.[3]

Furthermore there is another difficult problem in defining a people. A definition might come into conflict with the notion of a 'minority' according to Art. 27 International Pact for Civil and Political Rights.[4] While a people could refer in principle to the right of self-determination according to international law a minority can not.

Thus there are difficulties in defining what a people is and who eventually is subject to the right of self-determination. Nevertheless it is possible to refer

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[1] *Friendly Relations Resolution, General Assembly 2625 (XXV), in: UNYB 1970, 788 or UN Doc A/5217 (1970) 121. See also Decolonization Resolution, General Assembly 1514 (XV), in: UNYB 1960, 49 or UN Doc A/4684 (1960) 66. See also Thürer, op. cit., pp. 48ff and Simpson, op. cit., pp. 40ff. Simpson points to the fact that for a certain period the self-determination of people debate was exclusively connected to the decolonization process.*

[2] *See H Hannum* ***Autonomy, Sovereignty, and Self-Determination. The Accomodation of Conflicting Rights****, University of Pennsylvania Press, 1996, pp. 453f.*

[3] *See Oeter, op. cit, pp. 747f.*

[4] *U.N.T.S. No. 14668, Vol. 999 (1976), 171. See also G Barrie* ***Self-Determination in Modern International Law****, Occasional paper, Konrad-Adenauer-Stiftung, 1995, pp. 29ff; D Murswiek* ***Offensives und defensives Selbstbestimmungsrecht. Zum Subjekt des Selbstbestimmungsrechts der Völker****, Der Staat (1984), pp. 523ff; Neuhold and Simma, op. cit., p. 18.*

to distinctive attributes, and also to refer to the self-definition of a group as a people also.[1] In the case of Scotland such attributes do exist, and so does the conception of itself as a nation. Does that mean that Scotland is automatically entitled to refer to the right of self-determination and as a consequence of that right may demand her independence from the United Kingdom lawfully?

Does the right of self-determination substantiate the right of secession?

The right of self-determination is pointless if it is not connected with the right of secession.[2] Further, the act of secession per se is neither according to nor against international law.[3] However, this does not mean that every people has the right to secede. The right of self-determination is not synonymous with the right to have one's own state. It can be materialized in many other ways. Further, the practice of the international system gives no basis to conclude that such an unprecedented right of self-determination exists.[4] One has to consider that the right of self-determination is in conflict with the principle of territorial integrity.[5] A vital precondition is that a people must be object to 'alien subjugation, domination and exploitation'.[6] In the theory and practise of international law a secession is generally considered ligitimate only 'as a self-helping remedy in causes of extreme oppression.'[7]

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[1] *Frey, op. cit., p. 46.*

[2] *See Friendly Relations Resolution, General Assembly 2625 (XXV), in: UNYB 1970, 788 at 791 or UN Doc A/5217 (1970), 121 at 123.*

[3] *See C Haverland 'Secession'* ***Encyclopedia of Public International Law, Instal. 8****, ed. by R Bernhardt, North Holland, 1985, p. 384 at 385. Leder, op. cit., p. 8; D Murswiek* ***Die Problematik eines Rechts auf Sezession - neu betrachtet****, Archiv des Völkerrechts (1994) pp. 307 - 332.*

[4] *See Frey, op. cit., p. 50 and Oeter, op. cit., pp. 755f.*

[5] *See Decolonization Resolution, General Assembly 1514 (XV), in: UNYB 1960, 49 or UN Doc A/4684 (1960) 66 and Friendly Relations Resolution, General Assembly 2625 (XXV), in: UNYB 1970, 788 or UN Doc A/5217 (1970) 121. See also Simpson, op. cit., p. 54 and V Rudnitsky 'Self-Determination in a Moderm World. Conceptual Development and Practical Application' M Sellers (Ed)* ***The New World Order. Sovereignty, Human Rights, and Self-Determination of Peoples****, Berg, 1996, p. 78.*

[6] *Decolonization Resolution, General Assembly 1514 (XV), in: UNYB 1960, 49 or UN Doc A/4684 (1960) 66.*

