

SCOTTISH PARLIAMENTARY REVIEW

is published by

BLACKET AVENUE PRESS

VOLUME I, No. 2

The Lord Rodger Memorial Issue

Winter, 2013/2014



Copyright ©2013-14 by Blacket Avenue Press LP

Table of Contents

In Memoriam

Lord Rodger of Earlsferry - i

Articles

Sir David Edward - *Scotland's Position in the European Union* 1

John Cameron McCluskie, Q.C. - *Who Wrote this Bill? The Life and Work of Scottish Parliamentary Counsel* 27

Mr. Nicholas Grier, W.S. - *Bankruptcy Law in Scotland: Past, Present, and Future* 51

Mr. Kenneth Gibson, M.S.P. - *Implementing the Financial Powers in the Scotland Act 2012* 71

Dr. Paul A. Cairney & Dr. Jim Johnston - *What is the Role of the Scottish Parliament* 91

Case Commentaries

Prest v Petrodel Resources Ltd & Others - Ceit-Anna MacLeod 133

Legal Challenges to Scottish Legislation and the Impact of AXA v Scottish Ministers - Christine O'Neill and Laura Kennedy 139

Statute Commentary

The Children and Young People (Scotland) Bill: Another step in a remarkably long journey - Leslie-Anne Barnes Macfarlane 153

Book Reviews 165

SCOTLAND'S POSITION IN THE EUROPEAN UNION

David Edward*

In the event of an affirmative vote in the Referendum on 18 September 2014, Scots will confront a myriad of issues, domestic, regional and international. One very important question is whether and on what terms an independent Scotland would or could become a Member State of the European Union (EU), and whether citizens of Scotland would continue to enjoy their existing status as citizens of the EU with all the attendant rights and responsibilities.

This article, the substance of which has already been published elsewhere¹, seeks to clarify the legal issue from the point of view of EU law insofar as that can be stated with any degree of certainty.

I should first make my own position clear, since I am a Scot living in Scotland, and I will be one of those entitled to vote in the Referendum. I am a moderate unionist in the sense that I still believe in the United Kingdom and believe that Scotland should remain part of it, but I also respect the sincerely held views of moderate separatists, like the late Professor Sir Neil MacCormick, who believed in Scottish independence.

* Sir David Edward KCMG, QC, FRSE. Professor Emeritus of the University of Edinburgh, Judge of the Court of First Instance (1989-92), Judge of the European Court of Justice (1992-2004).

¹ See *Fordham International Law Journal* Vol. 36, No. 5 (July 2013), pages 1151-68.

Personally, I hope very much that the issue of an independent Scotland's place in the EU will not arise, but the issue is important for the integrity of the EU and, I would say also, the credibility of its institutions. It affects other countries as well, and, the people are entitled to know, as far as possible, where they stand.

The President of the European Commission, José Manuel Barroso, in a letter to the Chairman of the House of Lords Economic Affairs Committee of the United Kingdom Parliament, has stated:

The EU is founded on the Treaties which apply only to the Member States who have agreed and ratified them. 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. 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.

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. 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. This agreement is subject to ratification by all Member States and the applicant state.²

² http://www.parliament.uk/documents/lords-committees/economic-affairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf.

The same has been said by the President of the European Council, Herman Van Rompuy, in almost identical terms, suggesting that they are singing from the same hymn sheet.³ Mr. Van Rompuy and others also advance a form of moral argument against separation, saying that it goes against the grain of European integration and, on a wider plane, against the inevitability of globalism. The separatist movement in Catalonia has even been described by one Euro-guru as ‘irredentist Euro-tribalism’.⁴

Such arguments seem to me to ignore the fact that a more than insignificant number of people support the movements for separation or independence (whichever is the preferred description). Article 2 of the Treaty on European Union (‘TEU’) affirms the belief that the Union is founded on certain core values, including respect for human dignity, freedom and democracy.⁵ If the majority vote for independence, it is difficult to see why those core values should not be respected.

