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Self-determination and Sub-sovereign Statehood in the EU with particular reference to Scotland and passing reference to the Faroe Islands

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"In a united Europe every small country can find its place alongside the former great powers" [2]

Føroyskt Úrtak

Heiti: Sjálvsavgerðarrættur og at vera statur í ES við partvísum fullveldi, við serligum atliti til Skotlands, men eisini við atliti til Føroya. Greinin viðger í heimspekiligum og politiskum høpi týdningin av, at tjóðir, sum nú eru í felagskapi við aðrar í ES, fáa fullveldi og egnan ES-limaskap. Høvundarnir halda uppá, at tað er ómissandi rættur í fullum samsvari við ES-Sáttmálan hjá hesum tjóðum at fáa egnan ES-limaskap. Tessvegna og til tess at tryggja framhald í løgskipanum eigur umskifti til fullan limaskap at vera mett sum innlendis markanbroyting, og tí er umsókn um nýggjan limaskap ikki neyðug. Serliga er tað Skotland, ið verður viðgjørt í mun til Bretlands, men evnið og niðurstøðurnar eru av týdningi fyri alt Europa.

Høvundarnir: Alasdair Geater og Scott Crosby eru advokatar í Brússel og virka serliga innan ES-rætt, men saman fáast teir eisini við skotskan stjórnarrætt.

English Summary

This is a discussion of the legal aspects in their philosophical and political context of separate statehood and full EU membership for current state-sharing nations in the EU. It postulates that the attainment by these nations of separate EU membership through the exercise of the right of self-determination is an inalienable basic right and is wholly compatible with the EU Treaty. For these reasons and also to ensure legislative continuity the transition to full membership status would comprise an internal re-adjustment within the EU, no application to join as a new member being necessary. The particular focus is on Scotland and its position within the United Kingdom, but the topic is, and the conclusions are, of pan-European significance.

I. Points of Departure

1. There are many more nations[3] than states in the EU and some of them have it within their power to claim statehood and become EU Member

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[2] Cf. Norman Davies "*Europe, A History*", Pimlico 1997, ISBN 0-7126-6633-8 at page 944.

States in their own right. It is sometimes said, though, that to accord the smaller nations of the European Union separate statehood would contradict the very reason for creating the EU in the first place. This is a view with which we respectfully disagree.

2. First, as markets cease to be national in concept and scope, and become pan-European instead, the need for large national markets disappears. There is, therefore, no economic reason to oppose the emergence or re-emergence of smaller states.

3. Secondly, membership of the European Union is open to all European states provided they are democracies. Constitutionally, therefore, there is no impediment to nations, which currently share statehood with others, acquiring statehood in their own right within the EU.

4. Thirdly, the purpose of the founding Treaty, the Treaty of Rome, was not to coalesce the signatory states but to found "*an ever closer union between the peoples of Europe*". Heretical as it may seem to some, the creation of the European Union is not predicated on the maintenance of the national boundaries which obtained at the accession of each Member State, nor is EU membership in any way a guarantee of national territorial integrity. Indeed, integration would arguably advance more rapidly in the absence of dominant Member States.

5. Lastly, as the power of the EU grows and that of the Member States declines, a problem, not perhaps of identity, but certainly of voice arises for the state-sharing nations and especially for the smaller ones. Whereas the

[3] Some may instantly be inclined to object that before this discussion can advance a definition of the term nation or people is required. In the British context, for example, those of unionist persuasion might argue that each of the constituent parts of the present British State contains more than one people and conclude that the British State cannot be divided for that reason. This is, of course, a typical *divide et impera* argument and one which is therefore pernicious. For our purposes, the argument is also irrelevant, the definition of nation or people not being important. What is decisive is whether or not, as John Stuart Mill puts it, a *"sentiment of nationality exists in any force"*. One can assert British nationality despite the presence of several peoples on British territory. One can by like token also assert Scottish nationality despite the alleged presence of more than one people in Scotland. The right to self-determination is not reserved to the ethnically pure. How would those who now object to Scottish independence on the grounds of an insufficient definition of the term "people" have reacted to the emergence of the U.S.A.?

smaller nation was perhaps able to make itself heard sufficiently at domestic level, it finds that the Member State to which it belongs is increasingly unable to represent its views at EU level, precisely because the Member State itself has been weakened politically. In these circumstances the small state-sharing nation feels isolated and impotent. In order to contribute positively to the workings of the common endeavour, the EU, the smaller state-sharing nation must, it feels, speak with its own voice[4]. Granting such nations the right to speak with their own voice is therefore pro-European as it prevents isolation and promotes integration. This is one starting point.

6. The idea that Europe would be better governed without dominant states is not particularly new. It was put forward for example in 1703 by Andrew Fletcher of Saltoun, a most resolute opponent of the union between Scotland and England which of course did take place notwithstanding, in 1707 with all attendant and ensuing consequences. In a publication of 1703 entitled "*An Account of a Conversation Concerning a Right Regulation of Governments for the Common Good of Mankind*", Fletcher advanced the idea that governments should be rendered "*either incapable or unfit to make conquests*"[5] and should give up their habit of thinking that what is to the advantage of one country must be to the detriment of others and recognise that the interests of all countries are interdependent. Fletcher believed that Europe was best served by small states, each able to defend itself but not able to commit acts of aggression and argued that this system of "*divers small sovereignties*" represented the optimum,
"to preserve mankind, as well from great and destructive wars, as from corruption of manners, and most proper to give to every part of the world that just share in the government of themselves which is due to them."

7. These little known but rather prophetic words illustrate most clearly that the concept of "smaller sovereignties" is a humanistic one, and this humanistic aspect is another starting point for our discourse.

8. Another starting point is the possibility that Scotland - a notable state-sharing nation - may seek statehood and become an EU Member State in her own right. This is, after all, the policy of the SNP which is the second

[4] On the question of voice within the EU more generally see J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, 1999, ISBN 0-521-58567-8, chapter 2.

[5] Quoted and discussed in "Andrew Fletcher and the Treaty of Union", Paul Henderson Scott, *Saltire Society*, Edinburgh, ISBN 0-85411-057-7, Chapter 10.

largest party in the Scottish Parliament. Fearing presumably a domino effect, it appears that this prospect is not really regarded with any particular favour by the dominant Member States, the United Kingdom included, and so an understanding of the arguments habitually deployed by way of discouragement is of no little importance. Myths abound and, in the interest of rational debate, it is not misplaced to scotch them, as it were.

9. A final starting point is that the current government of the Faroe Islands (or more accurately the Faroes[6]) has decided to champion Faroese statehood, albeit retaining close links to Denmark and subject to popular approval by referendum[7]. Should the Faroes decide to end their protectorate status they would achieve statehood outside the EU and if they can do it from without, then the Scots can, a fortiori, do it from within.

II. Fear of Freedom

10. That said, many small state-sharing nations are afraid deep down of standing alone. Historically they may never have done so, or were driven in more violent or less tolerant times to seek the protection of a larger nation or overlord. The Faroese fit the first, Scotland the second category. This historical background does not, however, give an objective justification for the fear of freedom which is apparent in both nations even today. In fact no state, or at least no Western European state, need fear economic or any other kind of isolation, nor need they fear being ignored or abandoned if calamity ever befell them. If, then, there are no objective reasons to fear statehood, how is it that the fear persists?