[7] *Buchheit, op. cit., p. 222. See also McCorquodale, op. cit., pp. 9f. and Murswiek, op. cit., p 312 (Fn.15). There is also the liberal approach by H Beran (****A Liberal Theory of Secession****, Political Studies (1984), pp. 21 - 31) who suggests that the right of self-detrmination exists whenever a group of human beings lives in a well defined area*

It is impossible to consider Scotland a victim of 'alien subjugation' and 'extreme oppression'. It is part of a democratic state, has never lost its own institutions in almost three hundred years of Union with England, and finally has got its own Parliament and government.[1]

Conclusion: In the light of international law Scotland is not entitled to the right of self-determination.[2] The principle of territorial integrity clearly outweighs the right of self-determination.[3]

With regard to the OSCE-process the result is much the same.[4] After the breakdown of totalitarianism and authoritarianism in the communist states, Europe considers itself a continent of democratic states. Therefore, 'extreme oppression' appears as a rare exception. The CSCE-Conference in Moscow[5] on the 'Human Dimension of the CSCE' in October 1991 agreed upon a declaration that gave more emphasis to the principle of territorial integrity than to the right of self-determination. The Charter of Paris is reluctant to connect the right of self-determiniation to secession.[6] The example of Yugoslavia gives an idea how grave the 'extreme oppression' must be before the European states are prepared to recognise the break-up of a multinational state.

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*that is aware of itself as a people and large enough to form its own state. Those people are a 'potential candidate for permissible secession.' (ibid., p. 29). Another approach by A Margalit and J Raz (**National Self-Determination**, Journal of Philosophy (1990), pp. 439 - 461) is a communitarian one that stresses 'cultural rights' of a people. Both approaches are of intellectual interest, however, of minor significance in the debate on international law. See also U Schreckener **Leviathan im Zerfall. Über Selbstbestimmung und Sezession**, Leviathan (1997), pp. 458 - 479.*

[1] *See Simpson, op. cit., pp. 51ff, who introduces the term 'devolutionary self-determination'.*

[2] *See Rudnitsky, op. cit., pp. 78f; H-J Heintze **Autonomie, Selbstbestimmungsrecht der Völker und Minderheitenschutz**, Der Staat (1997), p. 406.*

[3] *Frey, op. cit., p. 62. See also McCorquondale, op. cit., p. 19 and Heintze, op. cit., pp. 406ff.*

[4] *See below*

[5] *Europa Archiv 46 (1991), D 579.*

[6] *See Murswiek, op. cit., p. 311 (Fn. 15).*

Conclusion: The OSCE-process would not support the Scottish demand for secession. To the contrary it is rather a bigger obstacle than international common law.[1]

SCOTTISH SECESSION WITH REGARD TO BRITISH CONSTITUTIONAL LAW

The English theory of the constitution

In English constitutional theory things are simple. It follows from the principle of absolute parliamentary sovereignty[2] that no parliament can bind its successor.[3] Consequently the parliament can annul the Act of Union of 1707 at any time it wants to give independence to Scotland. No special procedure is necessary. India and Ireland gained their independence through simple Acts of Parliament as well.

The Scottish theory of the constitution

There is some irony that Scottish constitutional theory makes things somewhat more difficult. According to the Scottish interpretation of the constitution, the Union between England and Scotland did not come into being by a simple Act of Parliament but by an international treaty between two sovereign states. There was in fact a treaty whose provisions guaranteed

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[1] *See also* ***CSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of 29 June, 1990****, International Legal Materials 29 (1990), p. 1306 (excerpts) or C Tomuschat (Ed.)* ***Modern Law of Self-Determination****, Martinus Nijhoff Publishers, 1993, pp. 319ff (excerpts): The document includes the guarantee of Human Rights, especially the individual and collective rights of minorities,and the commitment to 'provide protection against any acts that constitute incitement to violence against persons or groups based on national, racial, ethnic or religious discrimination...' But it does not address the right of self-determination with a word, not even in case of extreme oppression. It seems that the documents emphasise the rights of the individual and collective right to avoid any claim to independence as a the automatic consequence of their disregard. See also Heintze, op. cit., p. 405. To the contrary Frey, op. cit., p. 63.*

[2] *A V Dicey* ***Introduction to the Study of the Law of the Constitution****, 8th ed, Macmillan 1915, pp. 37f.*

