Liverpool Law Rev
DOI 10.1007/s10991-015-9173-8

The "Day After" the Scottish Referendum: Legal Implications for Other European Regions

Belen Olmos Giupponi[1] · **Hannes Hofmeister**[2]

Abstract This article examines the various legal aspects involved in Scotland's independence, focusing on the legal implications for other European regions. Essentially the results of this analysis might also provide useful guidance for other regions in Europe contemplating independence, such as Catalonia or Flanders. In order to offer an overview of the questions that may arise, membership of international organizations and succession of states are taken into account. This paper will then turn to the EU law aspects of Scottish independence; in particular it will address the question of how Scotland's independence would affect its status vis-à-vis the EU.

Keywords Scottish referendum · EU membership · Independence · Scotland · Self-determination · Sovereignty

Introduction

"Independence" and "referendum" have lately become the "buzz words" du jour in certain regions across Europe. This article looks into the quest for independence of Scotland from an international law and a European Union law perspective. Now that the outcome of the Scottish referendum is known, the relevance of the analysis consists in its impact on the future plans of other regions in Europe.[1]

The article presents a good opportunity for reflection that lies in the evidence and arguments suggesting that the Scottish referendum would serve as a useful

[1] Davies (2011).

✉ Belen Olmos Giupponi
m.b.olmosgiupponi@stir.ac.uk

[1] University of Stirling, Stirling, UK

[2] Free University of Bozen-Bolzano, Bolzano, Italy

Published online: 15 December 2015

"experiment" for other territories/regions in Europe with similar independence aspirations such as Catalonia.[2] In Catalonia, the current regional government has advanced a "Declaration of Sovereignty", planning to hold a referendum on Catalonia's secession from Spain. The Catalan Government has even established a Commission to articulate a smooth transition. In the same vein, Catalonia has taken the first steps to explore the possibilities of becoming a member of various international organisations.

The prospect of Scottish independence has given rise to different hypotheses about the possible legal solutions to intricate dilemmas. It is relevant to acknowledge at the outset that there are so many "burning questions" involved in the Scottish independence debate and that most of them look at the purely political and economic arguments for and against staying in the UK. This article, however, deals with the legal implications as to the future powers of an independent Scotland in the international arena and in the EU context.

In the following paragraphs, the importance of the international law aspects involved in the Scottish referendum debate will be highlighted, the analysis focusing on how the new state would function in the international law context. In order to provide an overview of the questions that arise, issues of membership of international organizations and succession of states are taken into consideration. This paper will then turn to the EU law aspects of the Scottish referendum; in particular it will consider the question of how independence may affect Scotland's status vis-à-vis the EU.

Historical Background

The Act of the Union established in 1707 the separation of powers between Scotland and the United Kingdom.[3] Within the UK, Scotland maintained a strong national and legal identity though.[4] During the 1960s, when the SNP put the issue back on the agenda, independence became again "an issue" in the form of calls for devolution. Two events, then, converged to foster the quest for independence. On the one hand, the SNP won a Scottish parliamentary election. On the other hand, the discovery of new economic resources strengthened support for economic independence. Throughout the 1970s, the Labour Party argued for the devolution of political authority to Scottish institutions, leading to the 1979 referendum. However, the proposal failed to reach a sufficient number of votes. Indeed, the Scottish Devolution Referendum, held on March 1979 obtained 52 % of votes in favour of devolution against 48 %, but the majority only represented 32.9 % of the registered electorate as a whole.[5] The issue of devolution was frozen during Conservative rule in the 1980s and early 1990s, but re-emerged when the Labour Party took office in

[2] Moreno (2006).

[3] Birlin (2007).

[4] Connolly (2013: 90–91).

[5] Dewdney (1997).

1997, following Tony Blair's promise that devolution would, as Mac Intyre points out, "lance the boil of independence."[6]

As a result of this recent historical evolution, the Scotland Act was passed as an Act of the Parliament in 1998, re-instating the Scottish Parliament. Two aspects included in the Scotland Act deserve special attention from an international law perspective: the UK's external relations and the powers of the Scottish Parliament to implement international and EU norms into Scottish law.

Under Schedule 5 of the Scotland Act (entitled "Foreign Affairs"), Scotland can implement international norms in Scottish law whereas the UK is responsible for conducting international relations.[7] Schedule 5 reads "7(1) International relations, including relations with territories outside the United Kingdom, the European Union] (and their institutions) and other international organisations, regulation of international trade, and international development assistance and co-operation are reserved matters. (2) Sub-paragraph (1) does not reserve—(a) observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law".[8]

A different way to look at the issue rather than through historic facts is to consider the powers of the Scottish Parliament over the past 16 years. Indeed, the Scotland Act 1998 devolved certain areas to the Scottish Parliament. With regard to law-making by the Scottish Parliament, the "early years" witnessed a significant production of measures in the different devolved areas.[9] As a consequence, this proactive approach taken by the Scottish Parliament has led to the adoption of "subordinate legislation" regulating different areas within its legislative competence. At present, if the laws therein enacted fall into the "reserved competences" of Westminster or are incompatible with EU law or the ECHR, according to the Scotland Act these provisions are not to be considered as "law" and can be struck down by the Courts.[10]

Under the Scotland Act the Scottish Parliament has exercised its power in all the devolved areas.[11] The theoretical relevance of the Scotland Act for the development of the Scottish Parliament and its devolved powers is reflected in the adoption of different legislative acts on various fields.[12]

It is in the framework of the Scotland Act that a Bill was prepared for holding a referendum about Scotland's independence in accordance to paragraph 5A of Part 1 of Schedule 5. The Bill was passed by the Parliament on 14 November 2013 and received Royal Assent on 17 December 2013. The UK and Scottish governments then reached an agreement to work together to ensure a referendum on Scottish independence takes place by the end of 2014. Finally, the referendum was scheduled for September, 18th 2014 and citizens voted in favour of staying in the UK.

[6] MacIntyre (2012).

[7] MacIntyre (2012).

[8] Scotland Act 1998. c.46. Sch.5.

[9] Sutherland et al. (2011).

[10] Finch and Munro (2012: 27).

[11] Page (2011).

[12] Manson-Smith (2008).

What remains of primary importance to the future development of the question of the independence are the relationships between Holyrood and Westminster with regard to the different fields of competence (Brodies Public Lae Blog 2014).[13] In the event that independence had been achieved, the agreement between the central government and the Scottish counterpart would have defined the details of the future modus vivendi.[14] Even now that the issue of independence may be shelved for some years, it will for sure re-emerge in coming years.[15] In a recent report, various aspects concerning future independence were presented from the view of the Parliament's Scottish Affairs Committee. A new referendum could happen as soon as in 2017 if the electorate use the pending referendum on EU membership to vote to withdraw when the "Europhile Scotland" may take that opportunity to re-introduce the issue of independence.