In any event, there is nothing ‘tribalist’ in the belief (whether it be right or wrong) that small political entities are more in tune with the aspirations of their citizens than large ones. That, after all, is what subsidiarity is supposed to be about - another of the Union’s core principles set out in Article 5 TEU.⁶

In short, the moral arguments are ambivalent and it seems more fruitful to focus on the legal issues. Before doing so,

³ The hymn sheet seems to be an unpublished opinion written some time ago (before the Lisbon Treaty came into force) by a former Director of the Legal Service of the Council of Ministers.

⁴ Joseph H.H. Weiler, *Catalonian Independence and the European Union*, 23 EJIL Vol.23/4 (2012), page 909 ff.

⁵ See Consolidated Version of the Treaty on European Union art. 2, 2010 O.J. C 83/17 [hereinafter TEU].

⁶ See *id.* art. 5(3); David Edward, *Subsidiarity as a Legal Concept*, ... in Pascal Cardonnel et al. (eds.) *Constitutionalizing the EU Judicial System: Essays in Honour of Pernilla Lindh* (2012) pages 93-103.

however, it is necessary to highlight important differences between the three cases of Scotland, Flanders and Catalonia, where separatist movements are strongest. In each case, there are complex and mutually incompatible arguments at the national level.

SCOTLAND

In the case of Scotland, the Government and the Parliament of the United Kingdom have accepted (not without opposition) that the devolved Government and Parliament of Scotland may call a referendum in 2014 on the issue of Scottish independence and that the result of that referendum will be ‘definitive’ – that is to say, that the United Kingdom as a whole will accept that, in the event of an affirmative vote, Scotland should become an independent State, separate from the rest of the United Kingdom (‘RoUK’). The necessary legislation to give effect to separation would be passed by the United Kingdom Parliament in the same manner as, in 1707, the Parliaments of England and Scotland passed Acts to give effect to the Treaty (or Articles) of Union between the two countries.

On that basis, the separation of Scotland from RoUK would be brought about by what are agreed to be constitutional means and would, on that basis, be entitled to international recognition.

However, lawyers and politicians differ as to the effect in international law. The government of the United Kingdom, supported by public international lawyers,⁷ contends that RoUK would be the ‘successor’ or ‘continuator’ State, and that Scotland would be a ‘new’ State, which would inherit

⁷ Professors James Crawford of Cambridge University and Alan Boyle of Edinburgh University.

neither the rights nor the obligations of the former State from which it had seceded.⁸

There is statistical support for the view that RoUK would be the successor State. The land area of Scotland as compared with RoUK is about 78,400 as against 165,000 square kilometers (about 50%), while the population is about 5.25 million as against 57.87 million (about 10%). There is thus a considerable difference in population, though less in terms of land area. The centre of government for the United Kingdom is in London which is also the capital of England.

The argument from size and existing geographical distribution of power is not definitive. The United Kingdom is, by its very name and nature, the union of Great Britain and Northern Ireland. Great Britain is the entity created in 1603 by the union of the crowns of England (and Wales) and Scotland and fortified by the Union of the Parliaments in 1707. Article 1 of the Treaty of Union (1706) provided:

“That the Two Kingdoms of Scotland and England shall upon the 1st May next ensuing the date hereof, and forever after, be United into One Kingdom by the name of GREAT BRITAIN.”

Therefore, it can be argued, the separation of Scotland from England and Wales would dissolve the entity known as Great Britain and thus dissolve the essence of the United Kingdom of Great Britain and Northern Ireland. (Incidentally, the words ‘and forever after’ have not been invoked as excluding separation in the 21st century.)

According to this argument, a continuing union between England, Wales and Northern Ireland (erroneously referred to as RoUK) would be a ‘new’ State, as would Scotland.

⁸ *Scotland Analysis : Devolution and the implications of Scottish Independence*, Cm 8554, Chapter 2, <http://www.official-documents.gov.uk/document/cm85/8554/8554.pdf>.

Neither could claim to be the successor State, or perhaps both could do so. The result would be akin to the situation that arose on the dissolution of the former Czechoslovakia into two new States, the Czech Republic and Slovakia (the so-called ‘velvet divorce’). In that case, both States were recognised as successor States.

There is yet a further argument – that, even if separation were to result in the existence of two States (in the sense understood by international law), the ‘United *Kingdom*’ would not disappear because Scotland and RoUK would continue to share the same monarch. (A comparable distinction between monarchy and legislature was advanced by some of the American colonists who wished to maintain the link with the British Crown, but disputed the right of the British Parliament to make laws for the self-governing colonies.)⁹

Whichever of these views is correct, the question remains whether it is public international law or EU law that would determine the effect of separation on membership of the EU; and if it is EU law, what that law requires.