11. The answer may reside in the fact that the smaller nations see as their own fear what is in reality the fear of the larger nation or of others. The case of the Faroes is illustrative. Statehood was almost achieved at the end of the Second World War and would arguably have been achieved if proper referendum techniques had been used. But Faroese statehood then would not, it seems, have pleased everyone. Evidence has apparently just come to light through the opening of Danish state archives that the USA was opposed to Faroese independence for fear of destabilising the North

[6] The term Faroe Islands is commonly used in English. Since "oe" already denotes island, we prefer the term Faroes. There are more than 45,000 Faroese on the islands, and a fairly large diaspora outside. As a linguistic group they count less than the Gaels in Scotland. And yet...

[7] Cf Jóhannus Egholm Hansen & Kári á Rógvi Olsen, *Faroese Busniess Law*, Dania Law Firm, 1998, ISBN 87-987134-8, page 39.

Atlantic at the beginning of and during the Cold War.[8] This opposition, it is said, led to a policy on the part of Denmark deliberately to create a culture of dependency in the Faroes, which if true, would go a long way to explaining the real reasons for the Danish block grant to the islands which is still being paid today, despite evidence that the Faroese economy may be perfectly viable without it.

12. The Cold War is, however, over. Yet Denmark continues to pay a heavy price to retain its dominion over the Faroes. Denmark could avoid this by negotiating reasonable terms permitting a gradual transition to Faroese statehood and thereby putting an end to the block grant. But this Denmark, in breach of an agreement struck with the Faroese Government in 1998, refuses to do. The reason is not oil, for any oil in Faroese waters is Faroese, not Danish according to a 1992 agreement between the Faroese and the Danish Governments[9]. In the absence of Cold War imperatives and in the absence of any prospect of oil revenues, Denmark, it must be concluded, simply does not want to let go and so, it seems, the real fear is not Faroese but Danish. The overlord is afraid of losing its vassal and is willing to pay a heavy price to maintain the status quo: the dependency culture is fostered as before, not so much because the Faroes need a subsidy but because it rather suits Denmark to give one.

13. So the Danish attitude may be motivated by nothing more than a reluctance to lose influence in the North Atlantic and to create a precedent which could lead to sovereignty claims from Greenland as well. In other words, the Danes probably do not want to see their sphere of influence cut back to the Kattegat. The Faroes, all eighteen islands and 45,000 people of them, inflate Denmark's importance. Hostility to Faroese statehood may therefore no more than a Danish fear of ego deflation.

14. Does not much of this apply by analogy to the relationship between dominant and dominated the world over, and between Scotland and England in particular? In terms of geo-politics, Scotland is much more important to England than the other may around, because Scotland has, in this regard at least, no ego problem. Yet Scotland refrains from seeking statehood. Scotland gives London influence far into the Atlantic - in fact

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[8] See the report commissioned by the Faroese Government, Føroyar í Kalda Krígnum (The Faroes in the Cold War), Løgmansskrivstovan, September 1999, ISBN: 99918-53-40-5

[9] Cf *Faroese Business Law*, op.cit. supra at page 38

up to the maritime boundary with the Faroes – whereas English influence would without Scotland, stop halfway up the North Sea.

15. England claims that it subsidises Scotland. If so, why should it not welcome Scottish statehood (and its own) and pocket the money? Perhaps England likes having or thinking it has a dependency. Perhaps it, like Denmark, fears the deflation of its national ego, and has created a dependency culture to keep the Scots in their place. In any event, what all this is leading up to is the proposition that the fear the Scots and the Faroese perceive as their own, is really the fear of the dominant to lose the wherewithal of their domination. If that were recognised the status quo might not last for long.

16. What also has to be said in this context is that there is no need to fear the emergence of new sovereign states pursuing interests inimical to those of the former partners in the old shared state. An independent Scottish state, for example, would continue to enjoy intense cooperation and, in many aspects of day to day life, virtually unchanged integration with England; the difference would be one of voice. The Faroes for their part would do the same with Denmark, mutatis mutandis. This form of statehood obtains in the case of many small states – Monaco, San Marino, Lichtenstein, Andorra, Luxemburg and even Ireland – but it also obtains, although not all would admit it openly, in the case of each and every state of the European Union. In short, the mere fact that of all the small nations, the Faroes are seriously contemplating statehood is proof that statism is not inextricably linked to absolute sovereignty or that, and this we return to later, in the modern world modern statecraft and modern constitutional practice are, as MacCormick puts it, "*beyond the sovereign state*" [10]

Neither small or large have in short any reason to fear the evolution to statehood of small and previously state-sharing nations.

17. In the remaining sections of this discourse we examine the achievement of statehood within the EU and the variation in the "internal geometry" that this would entail. In particular we deal with

(I) self-determination as a fundamental human right;
(II) the arguments commonly used to discourage the exercise of this right and the rebuttal thereof; and

[10] Cf MacCormick, *Beyond the Sovereign State*, 1997 Modern Law Review, p.56

(III) the exercise of the right of self-determination under EU law.

In the closing sections we look at the question of sub-sovereign Scottish statehood in the EU from which some general and particular conclusions may be drawn.

III. Self-Determination as a Fundamental Human Right

18. The right of people to self-determination is now indisputable, but the importance of this right is often forgotten. This is one reason why the right may on occasion seem to be honoured more in the breach than in the observance. We examine first the existence of the right and then its importance.

19. Article 55 of the Charter of the United Nations (signed on 26 June 1945) is based on the notion that self-determination of peoples is a prerequisite for comity among nations. It provides that

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> a. ...;
> b. ...;
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"

20. By 1960, when the U.N. General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples, self-determination was being placed squarely in the additional context of fundamental rights. Thus, the Declaration opens as follows:

> "Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom."

It then formally declares inter alia that

"1. he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. "

21. Six years later, on 16 December 1966 to be precise, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the U.N. General Assembly. The preamble and Article 1 of both these covenants are identical and they view self-determination unequivocally as a fundamental and as an individual right, i.e. as a right of the person. The recitals and Article 1 of these two covenants provide as follows:

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognising that these rights derive from the inherent dignity of the human person,

Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

22. In short, by 1960 and certainly by 1966, not only was the right of self-determination expressly and unequivocally recognised but it was clearly stated to be a fundamental right enjoyed by each individual person.

23. Individuals enjoy many rights, however, and many are sacrificed on the altar of some greater good or higher right. So it is necessary to assess how important self-determination is or where to rank it on a scale of rights. In our view, it is a right which cannot be defeated or outranked by any other right; it is a question of human dignity.