[3] *Ibid. p. 62.*

the continuance of the Church of Scotland[1], and of the Scottish legal and education systems 'in all time being', and accepted this guarantee as a 'fundamental and essential condition'. The importance of these provisions has been emphasized by the fact that the English Act of Union ratifying the treaty repeated them word for word.[2]

The Scots therefore argue that such a guarantee 'in all time being' must be treated like a 'fundamental law', which cannot be amended by a simple Act of Parliament but only by a special procedure. Because such a procedure is unknown in British constitutional tradition only the Scottish people would be entitled to amend the Treaty of Union of 1707.[3] Until a short time ago such an argumentation seemed to be quite odd because there is no institution in Scotland that performs as a legislative body.[4] When the Scottish and English Parliaments merged in 1707 the new established Parliament became the only legitimate legislative body for Britain as a whole, including Scotland. According to the Scotland Act of 1998, constitutional issues belong to the reserved matters Westminster is responsible for exclusively.

Conclusion: English constitutional theory prevails over Scottish theory. The constitution is no real obstacle to a lawful separation.[5]

'INDEPENDENCE IN EUROPE' - OPTION OR ILLUSION?

If the constitution does not represent an obstacle to Scottish independence politics probably will. We will address this question later. For most of the rest of the article we assume that Scotland and England agreed on separation. Under the prerequisite that Scotland intended to succeed to all rights as a

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[1] *See A.P.S. XI 406, c. 7: 'Act Ratifying and Approving the Treaty of Union of the Two Kingdoms of Scotland and England'.*

[2] *6 Anne, c. 11.*

[3] *See T B Smith* ***A Short Commentary on the Law of Scotland****, 1962, p. 57.*

[4] *S A de Smith* ***Constitutional and Administrative Law****, 3rd ed., Penguin, p. 72.*

[5] *A British observer might be surprised about giving so much emphasis to this problem. In Germany, however, there is no legal way to separate from the federation lawfully according to German constitutional law.*

member of the European Union, we now will deal with the question what 'the response of Community law to the mitosis of a member state'[1] could be.

The Scottish demand for independence and European law

The EU is not merely an international organization but a Community with its own legal system and institutions. Scotland cannot neglect this. The question is whether this system has any impact on the Scottish position. It seems there is a great deal of impact. The 'status within the Community of an independent Scotland or of any successor state is likely ... to be determined neither by the wishes of the United Kingdom, of England or Scotland' Robert Lane suggests.[2]

If it is not British wishes that determine the Community status of Scotland after its separation from the United Kingdom it must be somebody else who decides. Robert Lane says, the decision lies within the 'rules of Community law as interpreted and applied by the Court of Justice.'[3] But what are these rules like? Does the Treaty regulate such cases definitely? Are there any perecedents to the 'Scottish case'?

No precedents in European legal history

The Treaty does not address the problem in question here. Therefore, the 'rules of Community law' must be drawn from other sources, for example precedents. As a matter of fact there have been some territorial changes to the Community since 1951 apart from several enlargements. In 1956 the Saarland was detached from France and was integrated to the Federal Republic of Germany. Though this step did not make necessary a formal application by the Saarland or the Federal Republic for readmittance, and though it neither constituted an enlargement nor a reduction of the territory of the Community, all member states of the European Coal and Steel Community were obliged to consent to this little change of circumstances. It took more than two years before the process of ratification was finished.

Only the very small island of St. Pierre et Miquelon d'outre Mer was accepted as an integrated part of the French Republic in 1976 without

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[1] *R Lane ''Scotland in Europe'. An Independent Scotland in the European Community' W Finnie, C Himsworth and N Walker (Eds)* ***Edinburgh Essays in Public Law****, Edinburgh Univerity Press, p. 144.*

[2] *Ibid. p. 149.*

[3] *Ibid.*

application and formal approval, because the member states for good reasons considered this negligible enlargement too unimportant to create a precedent.[1]

There were three cases of reduction of the Community`s territory. In 1962 Algeria separated from France and the Antilles from the Netherlands and therewith both simultaneously from the Community. In 1985 Greenland withdrew from the Community. There is no agreement among scholars whether this change of status amounts to an amendment of the Treaties[2] or not.[3]

However, one cannot take these cases really as precedents to the question of Scottish secession.[4] The difference is too significant. Algeria and the Antilles were colonies. Greenland withdrew from the Community and remained an integrated part of the Danish Kingdom as an oversea territory.