The Scottish Referendum and International Law: The Legal Conundrum

Despite the fact that the process of achieving independence preponderantly consists of a political and negotiated process, international law's role is significant. In the UK different reports addressed the implications of an independent Scotland and its future position in the international arena. In February 2013 the UK government published the first of a series of reports analysing Scotland's place in the UK entitled "Scotland Analysis: Devolution and the Implications of Scottish Independence", called in short the "Devolution Report". Annex A of the Report (hereinafter referred to as "the Report") contains a legal opinion written by two highly regarded international law scholars: Professors James Crawford and Alan Boyle.[16]

In addition, the Scottish Government's White Paper on Independence (issued in November 2013) included consideration of different aspects of the future scenario as analysed by the European and External Relations Committee of the Scottish Parliament. Various contentious international legal questions were examined in light of the successor states who would have emerged after a vote for independence.

State succession is an area of international law which has not been entirely codified yet. In general, the succession of states is governed by customary international law.[17] The rules concerning succession to treaties are of customary law nature and some of them have been codified in the Vienna Convention on Succession of States in Respect of Treaties, which is not applicable to the Scottish case because the UK is not party to it.[18] The crucial issue is to determine which treaties need to be continued by the successor state. In an overview of the main

[13] Donnachie and Hewitt (2007).

[14] Livingstone (2012).

[15] Henley (2014).

[16] UK Parliament (2013).

[17] Shaw (2007: 697).

[18] 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.

international instruments to which Scotland could become party to one can mention, for instance, the Convention on the Law of the Sea.

In the Devolution Report, three options are defined regarding the future relationships between Scotland and the Rest of the United Kingdom (also defined as "RUK"), leaving the question open to the outcome of the referendum and the political negotiations that may follow. The various options outlined include previous examples observed in the international practice. In addition to that, by reading the report jointly with other relevant scholarly pieces written on Scottish independence a fourth option may be included.[19]

RUK as the Continuator State of the UK and Scotland as a New State

In this case the RUK would be the continuator of the original state whereas Scotland would be considered a new state. The Opinion mentioned various examples of states splitting into two or more new states. In most of the cases falling within this category, the continuator state preserved "the majority of the predecessor state's population and territory" and "substantially the same governmental institutions as the predecessor state" whereas the other state(s) the successor(s), like in the cases of Pakistan, Bangladesh and the dissolution of the USSR.

RUK and Scotland as New States

In the second potential scenario presented in the Opinion, the UK would disappear. Therefore, and as opposite to the previous option, there would be no continuator state to the UK, since it will be dissolved. Two new states would come into being within the international community. The report cites two cases of dissolution where there was no continuator state: the dissolution of Czechoslovakia on 31 December 1992, which resulted in the emergence of the Czech Republic and Slovakia; and the dissolution of the Socialist Federal Republic of Yugoslavia in the early 1990s, from which six new states were born. In each case all the emerging states applied for UN membership. According to the report, it would possible to draw analogies between the break-up of Czechoslovakia or the SFRY and the situation of Scotland and England regarding the allocation of the different items included in the equal division (treaty rights and obligations, as well as assets and debts). In Sloan's view this seems to be the approach favoured by the First Minister of Scotland who declared that after independence Scotland and the RUK would inherit "exactly the same international treaty rights and obligations."[20]

Scotland's Reversion to the pre-1707 Status

Under a third envisaged option if Scottish independence was achieved Scotland and England could have "reverted" to their pre-1707 Treaty of Union status as independent states. There are two different interpretations of the same argument.

[19] Sloan (2013).

[20] Sloan (2013).

First, the argument as presented in the report implied that the RUK would have been the continuator of the UK and Scotland would have reverted to its pre-1707 status. Second, both the RUK and Scotland would have reverted to their pre-1707 status, with no continuator state.

In the report there are two examples mentioned of a sovereign state regaining its previous personality, despite becoming part of another state. Amongst other examples, in 1958 Syria and Egypt formed the United Arab Republic ("UAR") and agreed that obligations of both states continued to bind the new state. When, in 1961, Syria withdrew from the UAR and it was able to resume its membership in the UN without a formal readmission. Syria "reverted" to its earlier status as the sovereign state of Syria.

However, this option raises some questions as to the real possibility of a genuine "reversion". What is not clear is if, based on these precedents, it can be argued that in the case of Scotland its personality never ceased to exist and that its formal legal identity remained intact during the period from 1707 to the time of independence.

The "Sui Generis" Option

Despite the different precedents that can be regarded as "models", Scotland may not follow a specific one. As Professor Michael Keating points out there are no "models" to follow.[21] Similarly, Nicola Sturgeon, the Deputy First Minister, in her reaction to the Opinion stated that: "[t]he reality is that there is neither a settled international legal position nor any consistent precedent in these matters. [The] fact is that international precedents—even those cited by the UK government—prove the point that these are matters to be settled, not by law, but by sensible and mature negotiation that reflect the particular circumstances of the countries involved."[22]

In sum, the precedents can serve as guidelines for future negotiations concerning the details of Scottish independence. In this context, international law will regulate the future relations of an independent Scotland with the rest of the UK and the rest of the world.

Scotland and Statehood: To Be or Not to Be, That is the Question…

From an international law perspective, as S. Blay affirms statehood concerns "two interlinked concepts that are at the core of the definition: territorial integrity and political independence (Blay 2010)." Territorial integrity refers to the territorial "wholeness" of the state.[23] Political independence is related to its capacity to enter into international relations with other states.[24]

In the case of Scotland, in addition to the willingness to become a separate state expressed by citizens through a positive vote in the referendum, Scottish

[21] Keating (2014).

[22] Sturgeon (2013).

[23] Blay (2010).

[24] Crawford (2009, 2011).

independence would surely be the outcome of political negotiations. Referenda have been frequently used in national constitutional law to address relevant issues of international and EU law. In fact, the "use of referenda" in international law is connected to the creation of new states.[25] With regard to EU Law, referenda have been used on several occasions to ratify a significant change to the founding treaties or with regard to the accession of new Member states.

International law rules would apply to defining the main characteristics and the crucial elements of the state that would emerge as a result of the negotiations. In a post-referendum context, international law will also play a significant role in positioning Scottish interests on the political agenda. More importantly, provided that independence is achieved, international law may regulate the relations and interactions with other European states in the event that Scotland does not acquire immediately EU membership.

With regard to the criteria for statehood, the *1933 Montevideo Convention on Rights and Duties of States* represents a good starting point for analysis since it sets out various criteria for a territorial entity to be defined as a state. According to article 1 of the Convention these are: permanent population, delimited territory, government and capacity to enter into relations with other states.[26]

In light of these provisions, Scotland would a priori satisfy the requirements:

(a) Permanent population: Scotland's population would be that determined by its internal law on nationality/citizenship.
(b) Internationally delimited territory: Scotland's territory would include its land, its territorial waters (up to 12 nautical miles) and the airspace above its land and territorial waters. In the boundary delimitation, any disputes that may that arise would need to be solved by pacific means.
(c) Government: As for government, an independent Scotland would be able to exercise effective control over its territory and people.
(d) Capacity to enter into relations with other states: The government should be empowered to enter into relations with other states.

The referendum's outcome will have a clear impact on Scotland's future political scenario and will bring consequences in the context of international law.

As stated earlier, the Scottish constitutional future may have implications for other secessionist causes in Europe. This is particularly so for Catalan independence. There is often confusion between different concepts when it comes to independence. Under GA Resolution 1514 on the right to self-determination, there are different requirements that need to be fulfilled in order to "activate" the right as conferred in the Declaration.