FLANDERS

Flanders is part of the Kingdom of Belgium, which separated from the Kingdom of the Netherlands in 1830. Belgium consists of three Regions: the Flemish (Dutch-speaking) Region (Flanders); the Walloon (French-speaking) Region (Wallonia); and the multilingual Brussels-Capital Region where most of the EU institutions are based.¹⁰ The German-speaking communities round Eupen, Malmedy and Sankt Vith were administered by Belgium after the First World

⁹ See Charles H. McIlwain in Pound, McIlwain, Nichols, *Federalism as a Democratic Process* (1942), page 34, and Jack P. Greene, *The Constitutional Origins of the American Revolution* (2011), page 91 ff.

¹⁰ Geographically, the Brussels-Capital Region is an ‘island’ within the territory of the Flemish Region.

War and became fully part of Belgium in 1925. They form part of the Walloon Region but constitute a separate linguistic Community.¹¹

The Walloon Region has a larger land area than the Flemish Region (11,500 as against 8,000 square kilometers), but the Flemish has the larger population (about 6.25 as against 3.5 million). Brussels-Capital has a population of about 1 million, and the German-speaking Community about 75,000.

Currently, the pressure for separation comes from the people of Flanders, which is economically stronger, the people of Wallonia being by and large content to remain in union with Flanders (and, the Flemish would say, dependent on Flemish subsidy). While it might be possible for Flanders to force separation, Flanders could not be said to ‘secede’, since the two entities are of roughly comparable size and population and together form the Kingdom of Belgium. Neither Flanders nor Wallonia has previously existed as a State or Kingdom separate from the other.¹²

It would be natural for an outsider to assume that the separation of Flanders and Wallonia would result in the emergence of two new States and that the Kingdom of Belgium would in consequence cease to exist. Some Flemish nationalists argue, however, that this is not their aim, but rather to create a Belgian Confederation of separate States under a single monarch (similar to one version of the Scottish argument).

¹¹ Belgium is a federal State, with powers distributed between the Regions, the linguistic Communities and the federation.

¹² The Prince-Bishopric of Liège was autonomous until it was annexed by Napoleon. The Belgian Province of Luxembourg was part of the Grand Duchy of Luxembourg, of which the King of the Netherlands was Grand Duke, until 1839, when the primarily French-speaking parts were annexed to Belgium under the Treaty of London 1839.

Whatever the outcome, it can probably be assumed that separation would be achieved by constitutional means and would consequently be entitled to international recognition.

*CATALONIA*¹³

Having been ruled as an autonomous entity by the Counts of Barcelona, Catalonia became a principality of the Kingdom of Aragon in 1137, which in turn united with the Kingdom of Castile to form the Kingdom of Spain. It enjoyed its own laws, taxes and privileges until they were removed after the War of the Spanish Succession in the eighteenth century. With the Basque Country and Galicia, Catalonia lost such autonomy as remained at the end of the Spanish Civil War of 1936-39. It has now become an Autonomous Community of the Kingdom of Spain.

Article 2 of the Spanish Constitution of 1978 provides that “The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed, and the solidarity amongst them all.”¹⁴

Catalonia is one of the ‘nationalities’ so recognised. The Preamble of its Statute of Autonomy of 2006, like the previous Statute of 1979, was drawn up by the Parliament of Catalonia, approved and sanctioned by the Parliament of Spain and ratified by a referendum in Catalonia. The Preamble states that “Reflect[ing] the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. The

¹³ I am grateful to Professor Miquel Strubell i Trueta of the Universitat Oberta de Catalunya for help with this section.

¹⁴ C.E., B.O.E. art. 2, Dec. 27, 1978 (Spain).