With Scotland it would be the other way round. She wants to remain a Community member as a sovereign state. Further, Greenland's social and economic structure, history, culture, language, population etc, contrary to Scotland, is not European, and Greenland is small, not more than 52,000 inhabitants.[5] Scotland undoubtedly is a European country of considerable significance, populated with more than five million people. Contrary to

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[1] *A Randelzhofer* ***Deutsche Einheit und europäische Integration****, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (1990), pp. 105ff. Schröder 'Art. 236' H v d Groeben, J Thiesing and C-D Ehlermann (Eds)* ***Kommentar zum EWG-Vertrag, Vol. 4****, 4th ed., Nomos, 1991, p. 5645.*

[2] *Schröder, op. cit., p. 5641; Hilf 'Art. 240' H v d Groeben, J Thiesing and C-D Ehlermann (Eds)* ***Kommentar zum EWG-Vertrag, Vol. 4****, 4th ed., Nomos, 1991, p. 5958; M Schweitzer and W Hummer* ***Europarecht. Das Recht der Europäischen Union. Das Recht der Europäischen Gemeinschaften (EGKS, EG, EAG) mit Schwerpunkt EG****, 5th ed., Luchterhand, 1996, p. 37; P J Kuyper 'The Community and State Succession in Respect of Treaties' D Curtin and T Heukels (Eds)* ***Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers, Vol. 2****, Martinus Nijhoff Publishers, 1994, p. 623.*

[3] *Randelzhofer, op. cit., p. 107.*

[4] *See F Harhoff* ***Greenland's Withdrawal from the European Communities****, Common Market Law Review (1983), pp. 29ff; O Johansen and C Lehmann Sørensen* ***Grönlands Austritt aus der Europäischen Gemeinschaft,*** *Europa-Archiv (1983), p. 406.*

[5] *See Harhoff, op. cit., pp. 21f.*

Greenland her separartion from the United Kingdom could be interpreted as a 'measure which could jeopardize the attainment of the objectives of this Treaty', a measure of the type which the member states are obliged to 'abstain from' according to Art. 5 of the EC Treaty. Consequently Scotland's independence would effect the Community. We will deal with this question later again.

However, Scotland's position does not depend on this rather indefinite article alone. One also has to consider international law, because the European Treaty does not deal with the question.

German reunification. No precedent - but a legal aid?

Firstly, German unification is no precedent. When it took place a state disappeared, and a larger one continued to exist. If Scotland separated from the United Kingdom two new states would arise. Germany was able to refer to the *rebus sic stantibus* rule in international law[1] Scotland is not able to refer to that.[2]

Nevertheless the German case is instructive. There has been a wide debate in Germany whether the European Community would have been entitled or in fact even obliged to consent to German reunification because of, for example, the mentioned Art. 5 of the EC Treaty. As a matter of fact there was no formal consent, but a tacit understanding[3] of all member states not to put the unification process into question. Therefore it is not clear whether a formal consent would have been necessary or not.[4] This is a very interesting discussion we cannot continue here.

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[1] *Kuyper, op. cit., pp. 633, 639.*

[2] *See below, p.*

[3] *C W Timmermans* ***German Unification and Community Law****, Common Market Law Review (1990), p. 438; J-P Jacqué* ***German Unification and the European Community****, European Journal of International Law (1991), p. 11.*

[4] *Against this view: Randelzhofer, op. cit., p. 112; E Grabitz and A v Bogdandy* ***Deutsche Einheit und europäische Integration****, Neue Juristische Wochenschau (1990), p. 1076; Schweitzer and Hummer, op. cit., pp. 35f; in favour mentioning Art. 5 EC-Treaty: Schröder, op. cit., p. 5645; mentioning Art. 227 EC-Treaty Jacqué, 1991, pp. 4ff.; see also: Case 14/74 Norddeutsches Vieh- und Handelskontor v. Hauptzollamt Hamburg-Jonas [1974] ECR 899 at 907. See also Thiesing, 3rd ed., 1983, Rn. 10ff. and A R Anker* ***Wiedervereinigungsgebot, Europaintegrationsgebot. Eine Untersuchung anhand des Konflikts bei einer westeuropäischen Integration der Bundesrepublik Deutschland****, VVF, 1991., pp. 101ff, 127ff.*