As Knop suggests, international law lacks a clear definition of both "self-determination" and "people". Some states in international law represent the exercise of self-determination by a people, others do not; some peoples have their

[25] Beigbeder (2011).

[26] This treaty was signed at the International Conference of American States in Montevideo, Uruguay on December 26, 1933. It entered into force on December 26, 1934.

own state, others do not.[27] Borrowing from Knop again, "international law has limited the revolutionary potential of self-determination in several ways (…) on the dominant approach, self-determination developed into a right in certain categories of cases: overseas colonies, cases in which a people is subject to alien subjugation, domination or exploitation; and (…) when people is denied any meaningful exercise of its right to determination within the state of which forms a part."[28] The recent Advisory Opinion on Kosovo's independence generated controversy (ICJ 2010). Countries such as Spain refused to recognise Kosovo as a new independent state.[29]

On a strict interpretation, neither Scotland nor other cases in Europe (such as Catalonia or Flanders) would fall into the Declaration's scope.[30] Despite the similarities and parallel developments between the Catalan and the Scottish case they are different under international law. Whereas in the Scottish case there would be a "negotiated independence", in the case of Catalonia the party in national government is claiming the right to exercise its sovereignty.[31] However, the historical development of the Catalan legal situation is different from Scotland's. Catalonia was integrated in the Spanish state from the middle of the fifteenth century, retaining some self-government institutions until the eighteenth century. Scotland is comprised within the territory of a parent state (the United Kingdom) by virtue of the 1707 Treaty of Union and the 2014 referendum was organised, as seen before, according to the Scotland Act's provisions. In the case of Catalonia, there is no consensus in the national government and the principle of territorial integrity applies, therefore, it would be in conflict with the Spanish Constitution as the Constitutional Court has already stated in a recent judgement.[32]

Recognition of States

Another question to be taken into consideration is the recognition of the new state by other states in the international community. Essentially, recognition by the pre-existent states is not necessary under international law in order to be considered an independent state. Recognition of states is essentially based on political reasons. Even if recognition does not possess a constitutive effect, it affects the capacity of the new state to enter into relations with other "peers".[33] The lack of recognition poses serious implications for the consolidation of the new state on the international stage. Take, for instance, the case of Northern Cyprus, the only state that has recognized it as a separate and independent state is Turkey.

Although a political act, recognition produces legal effects in international and domestic law. In similar cases states have refused to recognise new states where to

[27] Knop (2012: 101).

[28] Knop (2012: 102).

[29] Olmos Giupponi (2011).

[30] Thurer and Burri (2008).

[31] Desquens (2003).

[32] Spanish Constitutional Court (2014).

[33] Mas (2014).

do so may be taken as providing a precedent that might activate or reinforce domestic demands for independence.

As far as the international law effects of recognition are concerned, a recognised state can enter into legal and political relations with other states, whereas a non-recognised state cannot enter into legal or political relations with those states that have refused to recognise it. That said, it is possible to talk about in principle a de facto recognition of a new state, i.e. some initial forms of contact and relations may be established with other states. Even though this not a legal recognition, it is recognition in principle.

Seeking Membership on the International Level: Scotland's Membership in International Organizations

One of the main issues involved in the recognition of a new state in the international community and, of utmost importance for its relationships with other states, is the acquisition of membership in different international organisations.[34] The application to a become member of a particular organisation may even precede- the acquisition of statehood as in the case of Palestine's entry to UNESCO.

The criteria for membership varies from one international organisation to another based on the requirements set out in the respective founding treaty and the specific practice of the organisation. With regard to the question of whether international treaties would be implemented directly within Scotland or would need to be incorporated into domestic law, this will depend on how the Scottish constitution addresses the relationship between international and domestic law. If dualism is the approach chosen, then international law instruments would need- to be incorporated, and Scotland should enact legislation in order to incorporate them into national law.

If Scotland had achieved its independence, the dominant opinion was that it would have needed to apply for membership, whereas the RUK would have retained the UK's prior membership-. The brand new state would, then, try to join different international organisations in order to gain international recognition and protect its national interests.[35] The impact of independence on the membership of international organisations would be different according to the goals pursued by them.

It is worth considering the possible international organisations to which Scotland may have applied for membership bearing in mind that EU membership will be addressed extensively in another section of this article.[36] At this point, we should just note the Report issued by the Scottish Affairs Select Committee of the House of Commons, "Referendum on Separation for Scotland: Scotland's Membership of the EU."[37] According to this report, there is agreement among the House of Commons Foreign Affairs Select Committee that the Scottish Government "underestimates the unease which exists within EU Member states and EU institutions about Scottish

[34] Magliveras (2011: 84).

[35] UK Parliament (2014).

[36] UK Parliament (2014).

[37] Keating (2014).

independence."[38] This would mean that the period required for negotiation is longer than anticipated by the Scottish Government but, ultimately, all 28 Member states have the right to veto Scottish membership of the EU (Douglas-Scott 2014).

There has often been a polarisation in the debate as to the possibility of an independent Scotland becoming an EU Member state.[39] Basically, the Scottish government believed that it would automatically become a member of the EU on similar terms to the UK. To the contrary, the UK government maintained that an independent Scotland would have to apply for membership or, in the worst case-scenario that Scotland would have been kept at the margins of the EU. There was often a perception reflected by legal scholars that the fact that the Scottish Government did not "take this threat seriously demonstrates a lack of understanding of the realities of international politics."[40]

Undoubtedly, the first international organisation of which an independent Scotland would seek membership would be the *United Nations*, for the legal and political consequences that it entails regarding the recognition of a territorial entity as a state. UN membership criteria are laid down in article 4 of the UN Charter that reads "1 *Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."* Once independence was achieved, Scotland could submit an application to the Secretary-General in which it accepts the obligations established in the UN Charter. After that, the application would be examined by the Admission of New Members Committee and subsequently be sent to the Security Council. Finally, upon the positive recommendation of the Security Council, the General Assembly (GA) would discuss the application and adopt a final decision by a two-thirds majority of the present and voting members (Article 18(2) United Nations Charter). The two crucial elements in the process are that the applicant meets the requirements set out in the Charter and avoids the veto of a permanent member of the Security Council. Thus, provided that these admission criteria are met (and it is likely that this would be the case) Scotland would become a UN Member state. One particularly difficult issue regards the UK's permanent seat at the Security Council. According to the Foreign Office, in the event of Scottish independence the remaining UK state would retain its permanent place on the United Nations Security Council.

Apart from UN membership, there are other relevant organisations that deserve to be considered. In our view, in most cases new states must apply anew for membership.

In the *field of security*, the most important organisation to become party to is NATO. Membership of NATO constitutes an interesting case. Traditionally, the SNP has held a policy in favour of unilateral nuclear disarmament. Consequently, until 2012 the SNP also maintained the position that an independent Scotland should not be a member of NATO, mainly because it is a nuclear weapons-based alliance. However, this position changed at the SNP annual conference in October 2012,

[38] UK Parliament-Scottish Affairs Committee (2014).

[39] UK Parliament (2014).