Spanish Constitution, in its second Article, recognises the national reality of Catalonia as a nationality.”¹⁵

The constitutionality of the statement that Catalonia is a ‘nation’ was contested before the Spanish Constitutional Court (*Tribunal Constitucional*). In its judgment of 28 June 2010, the Court held that:

“It is indeed possible to speak of nation as a cultural, historic, linguistic, sociological and even religious reality. But the nation of importance here is solely and exclusively the nation in its legal and constitutional sense. And in that specific sense, the Constitution does not recognize anything other than the Spanish Nation, the mention of which opens its preamble, on which the Constitution is based (Article 2 CE) and with which it expressly qualifies the sovereignty that, when exercised by the Spanish people as its sole acknowledged holder (Article 1.2), has been manifested as the wish to constitute the State in the positive provisions of the Spanish Constitution

“Under no circumstances can any nationality be claimed other than the one specified in the Constitution proclaimed by the will of that Nation, nor through an ambiguity that is completely irrelevant in the judicial/constitutional context, the only guide that this Court can follow, by referring the term ‘nation’ to any other subject that is not the people holding that sovereignty.”¹⁶

The government of Spain contends that it would be constitutionally impossible for Catalonia to separate from the Kingdom of Spain. In addition to Article 2 of the Constitution, it relies on Articles 8 and 92.¹⁷

¹⁵ Statute of Autonomy of Catalonia, Preamble (2006, 6) (Spain).

¹⁶ S.T.C., June 28, 2010 (S.T.C., No. 31, § II ¶ 12) (Spain).

¹⁷ C.E., B.O.E. art. 2, 8(1) Dec. 29, 1978 (Spain). (providing “The mission of the Armed Forces, comprising the Army, the Navy and the Air

Catalans who argue for separation maintain that the Constitution of 1978 cannot be set up against Article 1.1 of the International Covenant on Civil and Political Rights which was ratified by Spain in 1977: “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.”¹⁸ Some Catalans also argue that Article 95 of the Constitution provides a ‘toe in the door’.¹⁹

On 23 January 2013, the Parliament of Catalonia passed, by a two-thirds majority, a Declaration of Sovereignty and of the Right to Decide of the People of Catalonia.²⁰ This sets out a number of principles, of which the first is “The people of Catalonia, for reasons of democratic legitimacy, has the character of a sovereign political and juridical subject [of law]“. The Spanish government, following an opinion of the Council of State (*Consejo de Estado*),²¹ has contested the constitutionality of the Declaration before the Constitutional

Force, is to guarantee the sovereignty and independence of Spain and to defend its territorial integrity and the constitutional order”); C.E., B.O.E. art. 92 (1-2), Dec. 29, 1978 (Spain) (Article 92(1) providing “Political decisions of special importance may be submitted to all citizens in a consultative referendum[,]” Article 92(2) providing “The referendum shall be called by the King on the President of the Government’s proposal after previous authorization by the Congress[,]” and Article 92(3) providing “An organic act shall lay down the terms and procedures for the different kinds of referendum provided for in this Constitution.”).

¹⁸ International Covenant on Civil and Political Rights art. 1(1), Dec. 19, 1966, 999 U.N.T.S. 14668.

¹⁹ C.E., B.O.E. art. 95, Dec. 29, 1978 (Spain) (providing, « 1. The conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional amendment. 2. The Government or either House may request the Constitutional Court to declare whether or not such a contradiction exists.”).

²⁰ For the original text, see: http://www.parlament.cat/web/actualitat/noticies?p_id=129656021, and for a translation, see: <http://www.vilaweb.cat/noticia/4076896/20130124/declaration-of-sovereignty-and-of-the-right-to-decide-of-the-catalan-nation.html>.

²¹ For the text of the advice and dissenting opinion, see: <http://www.aelpa.org/actualidad/201303/ConsejoCatalunya.pdf>.

Court which has provisionally suspended its validity and application.²² Judge Santiago Vidal of the *Audiencia Provincial de Barcelona* has cited the Advisory Opinion of the International Court of Justice in the *Kosovo Case*,²³ as supporting the lawfulness of the Declaration.²⁴

On 11 September 2013, supporters of independence formed a human chain stretching 400 km across the region, following the example of the people of the Baltic Republics in 1989 and 1991. On 12 December 2013, the President of the Generalitat of Catalonia, with the support of parties representing two-thirds of its population, announced the intention to hold a independence referendum on 9 November 2014. This was met by the response from Madrid that “the referendum will not happen” since only the government of Spain can call a referendum.