> Before German reunification, neither the text of the relevant Treaty provisions nor the legal literature nor the Commission's practice offered a compelling argument for or against the existence of a moving treaty boundary rule in EC law. German reunification has now settled the matter. The EC Commission expressed a legal opinion as to the existence of a moving treaty boundary rule of community law[1], and the Council did not object but proceed accordingly, nor was there any objection from individual member states. This tacit approval of the Commission's handling of the case bears sufficient testimony to a corresponding opinio juris.[2]

This strong view is debatable of course.[3] Nonetheless there is indication that the Community does not principally ignore the moving boundary treaty rule.

However, is Scotland able to refer to it to gain independence and further Community membership? Does the rule improve the legal position of Scotland in comparison to the indifinite situation of European Community law and practice before 1990?

Scottish independence and the right of the succession of states

In any case of the fusion, cession, secession and dismemberment of states there appears the same problem. Who will be the successor to the obligations which the predecessor state or states have entered?

To develop common standards the United Nations Organisation in 1978 introduced the 'Vienna Convention on the Succession of States in Respect to Treaties'[4] that adopted the principle that, in general, the treaties should continue in force for the remaining old and every arising state.[5] It seems that

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[1] *Bull. EC Suppl. 4/1990, pp. 27ff. See Kuyper, op. cit., pp. 623 - 633.*

[2] *Th Giegerich* ***The European Dimension of German Unification. East Germany's Integration into the European Communities****, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1991), p. 421.*

[3] *Timmermans, op. cit., p. 439 and Jacqué, op. cit. 1991, p. 6 doubt this.*

[4] *Text in UN Doc. A/CONF 80/16 Add. 2, p. 185 or Misc. No. 1 (1980), Cmnd. 7760.*

[5] *Art. 34. 1. When a part or parts of a territoty of a State separate to form one or more states, whether or not the predecessor State continues to exist: (a) any treaty in force at the date of succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed...*

international law favours the purposes of Scotland in response to the lack of rules in Community law. But things are not that easy.

Firstly, the Convention is not in force. Sceptisism prevailed from t(e beginning about rules that minimised the freedom of sovereign states to address an arising situation according to the circumstances individually.[1]

Secondly, 'not in force' does not mean automatically 'not in practice'. Because, for many years, there were few cases that made use of the Convention, the states have had no opportunity to develop a state practice. Therefore the state of the law of the Sucession of States was, to put it mildly, not clear.[2]

After the breakdown of the East European states, however, things changed radically. Many states arose. The European states to a large extent recognised them under the rules given by Art. 31 and 34 of the Convention.[3] But this does still not mean that meanwhile by practice those rules are in general accepted as part of international customary law.[4] The European states accept the Convention as a reference[5], but not as a binding and overruling force. In 1991 the EC passed 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'[6] which indicate that the EC made recognition depend on the committment that the sucessor states will fulfill their obligations.

Consequently, recognition was not a title the separating states could refer to. It still was something that was subject to the free decision of the recognising state. It seems that the member states prefer the 'tabula rasa' approach,

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[1] *D P O'Connell* ***Reflections on the State Succession Convention****, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1979), pp. 725 - 739.*

[2] *Kuyper, op.cit., p. 620; S Oeter* ***German Unification and State Succession****, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1991), p. 352.*

[3] *Michael Silagi* ***Staatsuntergang und Staatennachfolge mit besonderer Berücksichtigung des Endes der DDR****,Peter Lang, 1996, pp. 89 - 96.*

[4] *See Murswiek, op.cit., pp. 315 - 325; 330f (Fn. 15); Neuhold and Simma, op. cit., p. 22 and U Fastenrath 'Das Recht der Staatennachfolge', Neuhold and Simma (Eds.), op. cit., pp. 84ff.*