[40] UK Parliament-Scottish Affairs Committee (2014).

where a Foreign, Security and Defence policy update was agreed including a commitment to remain a member of NATO.[41]

That being the case, Scotland would have needed to fulfil all the conditions laid down in the Membership Action Plan (MAP) as agreed by Scotland and NATO. The MAP would cover legal issues concerning its membership as well as political, economic, defence, military and security matters. In the event of Scottish independence, a certain level of flexibility is foreseen. Even if NATO member states must respect the obligations of the Treaty, and amongst them the Strategic Concept, according to which NATO is mainly defined as a nuclear alliance, some flexibility may be needed for Scotland's participation as a Member state in the Alliance; this somehow would contribute to solve the controversial question of the nuclear weapons' facilities in Scottish territory.

In the *area of economic cooperation*, there are also other international organisations to which a new state may apply in order to strengthening its powers its international economic status.

In the European context, as a back-up plan to EU membership a European state could become part of the other main economic organisation: the European Free Trade Association (consisting of Norway, Iceland, Switzerland, Liechtenstein).[42]In contrast to the EU which is a supranational organisation, EFTA is an intergovernmental organisation, focusing on certain areas of cooperation. This would be an alternative organisation that Scotland could join if EU membership is obstructed or difficult to achieve. Since the principal goal of the EFTA Convention is to regulate free trade among member states within the European Economic Area (EEA) Agreement between the EU and EFTA, Scotland as an EFTA member state would enjoy guarantees of the EU internal market.

The possibility that Scotland would have also needed to become a *member of international economic organisations* has also been considered. The WTO comprises different agreements, with states and organisations as members and includes a dispute settlement mechanism. As for international financial institutions, the International Monetary Fund (IMF) is a financial organisation whose objective is to adopt a global monetary policy, financial co-operation and economic stability. It would also be convenient to join the World Bank as an organisation with the mandate to provide financial and technical assistance to developing countries.

The *International Labour Organisation* is another international organisation significant for Scotland's interests. To join the ILO, Scotland would need to ratify a total of 396 conventions, protocols, and recommendations.[43]

Another area of particular interest for Scotland would be the *law of the sea,* taking into account the importance of maritime resources for its economic development with regard to the resources available in the North Sea, mainly oil. The law of the sea deals with a number of maritime areas and rights and duties of states over these areas, including rules on maritime delimitation which will be of critical importance to Scotland. In international law, the norms regulating the sea are

[41] UK Parliament (2014).

[42] Harpaz (2009).

[43] ILO (2014).

codified in the four Geneva Conventions of 1958 (Territorial Sea, High Seas, Fishing and Conservation of the Living Resources, and Continental Shelf) and in the 1982 Convention on the Law of the Sea (UNCLOS).

Another relevant issue that should be stressed is *maritime delimitation*. Maritime delimitation involves legal questions as well as geographical, geological, economic and political dimensions. In light of the law of the sea, customary principles that apply to maritime delimitation are that (a) It is not possible to proclaim unilateral delimitations, and (b) the delimitation should be set up on the basis of equitable criteria.[44] Agreements will be the way in which Scotland may delimit its maritime zones. In the event that disputes arise, they should be submitted to arbitration, or submit it to a court, for example the International Court of Justice or the International Tribunal for the Law of the Sea, if it has jurisdiction.

In the context of future independence, Scotland would need to become party to the main instruments on the *protection of human rights*: international and regional, general and specialised. For a new state, the accession to human rights treaties would be a central plank for enforcing citizens' rights and at the same time it would demonstrate the new state's commitment to protecting and promoting human rights.

On the regional level, with regard to membership to the Council of Europe (CoE) the crucial instrument is the European Convention on Human Rights (ECHR). The participation in the ECHR depends on the membership of the Council of Europe. Since the Human Rights Act 1998 has introduced the ECHR into the UK legal system, the Convention is already of application in Scotland. The provision of the Scotland Act with regard to the Convention reinforces the incorporation of it into a theoretical framework for a post-referendum scenario. In the hypothetical scenario of independence, the ECHR may continue to apply it without interruptions following a declaration of independence and even before Scotland may become party to the CoE.

Once Scotland would become party to the ECHR, it would be necessary to ratify the additional Protocols to the ECHR. Another relevant effect is that as party to the ECHR, the European Court of Human Rights (ECtHR) would have automatic jurisdiction to receive individual applications concerning possible violations of the ECHR by Scotland. Scotland could participate as well in the inter-state complaints system, being able to bring cases before the ECtHR against other states or being the object of them.

Moreover, there are many other human rights instruments to which Scotland may accede. In all these cases, apart from becoming party to international human rights treaties, accession is relevant in order to grant individuals the right to petition before international human rights bodies. This would be the case, for instance, with the Optional Protocol to the International Covenant on Civil and Political Rights, or the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, both of which recognise the right to submit petitions. At the moment, the UK is not a party to neither of them. Scotland may take another approach.

Finally, in terms of multilateral cooperation, other international organizations in different fields may become relevant for the state in order to entertain relations with other states in the international community. In terms of multilateral cooperation,

[44] Tsagourias (2014).

cultural organisations, such as UNESCO or the International Organisation of La Francophonie, may also be interesting taking into account Scotland's historical ties with France in the latter case. The overview of the impact of international law with regard to the Scottish referendum provides insights into the endeavour involved in the creation of a new state.

Critical Reflections on the Post-Referendum Scenario

In the post-referendum scenario, the following reflections can be drawn from the Scottish case:

- Regions in Europe as sub-state entities are demanding more participation on the international arena. The Scottish case is not an isolated one, Catalonia and Flanders share similar demands.
- Membership of international organisations is one of the key stages in the process of recognition and creation of states. As the analysis shows, central and regional governments may have a different (and in some case opposed) viewpoint on a specific matter in the context of international organisations. In this case it is crucial to better articulate different interests.
- The Scottish referendum represented a negotiated process of independence allowed under UK constitutional law (namely the provisions of the Scotland Act) which led to a referendum with a significant turnout of citizens.[1]
- A unilateral declaration calling for a referendum or declaring independence from a state would constitute "a priori" a secession not legitimised under international law (unless it is a so-called "remedial secession").

In sum, examining the impact of the Scottish referendum from an international law viewpoint is something more than a theoretical exercise. It definitely brings deep connotations to the United Kingdom as a state on the international arena and to other nations or regions within European states that may also want to further secession.

EU Law Aspects

The Different Positions

According to the Scottish or Catalan government, their newly independent state would continue to be part of the EU after its declaration of independence.[45] This argument is not surprising. Supposedly unproblematic continued membership of the EU implies that citizens will enjoy continuity in times of change, which is without doubt an argument the psychological effect of which is not to be underestimated. Some regional governments have even gone so far as to expressly counsel that any fear of the implication of independence in this respect be wholly unfounded, claiming that the newly independent region shall remain within the safe haven of the

[45] See The Scottish Parliament Official Report (25.01. 2012) Referendum Consultation.

EU ('Independence in Europe'). The EU's fundamental freedoms enjoyed by citizens to date would remain in place. For instance, trade would be unaffected, since free movement of goods would continue as before.[46] The same is true for the free movement of workers.