24. Human dignity has not always been recognised in these terms. Thus Mill, speaking presumably for the English establishment of the day, advanced the seemingly liberal propositions in 1861 that *"the question of government ought to be decided by the governed"* and *"where the sentiment of nationality exists in any force, there is a prima facie case for uniting all the members of the nationality under the same government, and a government to themselves apart."* This apparent case for self-determination was precisely that, apparent. It was a prima facie case, defeatable if and when convenient. As Mill went on to say:

> "Experience proves, that it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior

> and more backward portion of the human race, the absorption is greatly to its advantage. Nobody can suppose that it is not more beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilised and cultivated people - to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship, sharing the advantages of French protection, and the dignity and prestige of French power - than to sulk on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world. The same remark applies to the Welshman or the Scottish Highlander, as members of the British nation."[11]

25. According to Mill, then, the "*backward*" nation may justly be absorbed into the "*civilised*" nation and the individual thus saved from the fate of "*revolving in his own little mental orbit*". Mill at least recognised that the individual's lot was inextricably tied to that of his national group and accepted in effect that denial of self-determination affected the individual. Presumably Mill would have accepted that respecting self-determination would also have affected the individual, so in his defence it can be said that Mill understood the relationship between the individual and the nation[12]. What, to his detriment, Mill seemingly did not understand or if he did chose deliberately to ignore, is the fact that individuals (and therefore the collectivity which makes up the nation) prefer to make up their own minds. Thus, if the Breton or Basque of French Navarre wants to "*sulk on his rock*", he must be free to do so. It is his temper and his rock, and no outsider has the right to prevent him from deploying both as he and he alone sees fit. Robert Burns put it this way: *"Alas, have I often said to myself, what are all the boasted advantages which my country reaps from a certain Union, that can counterbalance the annihilation of her*

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[11] Cf. J. S. Mill, "Considerations on Representative Government", in *On Liberty and Other Essays,* Oxford University Press, 1991, ISBN 0-19-28208, pp. 428 and 431.

[12] As Weiler puts it (J.H.H. Weiler, *The Constitution of Europe*, op. cit. supra at page 92): "... the classical model of international law is a replication at the international level of the liberal theory of the state. The state is implicitly treated as the analogue, on the international level, to the individual within a domestic situation. In this conception, international legal notions such as self-determination, sovereignty, independence, and consent have their obvious analogy in theories of the individual within the state".

independence, and even her very name?"[13] For Burns, then, his country's loss of independence amounted, as his personal regret shows, to a diminishing of his individual being, or in short of his dignity. And this diminishing of dignity is no greater nor any less than that of the Breton ordered to participate "*in the general movement of the world*" by some presumptuous Parisian politician.

26. Self-determination is thus a matter of human dignity, individual and collective[14]. If one accepts that human dignity must at all times be respected by one and all and at the individual as well as at the collective level, then the right of self-determination cannot be outranked by any other right. It is, we presume, for this reason that the 1960 U.N. Declaration on the Granting of Independence was couched in terms of faith in the dignity and worth of the human person, and that the 1966 Rights Covenants expressly asserted the inalienable nature of human rights and for their part also recognised that *"these rights derive from the inherent dignity of the human person".*

For this reason also the parties to the Rights Covenants are expressly obliged under Article 1(3) of each to "*promote the realisation of the right to self-determination*" and, as stated in the last recital, the individual too "*is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".*

IV. Arguments of Dissuasion and their Rebuttal

[13] Letter to Mrs. Dunlop, 1790, quoted in Paul Henderson Scott, "Scotland in Europe" 1992 Canongate Press, ISBN 0-86241-414-8.

[14] There is thus a strong humanistic element in accommodating the desire for self-determination. It is an improving phenomenon. It is for this humanistic reason for instance that Gandhi considered that Mazzini, not Garibaldi, was the real hero of the *Risorgimento*. Mazzini apparently believed that the individual had, in order to attain maturity, to learn how to govern himself, and was not free until he had done so. Mazzini thus sought to throw off the Austrian yoke to free Italy from foreign domination - certainly - but primarily to free the Italians from themselves. Gandhi himself believed that Svarâj (independence) compelled the individual to learn how to govern himself. See Giorgio Borsa, Gandhi, 1983, Bompiani, Milano, ISBN 88-452-2506-2 at page 185. Self-determination, seen in this light, is a necessary component of the development of the individual or of the realisation of individual potential, ideas taken up in the Preamble and Article 2(1) of the German Constitution *(Grundgesetz),* for instance.

27. There are three arguments commonly adduced by way of generally discouraging the exercise of the right of self-determination in the EU. They are

(i) that statehood is an expression of nationalism and nationalism is dangerous;
(ii) that statehood would lead to economic isolation;
(iii) that statehood in one case would lead claims for statehood from other state-sharing nations risking to unacceptable fragmentation and collapse of the established order.

On the perceived dangers of nationalism

28. One has to define one's terms. If by nationalism one means some form of aggressive expansion by one group at the expense of another or of others, then nationalism so defined is a dangerous concept, being of necessity based on a belief in the superiority of one group over another. In this sense nationalism is racially intolerant and has to be resisted and eradicated as a scourge.

29. If self-determination is a form of nationalism, it is not the same phenomenon as the racialist variety described in the preceding paragraph. Rather, it is a tolerant phenomenon based on mutual respect. This, the tolerant form of nationalist expression, is what MacCormick calls liberal nationalism[15]. His conclusions are as follows:

> "...what is then required is some form of universally stateable acceptance of diversity in human groupings with mutual respect and like rights to respect. So conceived, nationalism is absolutely incompatible with fascism, racism or majority discrimination against national (or other) minorities. The critique of nationalism in its virulent forms simply would not apply to nationalism defined as implying a right and duty of mutual respect among diverse national traditions, with appropriate political expression of national identities."

Or as Weiler puts it:

> "The nation, with its endlessly rich specificities, co-existing alongside other nations, is, in this view the vehicle for realizing

[15] Cf. MacCormick, "What Place for Nationalism in the Modern World?" from *Hume Papers on Public Policy*, Volume 2 N°1, Edinburgh University Press.

> human potentialities in original ways, ways which humanity as a whole would be poorer for not cultivating."[16]

30. In short, no form of nationalist expression, including self-determination, is dangerous if it is based on respect for the dignity and worth of each person. Sub-sovereign statehood in the EU is, of course, based on precisely these precepts.

On the perceived risk of economic isolation

31. The argument against statehood for nations not currently enjoying that status is that it would condemn the new state to economic isolation to its detriment. Whether or not this argument has substance in economic terms, it is politically and legally wholly irrelevant. Even if, in the case of the new state, isolation would occur, it would be a matter of exclusive concern to the nation itself, since no nation may be obliged to accept the protection (as Mill put it) of others.

32. In addition, the isolationist argument overlooks the fact that regaining decision making autonomy will in many cases act as a spur to economic activity and in the longer term arrest the slide into branch economy status [17]. The anticipated or at least possible decision of the Faroese to take decision making into their own hands, without the protection of Denmark and without the comfort of the Danish block subsidy, whilst also remaining outside the EU seems motivated, in part at least, by precisely this or by a similar consideration.

33. However, the main reason for rebutting the isolationist argument is that it is simply misplaced, in the sense that it fails to take into account the way the world in general and Europe in particular is moving. Statehood may alter the political and legal status of the group in question but it would not alter its geographical position, nor sever its links with the rest of Europe. Statehood would in other words deprive no European nation of access to and participation in the internal market. On the contrary, markets are no longer national in scope. No national or regional economy is impervious to external events and in particular the economies of the EU Member States are all mutually dependent, whether or not a given Member State is currently inside or outside the Euro zone. National governments no longer

[16] J.H.H. Weiler, *The Constitution of Europe*, op. cit. supra at page 248.

