

## **REVIEW: SCOTTISH INDEPENDENCE**

*Paul Henderson Scott*

Jo Eric Murkens with Peter Jones and Michael Keating, **Scottish Independence: A Practical Guide**, Edinburgh University Press, 2002, pb, 318 +xviii pp, £16.99, ISBN 07486 1699 3.

This book is the result of research by the Constitution Unit of University College London. It is the most ambitious study so far of the means by which Scotland could achieve independence and of its consequences. According to the Introduction, the book strives to be 'strictly neutral on the desirability of independence'. With the best will in the world, however, the essays inevitably tend to reflect the prejudices and idiosyncrasies of the authors. This is particularly true of the contribution of the leader of the research team, Jo Murkens.

His first point is to assert that Scotland does not have a right in law to self determination on the grounds that this right applies only in 'the colonial context' (p.10). The wording of the United Nations Covenant on the subject gives no support to this idea, but the point is irrelevant in the Scottish case. As Murkens recognises, the right of Scotland to self-determination has been accepted by a succession of British political leaders. As an example he quotes from Margaret Thatcher's memoirs: 'as a nation they have an undoubted right to national self-determination'.

Murkens then argues (p.11) that the relevant Union is not that of 1707 but of 1801 when Ireland was added. The relevance of this is not clear, especially as the scope of the 1801 Union was radically changed in 1921 when Ireland became independent. Also, the Scotland Act of 1998, on which Murkens relies in other connections, refers specifically to the Union of 1707 between Scotland and England. It even maintains (in Section 37) that the Acts of the Scottish and English Parliaments which enacted the terms of the Treaty of Union are still in force, subject to the 1998 Act. In other words, the Scotland

### *Scottish Affairs*

Act amends the terms of the Union. If the Acts establishing the Union can be amended, they can also be abrogated.

This last point is one which Murkens denies. He quotes (p.108) from a book by Robert Lane: 'there is no possibility of abrogation of the 1707 Treaty of Union because the parties have ceased to exist and could not, in any case, restore the status quo ante'. This seems to me a very dubious proposition. The Treaty which the Parliaments of both Scotland and England ratified in 1707 replaced both of these Parliaments with a new Parliament of Great Britain. Otherwise the two states continued much as before. Scotland retained, and still has, its own established church, its own laws and legal and educational systems, and its own Parliament has been restored. (Lane was writing in 1991 before the restoration of the Scottish Parliament, which may be the reason for his statement.) At an earlier point in the book (p.20), Murkens himself says: 'the clarity of Scotland as a territorial and political unit and the national identity of the Scottish people means that no one can seriously dispute that Scotland possesses all the necessary ingredients of statehood'. So, of course, does England. Even if England does not at present have a separate Parliament, the British one is overwhelmingly English and it has always regarded itself as the continuation of the historic English Parliament. Neither of the two parties to the Treaty have 'ceased to exist'.

I can see no reason therefore why the Treaty cannot now be abrogated by agreement between the two parties or (although this would be less desirable) by the withdrawal of one of them. It is a highly questionable instrument in any case. England forced a reluctant Scotland (or at least a majority in an unrepresentative Parliament) to accept it by various forms of pressure, including the threat of military force. Subsequent British Governments have often ignored or violated it, and the restoration of the Scottish Parliament, even if Westminster still claims ultimate sovereignty, destroyed its fundamental provision.

Murkens accepts that the process of establishing independence would be initiated by the SNP, or a coalition headed by it, achieving power in the Scottish Parliament. The Scottish Parliament would then hold what Murkens calls an 'advisory referendum to determine the will of the Scottish people'. If the result is positive, Murkens says that negotiations could then begin with the UK government. He suggests that the outcome of the negotiations would be 'embodied in a prospectus and draft constitutional document'. Westminster

*Review: Scottish Independence*

would then hold a second referendum and, if that was positive, 'would pass the necessary legislation to give effect to Scottish independence' (pp.39-40).

These proposals by Murkens are not entirely clear, but it sounds as if he envisages that the negotiations would be concerned not only with the relations between the two countries, but also with the constitution of an independent Scotland. It is clearly inappropriate and unacceptable that the Westminster Parliament, where Scottish members are a small minority, should debate and decide matters which are internal to Scotland, especially something so important as the constitution. The Scottish referendum will be concerned with the draft constitution which the SNP have already published and (in Murkens' words) that referendum will 'determine the will of the Scottish people'. The Scottish view is that sovereignty rests with the people. This referendum will therefore decide whether Scotland will be independent on the basis of the proposed constitution. If it is positive, it would be appropriate for both Parliaments to recognise the recovery of Scottish independence in Acts which in effect abrogate their ratifications of the Treaty of Union.

Murkens, in suggesting (pp.39-40) that Westminster should legislate on the new Scottish constitution and hold a second referendum, presumably relies on the Scotland Act, under Section 30.1 of which 'the Union of the Kingdoms of Scotland and England' is reserved to Westminster. A positive Scottish referendum would, however, create a new situation, and the repeated assurances by British Governments that they would recognise the right of Scotland to self determination would then be overriding.