This viewpoint is opposed by a prima facie unusual coalition made up of the European Council, European Commission and governments, in particular the Spanish government. The former President of the European Commission, José Manuel Barroso, has resolutely spoken out against the idea that an independent Scotland would automatically become a member of the EU. In a BBC interview in December 2012 he stated that 'if one part of a country … wants to become an independent state, of course as an independent state it has to apply for European Union membership according to the rules—that is obvious'.[47]

This appears to be the consolidated opinion of the European Commission. As early as March 2004, the then President of the Commission Romano Prodi stated likewise that: 'The European Communities and the European Union have been established by the relevant treaties among the Member states. The treaties apply to the Member states.[48] When a part of the territory of a Member state ceases to be a part of that state, e.g. because the territory becomes an independent state, the treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory'.[49] Statements along similar lines have also been issued by the President of the European Council, as well as by Spanish and British government representatives. What binds this alliance together is the fear of a domino effect. If one were to make the Scots' or Catalans' decision to secede easier by allowing them to remain in the EU, this might result in a 'wave of secessions': Flanders, the

[46] Sturgeon (2013).

[47] Transcript of the BBC Hardtalk Interview, 10. December 2012, available online at http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20664907. Following a request by the House of Lords, President Barroso specified his position in a letter, dated 10 December 2012:

(1) 'The EU is founded on the Treaties which apply only to the Member states who have agreed and ratified them.

(2) If part of the territory of a Member state would cease to be part of that state because it were to become a new independent state, the Treaties would no longer apply to that territory.

(3) In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.

(4) Under Article 49 of the Treaty on European Union, any European state which respects the principles set out in Article 2 of the Treaty on European Union may apply to become a member of the EU.

(5) If the application is accepted by the Council acting unanimously, an agreement is then negotiated between the applicant state and the Member states on the conditions of admission and the adjustments to the Treaties which such admission entails.

(6) This agreement is subject to ratification by all Member states and the applicant state.'

Letter of the President of the European Commission Jose Barroso to the Chairman of the House of Lords Economic Affairs Committee, Lord Tugendhat, 10 December 2012, available online at http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf

[48] Article 299 ECT: this was essentially replaced by Article 52 TEU.

[49] Response of the President of the European Commission Romano Prodi, (2004) OJ C84E/422.

Basque region and South Tyrol could follow. So far Spanish government representatives have been the most forthright in expressing their fear in this respect,[50] stating clearly that Madrid will not tolerate any secession by Catalonia.[51]

The following can therefore be said in summary: over the course of time, two diametrically opposed viewpoints have developed, namely continued membership of the EU versus an automatic exit from the EU. Which of these two points of view, however, is the legally correct one? This question shall be examined in depth below.

The Situation de lege lata

Article 52 TEU is the starting point for legal deliberations on a newly independent region's (NIR) future status vis-à-vis the European Union, as it determines the scope of application of EU law in more detail. It provides:

1. The Treaties shall apply to the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.
2. The territorial scope of the Treaties is specified in Article 355 of the Treaty on the Functioning of the European Union.

Article 52 TEU embodies the fundamental principle of international law that rather than enjoying *'original'* territorial sovereignty, international organisations merely enjoy so-called *'derivative'* territorial sovereignty transferred to those organisations by their Member states.[52] The territorial scope of application of the Treaties is thus defined in more detail by reference to the Member states in accordance with Article 52 TEU.

If one applies this provision to the Catalan scenario, the result is as follows: Under Article 52 the European Treaties apply to the sovereign territory that is the Kingdom of Spain.[53] At present Catalonia is still part of this sovereign territory. If, however, Catalonia were to leave this union, it would no longer be an integral part of the EU Member state that is the Kingdom of Spain.[54] As a consequence, EU law would no longer apply to Catalonia. In other words, on a literal interpretation of Article 52 TEU an independent Catalonia would not only drop out of Spain but also

[50] Buck (2013).

[51] Whittaker (2013).

[52] Streinz (2012).

[53] For further specifications see Article 355 TFEU.

[54] Crawford/Boyle (2013).

automatically out of the EU (with immediate effect!). The automatic knock-on effect contained in Article 52 TEU therefore combines two issues that are separate per se—i.e. secession from Spain on the one hand and exiting the EU on the other. Linking these two (separate) issues in this manner seems highly questionable.

Critical Analysis

On closer inspection this appears to be a strange conclusion for a number of reasons, which shall be examined in more detail below.

The 'Loss of Subjective Rights' Argument

The Argument As explained above, Catalonia/Scotland will remain an integral part of the EU until it declares its independence. Until such a time, Catalans/Scots[55] and any other EU citizens[56] living in the said regions will continue to enjoy the full range of rights derived from their EU citizenship. For instance, under Article 20 TFEU, EU citizens have the right to move and reside freely within the territory of the Member states[57]; moreover, they enjoy the right to vote and stand as candidates in elections to the European Parliament and in municipal elections in their Member state of residence, under the same conditions as nationals of that state.[58]Finally, they enjoy, in the territory of a third country in which the Member state of which they are nationals is not represented, the right to the protection of the diplomatic and consular authorities of any Member state on the same conditions as the nationals of that state (Article 20 II c TFEU).[59] Moreover, a number of additional rights originating from the four fundamental freedoms also apply, provided their specific prerequisites had been met. All in all, EU membership accords EU citizens a multitude of rights.

If one were to proceed on the 'automatism' assumption set out above then all of these rights would expire the moment the declaration of independence was made. Catalans/ Scots would be deprived of their standing as EU citizens 'over night', so to speak. EU citizens living in Catalonia/ Scotland would also no longer be able to call upon the aforementioned rights, since those 'regions' would no longer be part of the EU. The consequences would therefore be far-reaching. A few examples show quite emphatically what the effect would be. French fishermen would no longer be permitted to fish in Catalan/Scottish waters. Greek doctors who had been working in Catalan/ Scottish hospitals for years would no longer benefit from the principle of free movement of workers, and would consequently have to apply for a work permit. The same would apply *vice versa* to Catalans/ Scots working abroad in another EU country. The many Catalans working in Madrid, in particular, would feel the lasting effects thereof.

[55] As nationals of the EU Member state Spain/UK.

[56] See Article 9 TEU and Article 20 et seq. TFEU.

[57] Article 20 (II) (a), in conjunction with Article 21 TFEU.

[58] Article 20 (II) (b), in conjunction with Article 22 TFEU.

[59] Article 20 (II) (c), in conjunction with Article 23 TFEU.

Counterargument Against this, one might argue that the consequences set out above appear—at least prima facie—to be harsher than they really are.[60]

(1) Although in principle it is correct to say that *EU citizens living in Scotland* would no longer be able to rely on the aforementioned rights if Scotland were to leave the EU, this problem could be rectified—at least partially—by a unilateral decree on the part of the new Scottish government to the effect that EU law would continue to apply in Scotland. As a sovereign state, Scotland would certainly be entitled to issue a decree of this nature.
(2) As regards the effect on *Scottish citizens*, the said effect can be relativized if one bears in mind that nationals of third countries—which is what the Scots would then be—also enjoy certain rights under EU law. Third country nationals can, for instance, rely on those fundamental freedoms which do not explicitly apply to nationals of EU Member states only, such as the free movement of goods.[61] Under Article 28(2) TFEU, free movement of goods simply ties in with the provenance of the goods. It is all the more applicable in relation to the free movement of capital, since Article 63(1) TFEU even goes as far as prohibiting restrictions on the movement of capital between the EU and third countries. A number of rights for third country nationals are also enshrined within the EU's secondary law. To some extent non-EU nationals even enjoy the same protection against discrimination as EU citizens, such as under the provisions of Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[62]

Refutation of the Counterargument Ultimately, however, the counterargument presented above is not entirely convincing either. As before, it is worth differentiating between EU nationals living in Scotland and Scottish nationals themselves.