[17] For a description of the branch economy status of Scotland, see "Monopolies and Mergers Commission Report on the Royal Bank of Scotland", quoted in Steel, *Scotland's Story*, 1985, Fontana, Collins, ISBN 0-00-637003-9, at page 384.

have economic, monetary or even political sovereignty. They are without exception all sub-sovereign[18]. Consequently, the termination of certain state-sharing arrangements or, depending on one's standpoint, of one majority group's dominion over another, would not, in the grand pan-European scheme, operate to the detriment of a new state in the sense of causing economic isolation.

34. To round off this point, it is instructive to complete the quotation from Professor Davies [19] placed before the start of this discourse:

> "In 1923 one of the first offices of Count Coudenhove-Kalergi's Pan-European League was opened in the capital of Estonia, Tallinn. Outside the office door was a brass plate with the inscription PANEUROPA UNION ESTONIA. Seventeen years later when the Soviet Army invaded Estonia, the plate was hidden by members of the League. In 1992, during the visit to Estonia by the doyen of the European Parliament, Dr. Otto von Habsburg, it was brought out of hiding and presented to him. It was the symbol of Estonia's hidden aspirations, invisible to the outside world for half a century. "Don't forget the Estonians!", said Dr. von Habsburg; "they are the best of Europeans."
>
> At the time, admirers of the Soviet Union were saying that the Baltic States were too tiny to be viable, sovereign countries. Similar things were said about the new-born republics of Yugoslavia. The point is: Estonia, or Latvia, or Slovenia, or Croatia, would be extremely vulnerable if left in isolation. But as members of the European Community they would be every bit as viable as the Grand Duchy of Luxembourg or an independent Wales or Scotland. After all, Estonia is nearly twenty times larger than Luxembourg, and is four times as populous. In a united Europe, every small country can find its place alongside the former great powers."

The notion, then, that isolation would follow statehood is utter nonsense.

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[18] This has been recognised for decades. Monnet, for example, wrote that *'The sovereign nations of the past are no longer the framework in which to solve the problems of the present';* see Jean Monnet, *Mémoires*, Fayard, 1976 at page 617; the translation is ours.

[19] Cf. Norman Davies, *Europe, A History*, op. cit. supra at footnote 2, page 944.

On the fear of fragmentation

35. We have observed that several peoples have what psychologists call a free-floating phobia about the loss of any part of national territory. If, for example, one mentions the possibility of Scottish statehood to Spaniards, Dutchmen, Italians or Frenchmen, even to those who have been living for years in an international environment such as Brussels, they automatically evince a marked lack of sympathy and respectively ask, what of Catalonia, Frisia, The South Tyrol (Padania being a different story[20]) and of course Corsica? Caught off guard and unprepared, their reactions seem irrational. Quite simply, if the Corsicans, who cost France a fair amount of money, wish separate statehood, why should it and how, legally (or morally) can it be denied them by Metropolitan France especially since they are entitled to statehood by virtue of the right of self-determination?

36. In terms of public international law, the issue, i.e. the scope of the right of self-determination, may be stated as follows:

> "Who, though, is to be the beneficiary of this right? Were only the Algerian people entitled to claim self-determination from France or should this right be accorded to the Kabyles vis-à-vis the Republic of Algeria? Is there not a danger that every group of dissatisfied persons within a given area might suddenly discover its nationhood and claim this right? If applied in this way, this right, which has not yet been sufficiently defined could lead to an atomisation of states from which neither old states nor states created on the basis of this right would be immune."[21]

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[20] cf. Cesare Pettinato, *Per l'Italia contro il secessionismo*, 1997, Edizioni Settimo Sigillo, Roma. Pettinato's message is in essence that the Northern League's separatist claims have no validity because they are based only on 'fiscal intolerance' (*insofferenze fiscali).* Fiscal intolerance may trigger separatist claims but is not, in our view, sufficient to demonstrate nationality for the simple reason that if the cause of the fiscal intolerance were removed, the separatist claim would presumably lapse. Nationality is a rather more constant concept and one which to sustain requires some real substance. As Himsworth and Munro state in their commentary on the Scotland Act 1998: "*Claims to nationhood, which may have a resonance in constitutional debates, may be based on various criteria, but a period of statehood may be relevant and is favourable rather than otherwise to the issue.*"; 1999 *The Scotland Act,* W. Green & Son Ltd., ISBN 0-414-01278 x at page v.

[21] Seidl-Hohenveldern, *Völkerrecht,* Carl Heymanns Verlag KG 1984, ISBN 3-452-19690-9 at page 332; the translation is ours.

It seems, then, that fear of fragmentation (or atomisation as Seidl-Hohenveldern would put it), although not a legal impediment, is nonetheless a practical difficulty. In practice, however, it is a difficulty which has been overcome many times across the world.

37. If Seidl-Hohenveldern's fear is that every sizeable tribe could claim statehood, the answer is: "*yes, and they often do so successfully, without upsetting the world order - the Faroese are or may be - no disrespect intended - the latest example*". There is therefore a solution to Seidl-Hohenveldern's problem which may be termed the micro-state solution.

38. There are in the world currently twenty-eight states recognised in international law which have a population of less than 300.000. There will be twenty-nine such states if the Faroese opt for independence (see Table 1).

Table 1: Micro-states in the world with less than 300.000 inhabitants [22]

Country		**Population 1994**	**Area in km²**
Andorra	Europe	48.000	450
The Antilles and Barbuda	Caribbean/ Atlantic Ocean	67.000	440
The Bahamas	Atlantic Ocean	272.000	13.940
Barbados	Atlantic Ocean	260.000	430
Belize	Central America	206.000	22.960
Brunei	South China Sea on Borneo	282.000	5.770
Dominica	Caribbean / Atlantic Ocean	71.000	750
Granada	Caribbean / Atlantic Ocean	92.000	340
Iceland	North Atlantic	266.000	103.000
Kiribati	Pacific Ocean	77.000	717
Liechtenstein	Europe	28.000	160
The Maldives	Indian Ocean	241.000	300
Marshall Islands	Pacific Ocean	53.000	181
Micronesia	Pacific Ocean	118.000	702
Monaco	Europe	28.000	2
Nauru	Pacific Ocean	10.000	21
Palau	Pacific Ocean	16.000	458
St Kitts & Nevis	Caribbean	41.000	269

[22] Source: Division of the U.N. Secretariat, World Population Prospects/Statistics Division of the U.N. Secretariat and International Labour Office, *CIA World Fact Book*, 1998.

St. Lucia	Caribbean / Atlantic Ocean	141.000	620
St. Vincent & the Grenadines	Caribbean / Atlantic Ocean	111.000	340
San Marino	Europe / Italian Peninsula	23.000	60
Sao Tomé & Principe	Atlantic Ocean	130.000	960
Seychelles	Indian Ocean	73.000	455
Tonga	Pacific Ocean	98.000	748
Tuvalu	Pacific Ocean	13.000	26
Vanuatu	Pacific Ocean	165.000	14.760
The Vatican	Europe, Italian Peninsula	1.000	0,44
Western Samoa	Pacific Ocean	272.000	2.860
The Faroes (by comparison)	Europe / North Atlantic	45.000	1.399

Apart from the Vatican with a population of 1.000 and little chance of growth through natural reproduction, the smallest of these states is Nauru with a population of 10.000, closely followed by Tuvalu with 13.000 and Palau with 16.000. Closer to home, San Marino has a mere 23.000, Liechtenstein 28.000 and Andorra 48.000. Andorra is actually bigger than the Faroes by a mere 3.000 souls.