For present purposes, it would be safer to assume that a unilateral declaration of independence by Catalonia would be declared unconstitutional. In that event, it is not clear by what mechanism, even after a vote in favour of separation in Catalonia, separation could be negotiated at the national level, nor how or when Catalonia could achieve international recognition as a sovereign State.

ANALYSIS

At least three quite different scenarios can therefore be envisaged for purposes of discussion.

²² <http://www.boe.es/boe/dias/2013/05/10/pdfs/BOE-A-2013-4859.pdf>.

²³ See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, ¶¶ 79, 84 (July 22).

²⁴ See report of interview with Judge Santiago Vidal and video link at <http://www.directe.cat/noticia/276141/el-jutge-santiago-vidal-mostra-la-clau-de-volta-de-la-independencia-de-catalunya>.

In two cases (Scotland and Flanders) we can assume that separation would be accepted as constitutionally admissible under national law. In the other case (Catalonia) separation would be contested, not simply as unconstitutional but as constitutionally impossible.

The cases of Scotland and Flanders can then be distinguished from each other as far as public international law is concerned. It would be difficult, if not impossible, to identify Flanders or Wallonia as the successor State. In that event, on the analogy of Czechoslovakia, Flanders and Wallonia would each succeed to the international rights and obligations of Belgium.

On the other hand, in the case of the United Kingdom, it is at least arguable that RoUK would be recognised as the successor State and Scotland as a ‘new’ State. In that event, RoUK would succeed to all the international rights and obligations of the former United Kingdom. Scotland would not do so but would correspondingly be able to choose the treaty obligations by which it would continue to be bound.

It should, however, be kept in mind that there is no doctrine of public international law that *requires* either result. The issue here is whether and to what extent EU law provides a legal solution to the issue of EU membership, irrespective of the general rules of public international law (whatever they may be).

It can be seen at once that the theory advanced by Presidents Barroso and Van Rompuy (‘the Barroso/Van Rompuy theory’) cannot provide a sufficient answer. It is suggested that “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.”²⁵

²⁵ Barroso Letter, *supra* note 3.

Plainly that could not apply if Flanders and Wallonia were to become separate States and the Kingdom of Belgium ceased to exist. The same would arguably be true if the true effect of separation of Scotland and England were held to be that the United Kingdom ceased to exist.

Three basic points should be made at this stage.

First, it is a general rule of international law that, where States have agreed to regulate their mutual relations by a Treaty, then (in the absence of any peremptory rule of international law²⁶) any issue between them is to be resolved by reference to that Treaty. The solution to any problem for which the Treaty does not expressly provide must first be sought within the system of the Treaty.

In that connection, the Vienna Convention on the Law of Treaties provides that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁷

Second, it is clear that, in the event of a Yes vote in the Scottish referendum, that vote would not, by itself bring about separation between Scotland and RoUK. The Scottish Government envisages that this would occur on 24 March 2016²⁸ but that is thought by some to be unduly optimistic having regard to the myriad intra-UK issues that would have to be negotiated and resolved before the moment of separation - notably the issue of Currency Union and continuance of the Common Travel Area.

²⁶ So-called *ius cogens* - see Article 53 of the Vienna Convention on the Law of Treaties (1969).

²⁷ Vienna Convention, Article 31.1.

²⁸ See the White Paper *Scotland's Future*, page 51.

We are concerned here with what would be a negotiated constitutional outcome and not with anything in the nature of a Unilateral Declaration of Independence. It is indeed questionable whether it is appropriate to use the word ‘secession’ in this context.

Third, it follows from the second point that, until the moment of separation (i) the government of the UK would remain the government of Scotland for all reserved matters including relations with the European Union²⁹ and (ii) *vis-à-vis* the other Member States and the institutions of the EU, the UK would remain the Member State with responsibility for matters affecting Scotland, its territory and its inhabitants, including (and perhaps especially) the dissentient minority who voted No.

It follows, further, that during the period between the vote and the moment of separation, there would be no separate and autonomous entity called ‘Scotland’ that could enter into negotiations with the EU or the other Member States, nor for that matter, a separate autonomous entity that could do so for the interests exclusively of ‘RoUK’ and its inhabitants.