(1) With regard to *EU nationals living in Scotland*, it is highly uncertain whether the new Scottish government will in fact decree unilaterally that EU law norms shall continue to apply. Even if this were the case, a decree of this nature would at best cover a fraction of the aforementioned rights. The legal provisions of Article 20(2) in conjunction with Article 22(2) TFEU are an example of this, since from a purely logical point of view these rights could not be covered by a unilateral decree. The same applies to many other legal situations.
(2) What is more, nationals of third countries—and this would now include the *Scots* as well—are only granted a fraction of the rights enjoyed by EU citizens. Free movement of persons, in particular, is inextricably linked to

[60] It is worth differentiating insofar between (1) EU nationals living in Scotland and (2) Scottish nationals themselves.

[61] Schroeder (2011).

[62] Schroeder (2011).

citizenship of a EU Member state.[63] The same applies to the rights set out in Article 21 et seq. TFEU. Consequently, Scots living abroad in a EU Member state could expect their rights to be significantly curtailed. The following can therefore be said in conclusion: as commendable as the granting of rights to third countries may seem, this should not detract from the fact that these rights only constitute a fraction of the rights arising under the EU Treaties.

Systematic Aspects: Comparison with Article 50 TEU

For the reasons just analysed it is highly questionable, whether this consequence—i.e. automatic and immediate exit from the EU upon independence—was really intended by the drafters of the Treaties, or whether it was rather a scenario which the legislators of 'an ever closer Union' had not anticipated at all, In other words, a lacuna in the law (Edwards 2012). A comparison with Article 50 TEU, which codifies the withdrawal from the EU, seems to support this hypothesis. The specific wording of the provision is as follows:

(1) Any Member state may decide to withdraw from the European Union in accordance with its own constitutional provisions.
(2) A Member state which decides to withdraw shall notify the European Council of its intentions. In light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state setting out the arrangements of withdrawal taking account of the framework of its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218 (3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council of Ministers, acting by a qualified majority, after obtaining the consent of the European Parliament.
(3) The Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement, or failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member state concerned, decides to extend this period.
(4) For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member state shall not participate in the European Council or the Council discussions or decisions concerning it. A qualified majority shall be defined in accordance with Article 238 (3)(b) of the Treaty on the Functioning of the European Union.
(5) If a state which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49.

The scenario of a withdrawal following a lawful secession from the 'mother state'[64] is not addressed at all by Article 50 TEU, hence one might draw the

[63] Geiger et al. (2010).

[64] Combined with the wish to remain in the Union.

following conclusion: If a provision, such as Article 50 TEU, which deals explicitly and in detail with exit from the EU, does not cover the scenario outlined above, then it would be far-fetched to assume that this complex scenario was implicitly dealt with in Article 52 TEU. Rather it implies that the legislators were simply not aware of the problem.[65]

An immediate exit from the EU—triggered by the automatism of Article 52 TEU—would hardly be reconcilable with the spirit of Article 50(3) TEU. The underlying rationale of Article 50(3) can be summarised as follows: Withdrawal from the EU is a long and complex process that does not happen 'over night'. Thus, Article 50(3) provides that withdrawal only becomes effective (a) once the two year period following notification of withdrawal to the Council has expired or (b) a withdrawal agreement has been successfully concluded. Given the complexity of the latter it seems reasonable to assume that such negotiations will drag on for quite a while (1-2 years). This purpose—i.e. to give the parties concerned time to solve the complex issues arising from withdrawal—would be completely thwarted, if one allowed for an immediate[66] withdrawal under Article 52 TEU. This was not intended by the drafters as Article 50(3) TEU clearly shows. To construe such an immediate withdrawal via the automatism of Article 52 TEU therefore appears to be highly questionable.

Further Dogmatic Conflicts

A further conflict of values can be observed in relation to the ideological concepts behind the EU Treaties: the 'automatism' discussed above would, ultimately, lead to a newly independent region (e.g. Catalonia) being excluded from the EU. The region would have to leave the EU against the democratically legitimised wishes of its citizens (Hofmeister 2010). The EU Treaties, on the other hand, make no provision for any expulsion of this nature. Although the possibility of an expulsion procedure was discussed by the Constitutional Convention, it was in the end rejected for sound reasons.[67] The EU—so the thinking goes—is a democratic institution which endeavours to solve conflicts amicably by mutual discussion. This way of thinking is incompatible with any one-sided 'expulsion' of a state. If contrary to all expectations an issue arose that could not be solved by mutual agreement, then consideration would at the most be given to the sanctions envisaged by Article 7 TEU.[68] These include, inter alia, the suspension of certain rights under the agreement, notably the right to vote in the Council, not however an expulsion from the EU. If one keeps these consequences in mind, it appears very doubtful indeed that this is the result the drafters of the treaties would have wanted.

[65] Edwards (2012).

[66] As well as automatic withdrawal.

[67] See 'Suggestion for amendment of Article I-59 by Brok et alt. on behalf of the EPP Convention Group', der letztlich verworfen wurde, abrufbar online unter http://european-convention.eu.int/docs/treaty/pdf/46/46_Art%20I%2059%20Brok%20EN.pdf

[68] And the measuers envisaged under Articles 258 et seq. TFEU as well as Article 126 (11) TFEU.

The bizarre consequences inherent in the automatism described above become all the more evident, if one leaves aside for the moment the Catalan/Scottish scenario and focuses on another state harbouring similar intentions: Belgium. Assuming that Flanders or Wallonia secede from Belgium or Belgium as a whole is dissolved with no continuator state left, could anyone seriously argue that Brussels—the seat of most EU Institutions—would no longer be in the EU?[69]

Conclusion

Despite these serious misgivings, a plain reading of Article 52 TEU nevertheless leads one to conclude that—*de lege lata*—a newly independent region, such as Catalonia, Scotland or Flanders will exit the EU automatically and with immediate effect upon independence.