39. There are in addition fifteen states, recognised in international law with a population between 300.000 and 1.000.000. They include Cyprus, Malta and Luxembourg in Europe (see Table 2).

Table 2: Micro-states in the world with between 300.000 and 1.000.000 inhabitants [23]

Country		**Population 1994**	**Area in km²**
Bahrain	Arabian Peninsula	563.000	620
Cape Verde	Atlantic Ocean	407.000	4.030
Equatorial Guinea	Atlantic Ocean + continental Africa	389.000	28.050
Fiji	Pacific Ocean	755.000	18.270
Gambia	Africa	956.000	11.300
Djibouti	Africa	496.000	22.000
Guyana	South America	825.000	214.970
Qatar	Arabian Peninsula	476.000	11.437
The Comoros	Indian Ocean	630.000	2.170
Cyprus	The Mediterranean	729.000	*9.250

[23] Source: see footnote 22, above.

Luxembourg	Europe	383.000	2.586
Malta	The Mediterranean	364.000	320
Salomon Islands	Pacific Ocean	366.000	28.450
Surinam	South America	455.000	163.270
Swaziland	Africa (1998 estimate)	966.000	17.360

* The Greek and the Turkish parts together.

40. All in all, there are therefore or soon will be 44 sovereign micro-states in the world, which amounts to almost one quarter of all the world's sovereign states, numbering as they do 190 in total. Seidl-Hohenveldern's fears do seem rather irrelevant in the face of these facts.

41. Of course, everything depends, as usual, on definition. The micro-states may be sovereign in international law but they are sub-sovereign in reality. Indeed, there are very few states of any description which are any different. We live in a "*post sovereign*" [24] world, i.e. one where absolute sovereignty is an obsolete concept. Seidl-Hohenveldern's error was not to see or not to foresee this.

42. In this system of sub-sovereign states, many of the functions, formerly associated with absolute sovereignty - trade regulation, customs rules (tariffs, classification), defence provision, economic management, currency management, fiscal policy, agriculture, industrial norms and standards, public transport infrastructure, airline ownership, dispute settlement and so on - are entrusted in whole or in part to supra-national institutions or shared with other states or both. The functions previously performed by the single state alone and indeed sovereignty itself are, to use MacCormick's term, dispersed [25].

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[24] MacCormick "Liberalism, Nationalism and the Post Sovereign State", *Political Studies* (1996) XLIV.

[25] MacCormick, it must be stressed, is anything but a lone voice. Weiler says this: "*We have witnessed in recent years the emergence of a new academic discourse which attempts to rethink the very way in which classical constitutionalism was conceptualised. For me, the most powerful and influential voice is that of MacCormick in his trilogy,* 'Beyond the Sovereign State', 'Sovereignty, Democracy and Subsidiarity', *and* 'Liberalism, Nationalism and the Post-Sovereign State'. *Here is a discourse which understands the impossibilities of the old constitutional discourse, in a polity and a society in which the key social and political concepts on which classical constitutionalism was premised have lost their meaning"; cf.* J. H. H. Weiler, *The Constitution of Europe,* op. cit. supra at pages 233-234.

43. A few examples help illustrate this point. The micro-states of the South Pacific obtain technical assistance from the South Pacific Commission and several use the Australian or the US dollar. Likewise the Caribbean micro-states belong to a supra-national organisation, the OAS or Organisation of American States and a number of them share a common currency, the eastern Caribbean dollar. Most French-speaking West African states entrust currency management to France, so establishing a common currency (the CFA franc). The same French speaking West African states together with their English and Portuguese-speaking neighbours belong to the ECOWAS or the Economic Community of West African States, the long term objective of which is economic union and which in any event promotes cooperation between the members. None of Europe's micro-states (including, by way of anticipation, the Faroes) have their own currencies and in Andorra both the Spanish peseta and the French franc are legal tender. The Nordic countries have developed highly practical methods of cooperation and mutual assistance, including the sharing of diplomatic and consular services throughout the world, and this is largely co-ordinated and managed by the Nordic Union. The Faroes will therefore be rather cosseted by the support and co-operative systems long in place in the Nordic region. In the British Commonwealth, even the head of state is not infrequently shared, something likewise intended for the Faroes and Denmark.

44. These are all working examples of sovereignty dispersal. The largest and most successful example of sovereignty dispersal is of course the European Union. None of the Member States possesses sovereignty in the obsolete absolute sense of the term any more, especially since monetary union. Sovereignty, we repeat, has been dispersed, and dispersed irrevocably.

45. Fear of fragmentation is therefore also a misplaced emotion. There has long been fragmentation in terms of the number of states, and it is no paradox that this fragmentation leads to heightened bilateral and multilateral levels of co-operation and mutual assistance and dependency, not to mention a high degree of reliance on supra-national institutions. This is tangible proof that in a globalised world bigness is not necessary. Put differently, sovereignty in its modern non-absolute form is not predicated on any minimum size criteria, and on this note we can safely conclude that the issue of fragmentation need concern us no longer. It is simply a non-problem.

IV. The Exercise of the Right of Self-determination under EU Law

46. The right of self-determination is of course recognised by all EU Member States, all in any event being U.N. members and it is implicitly recognised by EU law. Article 6 of the Amsterdam version of the Treaty solemnly states that

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

It would be impossible to deny the right to self-determination in the face of that.

47. Besides, the EU in its various forms has given effect to self-determination on three occasions:

> (i) the independence of Algeria, before which it was part of France;
> (ii) the withdrawal of Greenland from the Community, after which it remained part of Denmark;
> (iii) the joining of the GDR to the FRG upon which the GDR also became part of the Community.

48. It is easy enough to minimise the precedential value of these events on the grounds that Community law is without prejudice to changes in national boundaries or to variations in the size of national territory. Nonetheless, one point is of fundamental importance.

Whatever the circumstances of each case were - decolonialisation, autonomous management of local resources (fish-stocks) and re-unification - , the principle prevailed. There is therefore no reason to suppose that the principle would not prevail in other circumstances such as in the event of a secession from or in the case of a dismemberment of a Member State. If the successor state concerned wanted to leave the EU, that would be negotiated although such negotiation would of necessity be protracted not least, as the Greenland case showed, because there is no mechanism for the withdrawal from the EU of Member States, in whole or in part. If, on the other hand, the successor state wanted to remain in, it would certainly be accommodated. The only question in the latter case would be a technical one as to how this goal would best be achieved within the law. It has to be

said, however, that it is easier by far to make adjustments from within than to negotiate one's way out.

49. It is our understanding of the law that should secession or dismemberment take place and the inhabitants of the new state(s) elect to remain in the EU, that choice would have to be respected, by dint of Article 6 of the Treaty in the first instance and would in any case have to be implemented without any interruption of membership, by virtue of the principles of public international law in regard to treaties and/or operation of the principle of legislative continuity in the second. In this respect, the law is relatively straightforward.