The Legal Nature of the EU

From the beginning, the Treaties have imposed three basic obligations on the Member States, which are now formulated as follows:³⁰

²⁹ Scotland Act 1998, Schedule 5, Part I, paragraph 7(1) as amended.

³⁰ Now set out in Article 4.3 of the Treaty on European Union (TEU) and Article 344 of the Treaty on the Functioning of the European Union (TFEU).

- (positively) “to take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties”;
- (negatively) “to abstain from any measure which could jeopardise the attainment of the Union’s objectives”; and,
- “not to submit any dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

In its judgment in *Van Gend en Loos*,³¹ the Court of Justice had to resolve the question whether the EEC Treaty conferred legally enforceable rights on individuals (including companies) as well as the Member States. The Court followed the rule of customary international law, now enshrined in the Vienna Convention (quoted above), and considered “the spirit, the general scheme and the wording” of the Treaty. Under the first head, the Court considered the objective of the Treaty and concluded that:

“The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals

³¹ Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] E.C.R. 1

as well as upon the member states and upon the institutions of the community.”³²

Thus, while the EU is certainly a creature of public international law, the Treaties create a “new legal order” of international law” which differs from conventional international law in that its subjects are not only the Member States, but also their nationals (now also citizens³³). The autonomy of the EU legal order has repeatedly been affirmed by the Court of Justice.³⁴

The relationship between a Member State, the EU institutions and the other Member States is governed by the Treaties. So, the solution to any problem for which the Treaties do not expressly provide must be sought first within the system of the Treaties, including their spirit and general scheme.

The EU Treaties, as amended by the Treaty of Lisbon – the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”) – contain no provision dealing with the case of separation of a Member State. So we must look to the spirit and general scheme of the Treaties to see whether they provide an answer.

A few additional citations will suffice.

Article 2 TEU (already cited in part) provides (emphasis added):

“The Union is founded on the values of respect for human dignity, freedom, *democracy*, equality, the rule of law and respect for human rights, including *the rights of persons belonging to minorities*. These

³² *Van Gend en Loos*, fourth paragraph under head II(B).

³³ TFEU Article 20.

³⁴ See, for a recent example, Joined Cases C-402/05P & C-415/05P, *Kadi v. Council of the European Union* [2008], E.C.R. 1225, §§ 21-25.

values are common to the Member States in a society in which pluralism, *non-discrimination*, tolerance, justice, *solidarity* and equality between women and men prevail.”³⁵

Article 4 TEU provides (emphasis added):

“2. *The Union shall respect* the equality of Member States before the Treaties as well as their national identities, *inherent in their fundamental structures, political and constitutional*, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

“3. Pursuant to the *principle of sincere cooperation*, the Union and the Member States shall, *in full mutual respect*, assist each other in carrying out tasks which flow from the Treaties.”³⁶

Article 20 TFEU establishes citizenship of the Union which, in the words of the Court of Justice, is “destined to be the fundamental status of nationals of the Member States”³⁷:

“1. ... Every person holding the nationality of a Member State shall be a citizen of the Union

“2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States”

³⁵ TEU, *supra* note 7, art. 2.

³⁶ TEU, *supra* note 7, art. 4.

³⁷ See Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I- 6193 at paragraph 31.

Article 50 TEU provides for the case of a Member State's withdrawal from the EU (a situation for which the Treaties did not previously provide):

“1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

“2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for 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, 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, unanimously decides to extend this period.”³⁸

The Treaties also contain highly detailed provisions for free movement of goods, persons, services and capital, which have resulted over time in a highly complex skein of budgetary, legal, political, financial, commercial and personal relationships, liabilities and obligations. These relationships, liabilities and obligations are multilateral and, in general, reciprocal. The nationals of each Member State have acquired rights of citizenship and free movement *vis-à-vis* all the others - their territory, their institutions, their economic

³⁸ TEU, *supra* note 7, art. 50.

structures and their people. They include (to take only four out of hundreds of possible examples) investors in the corporate sector, Erasmus and other students, migrant workers, and fishermen operating in the waters of other Member States.

The reason why the Treaties provide for an extended period of negotiation before withdrawal takes effect is precisely in order to overcome the difficulties inherent in unraveling that skein of relationships in the event of withdrawal of a Member State.