Ways Out of the Dilemma: Conclusions

One potential way to circumvent the problems outlined above, is to apply Article 48 TEU to the case under consideration. This was, for example, suggested by the Scottish government during the 2014 referendum campaign. In its White Paper,[70] the Scottish government argued that an independent Scotland would become a Member state of the EU upon independence and that this can be achieved through a revision of the EU Treaties on the basis of Article 48.[71] Instead of invoking the standard provision for accession to the EU—i.e. Article 49 TEU—the government thus proposed an alternative legal basis for the country's EU membership in the form of Article 48 TEU.[72] Article 48 TEU, which deals with treaty revision, provides:

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.
   Ordinary revision procedure

[69] The various scenarios of what would happen to Belgium in case of secession of one or more parts of the country were analysed by Conolly: 'The critical complication, however is Brussels. Flemish nationalists envision Brussels as a part of any future Flemish state. But many Walloons—not to mention many francophones in Brussels itself—argue that in the event of Flemish secession, Brussels should be joined to Wallonia. This might involve incorporation not only of Brussels proper but also of some francophone suburbs or a corridor of territory between Brussels and the Walloon border. In such circumstances, Wallonia could make a more credible case that it represents the continuation of the Belgian state. Under a third scenario, Brussels would become an autonomous capital district—in effect, the EU's version of Washington, D.C. While this latter scenario might solve continuity and extinction issues (the international community would almost certainly consider Belgium dissolved), it would nonetheless present a different headache for the EU: the loss of one member state and two new states (or perhaps three, depending on the status of the Brussels capital district within the EU) seeking admission', Conolly, Independence in Europe: Secession, Sovereignty and the European Union, *Duke Journal of International and Comparative Law* (24) 2013, 90-91.

[70] And the supplementary document 'Scotland in the European Union'.

[71] Armstrong, European and External Relations Committee, Scottish Parliament, Scottish Membership of the European Union, CELS Working Paper Series, No.2. (2014), 3.

[72] Ibid. 3.

2. The Government of any Member state, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.
3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of state or Government of the Member states, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member states as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member states.
4. A conference of representatives of the governments of the Member states shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.
   The amendments shall enter into force after being ratified by all the Member states in accordance with their respective constitutional requirements.
5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member states have ratified it and one or more Member states have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. (…).[73]

[73] Article 48 (1)-(5) TEU. Article 48 TEU further provides:
Simplified revision procedures

6. The Government of any Member state, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member states in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

The standard scenario in which Article 48 TEU is invoked by Member states is when they plan to change EU primary law. So far it has never been employed as a legal 'basis for extending the rights and duties created by the treaties to an entity seeking to become a Member state.'[74] The underlying rationale to employ Article 48 TEU is that 'the treaties currently apply to the territory and institutions that would form the new state. For this reason, it is argued that the newly independent region ought not to follow an accession process under Article 49 TEU but instead that the territorial scope of application of the treaties should continue to apply to it through a revision of the treaties under Article 48 TEU'.[75]

While prima facie convincing, this approach is subject to criticism—both dogmatic and practical: First, EU institutions and Member states cannot simply choose legal bases as they please. Rather, EU law has established a set of rules that apply when selecting legal bases. One of these rules is the traditional legal principle of '*lex specialis derogat legi generali*'.[76] Under the conception of the EU Treaties, however, accession is supposed to take place in accordance with the specific rules laid down in Article 49 TEU, which therefore appears to be *lex specialis* to Article 48 TEU.

But is that really the case? For the *lex specialis* principle to apply both provisions must basically cover the same subject matter. Only then will the more specific provision supersede the more general one: Yet this does not appear to be the case here. Article 49 TEU regulates the accession of a state that is currently outside the EU. In other words, it was drafted 'with a view to states that, being *outside* the EU, would like to join it. Yet, a revision treaty accommodating Catalan/Scottish membership would be agreed *before* Catalonia/Scotland would be an external state, and therefore before Article 49 would become applicable. It would not deal with *accession* of a new Member state, but rather with the *creation* of a new Member state by disaggregation of one of the current Member states.'[77]

Assuming that Article 48 TEU would therefore be applicable in the case at hand, its application in practice would nonetheless run into other problems: Pursuant to Article 48(1) only the government of an existing Member state can initiate the amendment process under Article 48(1). In other words, the seceding region would have to rely on the 'mother state' to initiate proceedings and negotiate its terms of

Footnote 73 continued

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

[74] Armstrong (2014).

[75] Ibid.,3.

[76] The *lex specialis* principle has a long history in international jurisprudence. Hugo Grotius, for example, aptly summarised its rationale in *De Jure belli ac pacis. Libri Tres*, Book II Sect. XXIX.

[77] De Witte (2014).

membership in the EU. Likewise, Article 48(4) explicitly provides that any amendments agreed upon shall only 'enter into force after being ratified by all the Member states in accordance with their respective constitutional requirements'. Again, the seceding region—be it Catalonia, Flanders or Scotland—would have to rely on the goodwill and support of the 'mother state'. This problem could only be circumvented, if the 'mother state' (Spain/UK) was willing to act on the newly independent region's behalf, for it already constitutes an existing EU Member state. Yet, as the Spanish example shows this is rather unlikely. Moreover, the newly independent region might also prefer to negotiate itself rather than putting its fate into the hands of a state it wants to secede from.[78]

In short, applying Article 48 TEU to the case under consideration is far from the ideal solution. It works only as an ultima ratio option. The 'Article 49 TEU route' does not make much sense either, as it would not avoid the manifold problems outlined above (cf. the hiatus issue and the temporary loss of rights). Given that the EU is a so-called 'Rechtsgemeinschaft' ('community of law'), its citizens and particularly those from regions contemplating independence deserve a degree of legal certainty. It is therefore up to the legislator *de lege ferenda* to change the situation and codify a new norm allowing for a newly independent region to become a Member of the EU without the problems outlined above.

Conclusions

Although Scotland has decided against independence one thing is for sure: The debate on independence in certain regions in Europe has gained momentum. The country north of Hadrian's Wall has, in a manner of speaking, lit a spark: Catalonia, the Basque region, South Tyrol and Greenland could soon follow. In view of its potential to set a precedent, the 'Scottish scenario' was therefore analysed in more detail and the following conclusions were reached:

From an international law viewpoint, an independent Scotland would have to face the challenge of successfully passing the "statehood test" and becoming a member of different international organizations in order to increase its global standing. As regards a newly independent region's future status vis-à–vis the EU, the following results can be observed: A plain reading of the European treaties—in particular Article 52 TEU—leads one to conclude that—*de lege lata*—a newly independent region will exit the EU automatically and with immediate effect upon independence.

[78] One might, however, argue that an obligation for the mother state to act on the seceding region's behalf, could be derived from reading Articles 2, 4, 20 TEU together as well as from the spirit of Article 50 given the emphasis the latter places on pre-withdrawal negotiations.

References

Armstrong, K. 2014. European and external relations committee, Scottish Parliament, Scottish membership of the European Union, CELS working paper series, No. 2.

Beigbeder, Y. 2011. Referendum. *Max Planck Encyclopedia of Public International Law*. Oxford University Press.

Blay, K.N. 2010. Territorial Integrity and Political Independence. *Max Planck Encyclopedia of Public International Law*. Oxford University Press.

Brodies Public Law blog. 2014. "Scottish independence". http://www.brodies.com/blog/public-law/important-ifs-scottish-independence-view-parliaments/.

Buck, T. 2013. Spain fights Catalan push for secession. Financial Times, 1 March 2013. http://www.ft.com/intl/cms/s/0/1dbc93a0-8290-11e2-a3e3-00144feabdc0.html#axzz2SiAMjQcO.

Catalonia. See 1979 Statute, available in English at Generalitat de Catalunya, Statute of Autonomy of 1979, http://www.gencat.cat/generalitat/eng/estatut1979/index.htm.

Connolly, C.K. 2013. Independence in Europe: Secession, Sovereignty and the European Union. *Duke Journal of International and Comparative Law* 24: 51 et seq.