50. So far as it is relevant, Article 34 of the 1978 Vienna Convention on Succession of States provides as follows:

> "1. When a part or parts of the territory 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 the succession of States in respect of the entire territory of the predecessor State continues to be in force in respect of each successor State so formed;
> (b) ...
>
> 2. Paragraph 1 does not apply if:
> (a) the States concerned agree otherwise;
> (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."

51. As to paragraph 1, it applies in the case of secession, i.e. where there is a predecessor state and in the case of dismemberment, i.e. where there is no predecessor state. It goes without saying that the EU Treaty and its attendant secondary legislation is a treaty within the purview of paragraph 1. As to paragraph 2, we assume that continued EU membership would be part of any independence package, so that fulfilling (a) would not pose any problem. As to (b), it is hard to imagine how the application of the EU Treaty to any successor state whose inhabitants wished to remain in could be "*incompatible with the object or purpose of the Treaty*". The Treaty strives for ever closer union of peoples, Article 6 requires human rights to be respected, self-determination being just such a right and all European

democratic states qualify for membership. Nor could the application of the Treaty to the successor states "*radically change the conditions for its operation*". They would scarcely change the conditions at all, or if so certainly not radically. How could it be argued that the operating conditions of a Community which has expanded from six to fifteen members in little more than 40 years and is on the verge of embracing a substantial number of new states in Eastern Europe would be radically changed or even changed at all if an existing Member State became two or even more new Member States? So we would conclude that self-determination or separate statehood would not require any successor state to apply for membership from without. The necessary adjustments would be made from within, whilst the EU Treaty would meanwhile continue to apply in full force [26].

52. It may of course be objected that the Vienna Convention has not yet been formally ratified by a sufficient number of States to have come into force or to have become effective as a matter of treaty law [27]. To this we reply that either
(i) the Vienna Convention is declaratory of customary law so that the principles stated therein would apply anyway, or
(ii) the EU Treaty must in any event continue to apply to successor states on the basis of the principle of legislative continuity.

Consequently, secession or dismemberment would not and could not abruptly terminate the application of the Treaty and its secondary

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[26] The full institutional consequences of splitting a given Member State would have to be assessed on a case by case basis. That is not a topic for this discourse, which is concerned only with the question of membership *simpliciter* upon a split and not with the terms of continued membership.

[27] Entry into force of the Convention is governed by Article 49 thereof which provides that

"1. The present Convention shall enter into force on the thirtieth following the date of deposit of the fifteenth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the fifteenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession".

On the last count only 32 states had ratified the Convention, enough to bring it into force in terms of Article 49(1) but not enough to give it much effect in terms of Article 49(2), at least for current purposes, since no EU Member State figures among the ratifying states.

legislation. Any withdrawal would have to be negotiated and the Treaty would continue to apply during the negotiating period. On the other hand, should the wish be to remain in, the negotiations on the adjustments required to accommodate the successor states would take place on the inside and result in uninterrupted and necessarily continued membership anyway.

53. In conclusion, EU law recognises the right of self-determination and if in exercise of that right a successor state wished to become a Member State in its own right, public international law in general and the principle of legislative continuity in particular ensure that the transition from state-sharing nation to full EU membership would be without interruption and in that regard be seamless.

VI. The Importance of History

54. To claim statehood one must first claim nationhood. The Faroese, for instance, have never enjoyed statehood in any formal sense, yet there are many historical facts on which the Faroese may base their claim for nationhood. History tells us for a start that the Faroese, not the Icelanders, had the first Parliament in Europe.[28] Past history also tells us that, generally speaking, the Faroes have always enjoyed a high degree of autonomy, first from Norway and later from Denmark. The best founded historical assessment would be to view the Faroese-Danish relationship as founded in treaty, not devolution. The Norse settlements in the North Atlantic all appear to have concluded Treaties with the Kings of Norway in the latter half of the 13th century, the Faroes being the last to do so in 1271. The gist of these treaties, often referred to as the 'Old Treaties', appears to have been an acceptance of allegiance to the Kings of Norway, with strong reservations regarding internal autonomy and the ultimate right to break the link with the Norwegian Crown[29]. This allegiance did not, however, signify incorporation into Norway nor into its successor, Denmark. It is consistent with this fact that it was the Faroes, not Denmark, that decided that the Faroes would not accede to the then EEC in 1973. Legal history shows us that all statutes and other regulatory instruments do not become part of

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[28] Cf G.V.C. Young, *From the Vikings to the Reformation, a Chronicle of the Faroe Islands up to 1538*, Shearwater Press, Douglas, Isle of Man, 1979, ISBN 0 904980 20 0, page 79

[29] cf Professor Hans Jacob Debes, *The Faroese Islands History – an outline,* in Faroes Islands, The New Millennium Series, 1999, ISBN 9979-9404-3-3, page 42 and Chapter 1 of Føroya Søga 2, also by Professor Debes, ISBN 99918-0-060-3

Faroese law until promulgated by the Faroese Parliament.[30] Significantly the Home Rule Act of 1948 was voted on and ratified by the Faroese Parliament before the Danish Parliament adopted it. Consequently the bulk of recent legal opinion sees the Home Rule Act as an 'agreement' (Danish/Faroese aftale/avtala) or treaty between the Faroes and Denmark.[31] Present day Denmark can thus be viewed as the successor to the Norwegian and later Danish sovereign monarchs with whom the Faroese made their earlier treaties. The continued use of agreements between the two countries rather than unilateral Danish legislation regarding the Faroes would seem to reinforce this line of thought. Lastly, the history of the Faroese language reveals the will of a people to preserve their own identity and culture against many odds.

55. What in sum all this demonstrates is that history establishes status. In the case of the Faroes it allows them, in addition to their basic human right, to discuss their constitutional arrangements with the Danes as equals.

56. The following section attempts to explain why the same must be true in respect of Scotland and England.

VII. The Particular Case of Scotland

57. Much energy seems to have been expended on the question whether the restitution of Scottish statehood would be an act of secession from or an act of dismemberment of the UK. In light of the position under public international law, it might be thought that, since the result would apparently be the same, either way, the question is moot. What such an approach would overlook, however, is the fact that Scottish statehood would require adjustments to be made to the EU Treaty, albeit from within, and it would make a significant difference if Scotland and England were engaged in this process as equals on the same side of the table than perhaps as something less than equals on opposite sides of the table. So the historical and constitutional position must be examined briefly.

Historical

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[30] cf Jóhannus Egholm Hansen and Kári á Rógvi Olsen, *Faroese Business Law*, op. cit. supra at chapter 2; see also Preface to the Faroese Statute Series, Lógbók fyr Føroyar 1. Bind, Føroya Landsstýri 1992

[31] cf Jákup Thorsteinsson and Sjúrdur Rasmussen: Rigsfællesskabet mellem Danmark og Færøerne in Folketingets Festskrift Grundloven 150 år, page 491 at 505, ISBN 87-00-39106-9

58. To regard the restitution of Scottish statehood as an act of secession would imply that Scotland belonged to what would be left of the current British state. What would be left would be England and Wales on the one hand and Northern Ireland on the other. Scotland has never belonged to or been part of Northern Ireland or England and Wales. Proponents of the secessionist theory reason therefore on the basis of ignorance of historical fact or of the very bad English habit of regarding the terms UK and GB as synonyms for England. Professor Davies, an Englishman certainly not ignorant of historical fact, describes the phenomenon thus:

> "In modern times, almost every European country has devoted greater energy and resources to the study of its own national history than to the study of Europe as a whole. ...
>
> The problem is particularly acute in Great Britain, where the old routines have never been overturned by political collapse or national defeat. Until recently, British history has generally been taken to be a separate subject from European history - requiring a separate sort of expertise, separate courses, separate teachers, and separate textbooks. Traditional insularity is a fitting partner to the other widespread convention that equates British History with English History. (Only the most mischievous of historians would bother to point out that his *English History* referred only to England.) Politicians have accepted the misplaced equation without a thought. In 1962, when opposing British entry to the European Economic Community, the leader of HM Opposition felt able to declare quite wrongly that such a step would spell 'the end of a thousand years of British history'. The English are not only insular; most of them have never been taught the basic history of their own islands." [32]

What is worse is that the English have transferred their view of British history to the outside world so that all but the Celtic nations of Britain have an entirely misconceived view of the basic history. It is thus a matter of some international necessity to set the record straight.