[5] *Badinter Commission, Opinion No 1, 14 January 1991, ILM, Vol. 31 (1992), p. 1495; Kuyper, op.cit., p. 640.*

[6] *Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991, EC Bulletin 12/1992, p. 119.*

strongly emphasising the stability of treaty relations.[1] The Community states are well advised not to agree a rule which suggests that ervery arising state succeded to all treaties of the predecessor state/states automatically. If the United Kingdom disintegrated into three or four parts it would be represented by three or four ministers in the Council of Ministers as the main legislative body of the Community to address only the most important change in the structure of the Community. This would obviously amount, again, to a 'measure which could jeopardize the attainment of the objectives of this Treaty' the member states must 'abstain from' according to Art. 5.

With regard to the Vienna Convention on the Succession of States in Respect to Treaties the result is quite the same. Art. 34 Paragraph 2 of the Convention provides that 'Paragraph 1[2] does not apply if: (a) the States concerned otherwise agree; or (b) it appears from the Treaty or is otherwise established that the application of the treaty in respect of the successor state would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.' Because of the fundamental impact on the Community which Scotland's separation from the United Kingdom would have, this would be an act that 'would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.'

Conclusion: Scotland cannot refer to the Convention as a claim to succeed to the EC Treaty. Its consensual dissolution from the United Kingdom would be unlawful under Community law and under international law without the consent of the participant states of the Community. Therefore in any case Scotland is dependent on the consent of all the other contracting partners. Their acquiescence in Scottish wishes is crucial for the legal result.

The withdrawal from the Community as a legal problem

So far we must conclude that under international law the consensual separation from the United Kingdom would constitute the withdrawal from

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[1] *See for Yugoslavia Badinter Commission, Opinion No 8, 4 July 1992, ILM, Vol. 31 (1992), p. 1523; Badinter Commission, Opinion No 10, ibid., p. 1526; see W Fiedler 'Staatensukzession und Menschenrechte' B Ziemske et.al. (Ed.)* ***Staatsphilosophie und Rechtspolitik****, Beck, 1997, pp. 1374 - 1387; Kuyper, op.cit., pp. 634, 640f.*

[2] *see p.122, footnote 2.*

all international treaties, including the EC Treaty.[1] How does Community law address the question of the withdrawal of a Community member?

Art. 240 (312) of the EC Treaty and Art. Q (51) of the EU Treaty identically provide: 'The Treaty is concluded for an unlimited period.' At the same time the Treaty gives no provisions about the withdrawal or expulsion of a member state. This is not a shortcoming or error but a deliberate decision of the governments of the founding states. It was their purpose to make the dissolution of the Community as difficult as possible.

From the beginning the Treaty was outlined to be more than a mere internatioanl treaty or simply an economic community; it has a political objective. After more than forty years of integration the Community has developed its own dense legal system. Being member of such a legal system asks for a high degree of confidence, durabilty and reliabilty.[2] This is the more true as the member states in some fields of politics have transferred their sovereignty to the Community. Some scholars therefore conclude that meanwhile Art. 240 in fact means 'indissolubility'. Consequently, withdrawal from the Community would be illegal.

This interpretation is debatable. Other scholars reject it. They prefer the view, that withdrawal is possible, but only if all member states consented.[3] After all, the Treaty does not embody any provision about the issue, and there is also no precedent. Therefore we have to consider whether international law does give any rules for the case, quite similar to the example of the moving boundary treaty rule mentioned above.

The 'Vienna Convention on the law of Treaties'[4], signed in 1969 and in force since 1980, provides in Art. 54: 'The termination of a treaty or the withdrawal

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[1] *We assume that no special agreement which would say otherwise have been arrangened.*

[2] *M Hilf, op. cit., p. 5952; Schweitzer 'Art. 240' E Grabitz and M Hilf* ***Kommentar zur EU****, 2nd ed., Beck, 1989ff. This is in accordance with Art. 31 Vienna Convention on the Law of Treaties, U.N.T.S. No. 1155, Vol. 331 (1969).*