Crawford, J., and A. Boyle. 2013. Annex A opinion: Referendum on the independence of Scotland—International law aspects. (Scotland Analysis: Devolution and the implications of Scottish independence). UK Government.

Crawford, J. 2011. Sovereignty as a legal value. In *The Cambridge Companion to International Law*, ed. J. Crawford, and M. Koskenniemi. Cambridge: CUP. **2011**.

Crawford, J. 2009. *The creation of states in international law*. Oxford: OUP.

Davies, N. 2011. Vanished kingdoms: The rise and fall of states and nations, 151–227. New York: Viking.

Desquens, J. 2003. Europe's stateless nations in the era of globalization: The case for Catalonia's secession from Spain, Bologna Ctr. J. Int'l Aff., Spring 2003. http://www.jhubc.it/bcjournal/articles/desquens.cfm.

De Witte, B. 2014. Scotland and the EU—A comment. http://www.verfassungsblog.de/scotland-eu-comment-bruno-de-witte/.

Dewdney, R. 1997. Results of devolution referendums (1979 & 1997) Research Paper No 97/113. London: House of Commons Library.

Donnachie, I., and G. Hewitt. 2007. *The Birlin Companion to Scottish History*. Edinburgh: Birlin.

Douglas-Scott, S. 2014. How Easily Could an Independent Scotland Join the EU? Oxford Legal Studies Research Paper. SSRN: http://ssrn.com/abstract=2462227.

Edwards, D. 2012. Scotland and the European Union. *Scottish Constitutional Futures Forum*, 17.12.2012, 3–4.

Finch, V., and J. Munro. 2012. *Constitutional law*, 4th ed. W. Green.

Geiger, R., D.E. Khan, and M. Kotzur (eds.). 2010. *EUV/AEUV Kommentar*. Munich: CH Beck.

Harpaz, G. 2009. 'European Free Trade Association (EFTA)'. In *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press.

Henley, J. 2014. Money, pride and dirty tricks: What Scotland can learn from Quebec. *The Guardian*, Sunday 8 September 2014.

Hofmeister, H. 2010. 'Should I stay or should I go?'—A critical analysis of the right to withdraw from the EU. *European Law Journal* 16: 589.

ICJ. 2010. Accordance with international law of the unilateral declaration of independence in respect of Kosovo. *Advisory Opinion*, 22 July 2010.

ILO. 2014. Labour Standards 2014 (Geneva, ILO 2014), available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_235054.pdf.

Keating, M. 2014. Scotland and the European Union—again. http://www.futureukandscotland.ac.uk/blog/scotland-and-european-union-%E2%80%93-again.

Knop, K. 2012. Statehood: Territory, people, government. In *The Cambridge companion to international law*, eds. J. Crawford and M. Koskenniemi, 101, 102. Cambridge: CUP.

Livingstone, Ch. 2012. Independence before the law. *The Journal*, December 2012, 10. http://www.journalonline.co.uk/Magazine/57-12/1011979.aspx.

MacIntyre, J. 2012. From devolution to independence. NY Times, 8 February 2012.

Magliveras, K. 2011. Membership in international organizations In: *Research handbook law international organizations*, eds. J. Klabbers, and A. Wallendahl, pp. 84 et seq. Cheltenham: Edward Elgar.

Manson-Smith, D. 2008. *The legal system of Scotland*. 4th ed. Edinburgh: Stationery Office Books.
Mas, A. 2014. ¿De qué serviría una Cataluña independiente si no la reconoce nadie? El Mundo, 8 September 2014.
Moreno, L. 2006. Scotland, Catalonia, Europeanization and the "Moreno Question". *Scottish Affairs*, 54: 1–21.
Olmos Giupponi, B. 2011. 'Luces y sombras de una Declaración de Independencia: el Dictamen de la Corte Internacional de Justicia en el caso de Kosovo', Revista General de Derecho Público Comparado, No. 8.
Page, A. 2011. A Parliament that is different? In *Law making and the Scottish Parliament: The early years*, ed. E.E. Sutherland, K.E. Goodall, G.F.M. Little, and F.P. Davidson, 9–31. Edinburgh: Edinburgh University Press.
Schroeder, W. 2011. *Grundkurs europarecht*. Munich: CH Beck.
Scottish Affairs Committee. 2014. Twelfth Report. 'The Referendum on Separation for Scotland: Scotland's Membership of the EU'. http://www.publications.parliament.uk/pa/cm201314/cmselect/cmscotaf/1241/124102.htm.
Shaw, M. 2007. *International law*, 6th Ed. Cambridge: CUP at 697.
Sloan, J. 2013. The international law implications for an independent Scotland: findings of an expert legal opinion requested by the UK Government. 17(2): 224–264. ISSN 1364-9809, May 2013.
Spain (Resolución del Parlamento de Cataluña 5/X por la que se aprueba la Declaración de soberanía y del derecho a decidir del pueblo de Cataluña (Parliament of Catalonia, Declaration of Sovereignty and of the Right to Decide of the People of Catalonia), Jan. 22, 2013).
Spanish Constitutional Court's judgement on Catalonia declaration's compatibility with the Spanish Constitution, 25th March 2014, available at http://www.tribunalconstitucional.es/es/salaPrensa/Documents/NP_2014_026/2013-01389STC.pdf.
Streinz, R. (ed.). 2012. *EUV/ AEUV Kommentar*. Munich: CH Beck.
Sturgeon, N. 2013. We'll take our place at table in Brussels, The Scotsman, 17.06.2013. http://www.scotsman.com/news/nicola-sturgeon-we-ll-take-our-place-at-table-in-brussels-1-2968958.
Sturgeon, N. 2013. 'UK Government's legal opinion on EU'. February 11, 2013. Available at the Scottish Government website: https://www.scotreferendum.com/2013/02/uk-governments-legal-opinion/.
Sutherland, E., K. Goodall, G. Little, and F. Davidson. 2011. Law Making and the Scottish Parliament: The Early Years in Context. In *Law Making and the Scottish Parliament: The Early Years*, ed. E.E. Sutherland, K.E. Goodall, G.F.M. Little, and F.P. Davidson. Edinburgh: Edinburgh University Press.
Thürer, D. and Th. Burri. 2008. Self-Determination. In *Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press.
Tsagourias, N. 2014. Scotland on the world stage. *The Journal* (17 June 13) http://www.journalonline.co.uk/Magazine/58-6/1012692.aspx Accessed 29 August 2014.
UK Parliament. 2014. 'Scotland referendum 2014: The impact of independence on international organisations'. http://www.parliament.uk/business/publications/research/scotland-the-referendum-and-independence/impact-on-international-organisations/.
UK Parliament. 2013. Scotland analysis: Devolution and the implications of Scottish independence. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79417/Scotland_analysis_Devolution_and_the_implications_of_Scottish_Independan…__1_.pdf.
UK Parliament. 1998. Scotland Act. http://www.legislation.gov.uk/ukpga/1998/46/schedule/5.
Whittaker, A. 2013. 'Scottish independence: MEP claim over Scotland/EU', The Scotsman, 17 June 2013. http://www.scotsman.com/the-scotsman/politics/scottish-independence-mep-claim-over-scotland-eu-1-2968907.