59. King Edward I of England (1272-1307) had ambitions to rule all of the British Isles and set out to gain control by military conquest and/or

[32] Cf. Norman Davies, *Europe, A History*, op. cit. supra at page 32.

exploitation of the feudal system[33] to gain control over Ireland, Scotland and Wales.

In military terms, he had his major success in Wales. In terms of constitutional law, the process of incorporation of Wales into England was completed by an Act of the Parliament of England, the Union of Wales and England Act of 1536. Wales therefore has been part of England since that date and so England and Wales were one entity at the time of the Treaty creating the union between Scotland and England. As a slight digression it is worth stating at this juncture that Welsh statehood would be an act of secession, in sharp contrast to the correct classification of Scottish statehood because in the former case the core would remain but in the latter the core would cease to exist.

60. The history of English intervention in Ireland is rather more complicated. For present purposes, though, it suffices to refer to three pieces of legislation:

(i) The Act of Union of 1800, an Act of the Parliament of Great Britain terminating the Irish Parliament;
(ii) The Government of Ireland Act of 1920, an Act of the United Kingdom Parliament, recognising the Parliament of the Irish Free State and setting up a Parliament of Northern Ireland;
(iii) The Ireland Act 1949, which some authorities describe as purely declaratory in nature faced with Ireland's becoming a republic outside the British Commonwealth.

61. Unlike Ireland and Wales, Scotland was a recognised independent sovereign state before the military incursions of Edward I [34]. After the

[33] The scope of the feudal system for subjective interpretation when medieval magnates owned land in more than one kingdom is clearly and in the present context aptly brought out by the positions Edward I himself assumed towards Scottish monarchs owning land in England on the one hand, and French monarchs in whose kingdom he himself owned land on the other. In the former case he expected homage not just for the land in England, but also for the entire Kingdom of Scotland; in the latter case he refused to pay homage to the King of France other than for his lands in France. See Norman Davies, *The Isles – A History*, Macmillan 1999, ISBN 0-333-76-370 x, Chapter 6; Fiona Watson, *Under the Hammer – Edward I and Scotland 1286-1307*, Tuckwell Press 1998, ISBN 862320209, Chapter I.

successful conclusion of the War of Independence by the Treaty of Northampton in 1328, Scotland's status as an independent country was never challenged in law [35]. In 1603, King James VI of Scotland inherited the throne of England ("*The Union of the Crowns*") and thus added the Kingdom of England to his Crown. In 1707, "*The Union of the Parliaments*" dissolved the Scottish and the English Parliaments, created Great Britain and thus set up the constitutional arrangements which governed Scotland and England until the Scotland Act 1998. This act restored the Scottish (but not the English) Parliament [36].

62. In 1920, Professor A. V. Dicey, Professor of English Law at the University of Oxford, the "father" of English Constitutional Law and the author of Introduction to the Study of the Law of the Constitution, the standard textbook for generations of British students of constitutional law, published a joint work with Professor R. S. Rait, Professor of Scottish History and Literature in the University of Glasgow and Historiographer-Royal for Scotland, "*Thoughts on the Union between England and Scotland*" (hereinafter "*Thoughts on the Union*") [37].

63. Part I of "*Thoughts on the Union*" is entitled "*The Parliamentary Government of Scotland 1603-1707*", thereby demonstrating again the continued existence of two separate sovereign states (albeit even then sub-sovereign states since the head of state was shared). Part II deals with "*the War between the Parliament of Scotland and the Parliament of England*", and the eventual passing of the Act of Union. Two events are worth

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[34] Inter alia by Edward I himself as in the Treaty of Birgham 1290, discussed in Watson, *Under the Hammer*, op. cit. supra at page 11.

[35] During the Cromwellian inter-regnum the Scottish Parliament was suspended (1651-1661) and thirty MPs from Scotland were returned to Westminster. However, no steps were taken constitutionally to bring about a parliamentary union or to create a new single state. The arrangements whereby MPs from Scotland (one half of whom were English army officers) went to London simply lapsed on the restoration of the monarchy and Scottish parliamentary business resumed in 1661. If this was an interruption of statehood, it was so de facto but not de jure, the Scottish Parliament never having been formally dissolved nor any new parliament put in its place. For a fuller account see Lynch, *Scotland, A New History,* Century, 1991, ISBN 0-7126-3413-4 at pages 283-286.

[36] The restored Scottish Parliament lacks the powers of the old one which was dissolved along with the English Parliament in 1707.

[37] A. V. Dicey and R. S. Rait, *Thoughts on the Union between England and Scotland*, Greenwood Press (USA), 1971, SBN 8371-4785-9.

mentioning so as to demonstrate yet again the sovereign nature of the two kingdoms:

First, on 16 September 1703 the royal assent, by Queen Anne, was given to the Scottish Act Anent (relating to) Peace and War. The purpose of this Act was to ensure that

> "even should the Union of Crowns continue after Anne's death:
> (a) no King or Queen of Scotland should have power to make war on any State without consent of the Scottish Parliament;
> (b) no declaration of war made without such consent should be binding on the subjects of the Kingdom of Scotland;
> (c)treaties of peace, commerce and alliance must be negotiated by the sovereign with the consent of the Estates of Parliament." [38]

Secondly, in response to this Scottish Act and certain other events, the royal assent was given on 14 March 1705, again by Queen Anne, to the English Alien Act. This measure has two names other than the "popular" name, the Aliens Act. In the Statutes at Large, the title is *"An Act for the effectual securing the Kingdom of England which may arise from several Acts lately passed by the Parliament of Scotland"*. In the chronological table of Statutes, the measure is entitled *"An Act for the Union of England and Scotland"*.

The English Alien Act offered the Scottish Parliament the opportunity of negotiating with the English Parliament for a union between the two countries and empowered the Queen to nominate commissioners to negotiate a treaty whenever the Scottish Parliament should pass an act empowering the Queen to appoint Scottish commissioners for the same purpose.

Constitutional

64. In due course both countries did of course appoint commissioners and negotiations took place leading to the Act of Union. Dicey and Rait describe the nature of the Act as follows:

> "The Act was itself a piece of legislation quite unlike any statute which had been passed before 1707 by any Parliament either of England or Scotland, ... It was of necessity both a bona fide treaty

[38] A. V. Dicey and R. S. Rait, *Thoughts on the Union*, op. cit. supra at page 165.