[3] *See C O Lenz (Ed),* ***EG-Vertrag. Kommentar zu dem Vertrag zur Gründung der Eurrpäischen Gemeinschaften,*** *Bundesanzeiger Verlagsgesellschaft, 1994, pp. 1365f; Th Oppermann* ***Europarecht. Ein Studienbuch****, Beck, p. 85; H P Ipsen* ***Europäisches Gemeinschaftsrecht****, J C B Mohr (Paul Siebeck), 1972, pp. 100f; Hilf, op. cit., p. 5955.*

[4] *U.N.T.S. No. 1155, Vol. 331 (1969).*

of a party may take place: a) in conformity with the provision of the treaty; or b) at any time by consent of all the parties after consultation with the other contracting states.' Because the EC Treaty does not regulate the termination or withdrawal of a contracting state, (b) is relevant. It says that the demand to withdraw from the Community would make necessary the consent of all the other member states in international law as well. For Scotland this would mean that in principle it has the right to separate, but only after consultation with and consent of all member states of the Community.

However, at first sight, the Vienna Convention on the law of Treaties in Art. 62 seems to provide an exception. It says, that in case of fundamental change of circumstances (*clausula rebus sic stantibus*) there might occur the right to withdraw unilaterally from a treaty. This is true for only a few cases, and the Scottish case definitely would not be one. Paragraph 2 of Article 62 says: 'A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: a) ..., b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other part of the treaty.' There is no doubt that this would be the relevant provision for Scotland.

Conclusion: Again, neither European law nor international law supports the view that unilateral separation is legally possible without the consent of all contracting partners.

SOME CONCLUDING POLITICAL CONSIDERATIONS

So far we have discussed the legal aspects of the separation of Scotland from the United Kingdom as the result of an agreement between them. In my concluding political considerations I would like to discuss the question whether the government in London and the contracting partners in Europe would feel inclined to give way to Scottish wishes for independence.

Scotland was 'one of the building blocks' of the United Kingdom. The separation of Scotland would mean that nothing would be left behind that could call itself 'United Kingdom'.[1] The separation of Scotland would constitute two arising states. If this occured, Britain after separation must fear for its membership in the Community just as Scotland would. As an arising state according to the 'tabula rasa' approach England/Britain would have to

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[1] *Lane, op.cit., p. 146.*

apply for readmittance like Scotland. Therefore it seems to be plausible that England/Britain would agree to Scottish separation only after the renegotiation of the Treaties that would guarantee England/Britain's readmittance. That means that England/Britain would make it depend on the attitude of the contracting partners before agreeing in Scottish separation.

What about the contracting partners? The Community comprises free and democratic states and does not care about the political structure of their members unless it is undemocratic. Who should care about an independent but democratic Scotland and reduced Britain?

Firstly, is seems quite unlikely that the partner states would accept the enlargement of all important decision making and legislative bodies of the Community. This would not only make bargaining, decision making and the admittance of member states from East Europe more difficult; it would also reduce the power and influence of the big nations.

Secondly, for political reasons it seems quite unlikely that the member states would welcome the mitosis of a member state. Several of them would consider Scotland's separation with great distrust, because they must pay regard to the fact that national, ethnic and linguistic minorities live within their own boundaries and represent in some cases a threat to their territorial integrity: Basques and Catalans in Spain, Corses in France, Flames and Wallones in Belgium, the Lega Nord in Italy. Granting independence to Scotland would open Pandora's box. It would be the precedent that provided these minorities with a perfect argument for their separatist cause.[1] Therefore it seems quite likely that the member states would try to impede Scottish separation, definitely not by force, but on punishment of exclusion from the Community. But this might be too speculative.

RESULTS AND CONCLUSIONS

- According to European and international law Scotland cannot legally withdraw from the Community unilaterally.

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[1] *See Lane, op. cit., p. 144; E Attwool 'A Right to Secede? Scotland Reviewed', R Bellamy (Ed)* ***Constitutionalism, Democracy and Sovereignty. American and European Perspectives****, Avebury ,1996, p. 143. With a different view I Lindsay, op. cit., p. 88.*

- According to European and international law Scotland is not entitled to succeed to the European Community Treaty as the result of an obtained right. She would need the tacit or formal consent of all member states.
- There is good reason to doubt that the European member states would be prepared for a tacit or formal consent to Scottish separation.