Negotiations between the two countries on such matters as the division of assets and liabilities and the future of the nuclear submarine bases at Faslane and Coulport are another matter. They will be complex and will take several months or even years. Except for the nuclear bases there will be nothing unusual about them; the British Government has great experience of such negotiations over the independence of scores of former colonies. One of the advantages of independence is that it will improve relations between Scotland and England by removing the fundamental cause of tension. Both countries will see advantage in reaching an equitable settlement as soon as possible. It will be more of a process than an event, and a second referendum about it would be unsuitable and unnecessary.

### *Scottish Affairs*

The nuclear bases, to which public opinion in Scotland is strongly opposed, are likely to be the most difficult problem. As Murkens says, their removal to a site in England would be very costly. He also remarks (p.89) there would be public hostility from people who would object to having them in their backyard. (He does not explain why it should be thought acceptable to have them in Scotland, close to our major centre of population). The best possible answer to the problem would be a decision by the British Government to abolish these nuclear weapons altogether. Their maintenance is hideously expensive; they serve no useful purpose; they involve the risk of a catastrophic nuclear accident. We should all be better off without them.

There is then the question of membership of the European Union. In my book, **Scotland in Europe: Dialogue with a Sceptical Friend** (1992), I quoted statements by well qualified authorities which seem to dispel any doubt on the matter. For instance, Emile Noel, the former Secretary-General of the European Commission wrote:

There is no precedent and no provision for the expulsion of a member state, therefore Scottish independence would create two new member states out of one. They would have equal status with each other and the other 11 states. The remainder of the United Kingdom would not be in a more powerful position than Scotland ... Anyone who is attacking the claim in respect of one country is attacking it in respect of the other. It is not possible to divide the cases.

But attacking it in respect of Scotland is precisely what Murkens does. He refers to Noel's statement, but only in part, and then without citing any other statement of comparable authority he asserts the opposite. He maintains that the remainder of the UK would continue to be the member state, but that an independent Scotland would have to apply for membership. He argues that Scottish independence would come about as a 'break-away' from the UK, not as an abrogation of the Treaty of Union, and that it is only in the second of these possibilities that Scotland would inherit membership of the European Union. This is inconsistent with his assumption in the rest of the book that independence would be 'granted' (I should prefer to say 'recognised') by Westminster. That would surely amount to the dissolution of a previously agreed union. Certainly, the two new states would have to negotiate with the European Union over such matters as the number of votes in the Council of Ministers and number of seats in the European Parliament, but neither would be expelled.

*Review: Scottish Independence*

Murkens has therefore introduced to this debate a number of original propositions: that Scotland has no right to self-determination; that it is the Union of 1801 which is relevant; that the Union of 1707 cannot be abrogated; that Westminster should legislate on the Scottish constitution and hold a second referendum; that an independent Scotland would not inherit membership of the European Union. He fails to make a convincing case for any of them and gives the impression that he is contriving obstacles and difficulties that do not really exist. This might be interesting as an intellectual exercise, but it is certainly not a 'practical guide'.

The next section of the book, on the economics of independence by Peter Jones, is much more realistic and useful and is clearly based on substantial research. He concludes that 'an independent Scotland would have a trade surplus under almost all conceivable conditions' (p.198) and substantial resources from her share of UK assets (p.215). He suggests that the approach to independence might create a climate of uncertainty which would disturb the economy, and refers to the effect of the referendum in Quebec. (It was Jack McConnell's quotation of this passage which drew a strong denial from the Agent Général of Quebec). Of course, the effects might be the opposite. Independence has brought economic and other benefits to other small countries in Europe and there is no reason why Scotland would be different.

There is an interesting final chapter by Michael Keating. He makes one very questionable statement: 'the almost complete absence of a debate in Scotland on defence and foreign policy would seem to suggest that these are not areas where there is a strong demand to diverge from UK policy' (p.297). On the contrary, the opposition in Scotland to nuclear weapons and to such policies as the bombing of Serbia and the alignment with Bush over Iraq show a vigorous Scottish concern. Keating is right to draw attention to the divergence of views between Scotland and England on the nature of sovereignty. He points out that Labour MPs asserted the sovereignty of the Scottish people in signing the fourth Claim of Right and then passed the Scotland Act which insisted on that of Westminster (p.296).

Finally, Keating hits the nail on the head by one sentence which states the real issue which faces us: 'the question here has always been whether Scotland can gain more influence as a small part of a member state of the EU, or as a small member state itself' (p. 294). I do not think that there is much room for doubt. As a part of a member state our views and interests are simply ignored when they differ from those of England; but they would be

### *Scottish Affairs*

expressed and taken into account if we were a member state. Also, in cases where we agree with England, we should together have more votes and more influence as two states than we have as one. And, as Keating says, 'enlargement of the Union to include the countries of central and eastern Europe along with Cyprus further reinforces the case for independence, since it would become difficult to explain why Slovenia should have a voice in the Council of Ministers and Scotland should not' (p.295).

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*November 2002*