> or agreement between the two countries, and it had also to be an Act or statute regularly and peaceably passed by each of the separate Parliaments of England and of Scotland." [39]

65. The Act of Union was passed on 16 January 1707 by the Scottish Parliament and on 6 March 1707 by the English Parliament. That the Act of Union was by its nature an international treaty is evidenced by its opening article which provides,

> "That the two Kingdoms of Scotland and England shall upon the first day of May next ensuing the date thereof, and forever after be united into one Kingdom by the name of Great Britain."

Thus, a new state, Great Britain, came into existence as a result of this Act of Union made up, in terms of legal instruments, of:

> (i) the Treaty (or Articles) of Union signed in triplicate by the Commissioners of the two countries;
> (ii) the Act of Union adopted by the Scottish Parliament (Acts of the Parliament of Scotland, xi, 406, c. 7);
> (iii) the Act of Union adopted by the Parliament of England (6 Anne, c. 11).

Consequences of Scottish Statehood

66. Great Britain was thus created by an international treaty between two states, each sovereign in law. If either of these formerly sovereign states regained statehood, so too would the other and the union would simply be dissolved. That seems an unassailable proposition in both law and logic. The Constitutional Unit in London states, however, that "*the process of Scottish independence as implied in the Claim of Right - whereby only Scots are to have a vote - is evidence that it is Scotland that is seceding from the UK*" [40]. This assertion, which is based, it has to be said, on no cited authority, simply does not survive scrutiny. If the union was created by an international treaty between two sovereign states, how could the process involved in a splitting of the ways alter in any way the result in law and fact that the union would no longer exist and would be replaced by a return to the status quo ante?

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[39] A. V. Dicey and R. S. Rait, *Thoughts on the Union,* op. cit. supra at page 206.

[40] Cf. The Constitution Unit: Issues Around Scottish Independence, September 1999, page 10.

67. There is a joker in the pack, though, and this may be a source of confusion. In the event of a dissolution of Great Britain, where would Northern Ireland go? There are four potential possibilities[41], but none of them alter the legal nature of the restoration of Scottish and English statehood. The reason is that the core of the British state is constituted by the union of Scotland and England (Great Britain), not by the augment to Great Britain of Northern Ireland. The existence of the augment could not save the core from dissolution if either of the constituent parts of the core wanted statehood. Similarly, if Northern Ireland wished to split from Great Britain, the core would remain intact. Consequently, although the fate of Northern Ireland is important and would have to be properly regulated it does not alter the constitutional position as between Scotland and England.

68. It is not known whether the EU Institutions would regard the restoration of Scottish statehood as an act of secession or dismemberment.

However, in "*Scotland on Sunday*" of 5 March 1989 and in "*The Scotsman*" of 12 June 1989 Emile Noël, then Secretary General of the Commission of the European Communities and subsequently Professor at the European University Institution at Florence, is quoted as saying:

> "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."

And, in "*Scotland on Sunday*" of 8 March 1992, Lord MacKenzie Stuart, former President of the European Court of Justice, is quoted as opining that

> "Independence would leave Scotland and 'something called the rest' in the same legal boat. If Scotland had to re-apply, so would the rest... I am puzzled at the suggestion that there would be a difference in the status of Scotland and the rest of the United

[41] Independence, incorporation into the Republic of Ireland, attachment to England or Scotland.

> Kingdom in terms of Community law if the Act of Union was dissolved."

Scotland and England would thus, in the view of these two eminent gentlemen, be successor states of equal standing and the authors are aware of no authoritative attempt to refute these two views.

The Process

69. One final point seems to confirm the fact that Scottish statehood would constitute dismemberment of the United Kingdom rather than an act of secession. It is that unilateral withdrawal from the union is constitutionally not possible. Statehood would have to be granted by the current UK Parliament. In granting statehood, this Parliament would, however, automatically dissolve itself: it could not grant statehood to Scotland (and consequently to England) and thereafter claim to be the Parliament of the United Kingdom of Great Britain and Northern Ireland.[42] On the dissolution of the current British Parliament the British state would simply expire, and in these circumstances it is clear that neither Scotland nor England would be seceding.

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[42] It is worth spelling this out once again. The British Parliament is the result of the fusion of the old Scottish and the old English Parliaments, both of which were the legislatures of sovereign states, and which were dissolved in 1707. An act granting independence to Scotland would endow the Scottish Parliament with plenary power and recreate at the same time a sovereign English Parliament. The British Parliament would cease to have any basis and would therefore disappear. Whether or not either new Parliament acquired the responsibility for Northern Ireland would not alter this process. The question arises of course whether or not the British Parliament could refuse to grant statehood to Scotland. Ultimately, the answer is in the negative for legal and political reasons. Legally speaking, the British Parliament could not resist an unequivocal demand for Scottish statehood without denying the right of self-determination. The sanction for the denial of that right would be political - a total loss of legitimacy in Scotland with the ultimate threat of civil disorder. The British Parliament would not, in our view, let things go that far. The legitimacy point is, finally, of relevance for the EU. The EU clearly has no power to prevent Scotland's return to statehood. Yet, were it to require Scotland to apply for separate membership from without it too would lose legitimacy, and it might be some time before Scottish faith in the EU were restored, if ever. Thus whatever the law might be deemed to be, the political reality is that Scotland would become a Member State in her own right without having to submit an application for admission and the same would apply for England.

The benefits of statehood ?

70. We offer no view on the benefits of Scottish statehood. In general terms, there seem to be advantages, though. Thus Weiler says this: *"It is worth remembering at the outset that national existence and even national vibrancy do not in and of themselves require statehood, though statehood can offer the nation advantages, both intrinsic as well as resulting from the current organization of international life, which gives such huge benefits to statehood"* [43].

71. There is also some authority for the view that Scottish statehood would benefit European integration in particular. Thus, in "*The International Importance of Scottish Nationalism*", Douglas Young (a Scotsman) wrote in 1932 that

> "Any European federalist association must have a nucleus, and what is that nucleus to consist of? The notorious insularity and the imperialist tradition of England - dying, but dying hard - renders England a reluctant and a suspected participant... Now Scotland, as the *auld ally* of France against English dynastic accession in the Middle Ages, has retained a constant popularity in France which is an international factor of some account. And Scotland has old cultural ties of many kinds with Scandinavia and the Low Countries, and much further afield with Europe. Accordingly, Scotland can act as a link between insular and suspected England, and the nations of Europe. The development of a federal nucleus in what is now Great Britain by the free and equal participation of Scotland, Wales, and an unpartitioned Ireland, would encourage cohesion in Western Europe which would spread elsewhere." [44]

72. The last word we leave, though, with an Englishman, Professor Davies, who writing in 1996, says that the Scots "*possess the power to destroy the United Kingdom, and thereby to deflate the English, as no one in Brussels could ever do. They may make Europeans of us yet.*"[45]

On that note we rest our case.

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[43] Cf. J.H.H. Weiler, *The Constitution of Europe*, op. cit. supra at page 248.

[44] Quoted by Dewar Gibb in *Scotland Resurgent* 1950, Eneas Mackay, Stirling at page 280.

[45] Cf. Norman Davies, *Europe, A History*, op. cit. supra at page 1134.