The question of Treaty interpretation that arises here is whether the same would apply to the far less drastic situation where an existing Member State separates into two parts and both parts wish to continue membership? Do the spirit and scheme of the Treaties really offer no solution, so that we have to resort to conventional public international law as the Barroso/Van Rompuy theory suggests?

Application of EU law to the case of separation

It is useful to begin by considering the legal and practical implications of the Barroso/Van Rompuy theory.

First, at the level of principle, the theory seems to assume that - contrary to the principles asserted in Articles 2 and 4 TEU (as well as the Preamble of the Treaty) - EU law does not recognise the democratic right of the inhabitants of one part of a Member State to dissolve their constitutional union with those of the other part(s) unless they are prepared to accept *automatic* loss, for the whole population including any dissentient minority, of the rights they have acquired as citizens of the EU.

Second, the theory seems to assume that—at the moment of separation or on some other unspecified date—the ‘separating State’, its citizens and its land and sea area would find

themselves in some form of legal limbo *vis-à-vis* the rest of the EU and its citizens, unless and until a new Accession Treaty were negotiated. Until the moment of separation, they would remain an integral part of the EU; all EU citizens living in the separating State would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with that State. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that, from that moment, the *acquis communautaire* would no longer, as such, be part of the law of the separating State. The State would cease, for example, to be constrained by the Treaty rules in relation to the rates of VAT and corporation tax. Erasmus students studying there would become ‘foreign students’ without rights. Migrant workers would lose their rights under EU law to social security. And the whole land and sea territory of the separating State would cease to be within the jurisdiction of the EU. (In the case of Scotland, which probably has the largest sea area in the EU, that is an important security consideration quite apart from other considerations.)

Third – apparently – there would be no legal obligation upon the State concerned, the EU institutions or the other Member States to enter into any negotiations before separation took effect in order to avoid such a remarkable, and potentially uncontrollable, situation coming to pass. (It is significant that, in another context, the Vienna Convention provides expressly for a situation where interpretation of a treaty according to the normal rules “leads to a result which is manifestly absurd or unreasonable”.³⁹)

On closer examination, it can be seen that the Barroso/Van Rompuy theory is workable only in a situation, like Scotland and RoUK, where one entity is significantly larger than the

³⁹ Vienna Convention, Article 32.

other, and it can plausibly be suggested that one of them is the successor State and the other the ‘seceding’ or separating State. In the case of Flanders and Wallonia (assuming the extinction of the Kingdom of Belgium), the logic of the theory suggests that both would have to be classified as ‘new’ States, so that the political institutions of the EU (including Mr Barroso’s and Mr Van Rompuy’s own offices) would find themselves in a ‘third country’!

It might be suggested that this would produce such ‘absurd and unreasonable’ results that the EU would accept both Flanders and Wallonia as successor States which would then be entitled automatically to the status of Member States in their own right. The case of Scotland and RoUK would, by contrast, be treated according to the Barroso/Van Rompuy theory. That might be a political solution, but hardly adequate as a legal one, nor for that matter consistent with the fundamental principle of non-discrimination.

Moreover, such a solution would ignore the necessity to settle matters such as the number of members of the European Parliament and the contribution to the EU budget to mention only two. On these and other issues, there would be scope for substantial disagreement, not only between Flanders and Wallonia, but also between them and the other Member States. In short, even in that case, pre-separation negotiation would be essential.

Looking to the presumed intention of the Treaty-makers, can they reasonably be supposed to have intended that there must be prior negotiation in the case of withdrawal but none in the case of separation? Can they really have intended the paradoxical legal consequences of automatic exclusion or, at a more practical level, that the complex skein of relationships, liabilities and obligations created by EU law should be allowed to unravel without measures being taken to prevent it?

The answer, surely, is No. In order to avoid the disruption that would otherwise ensue, negotiation would be necessary *before* separation took place—precisely as the Treaty requires in the case of withdrawal.

The purpose of pre-separation negotiation would be to agree the necessary amendments to the existing Treaties to accommodate the new situation and not, as Barroso and Van Rompuy suggest, one or more Accession Treaties. Accession Treaties are huge documents covering all the points that are necessary, amongst many other things, to bring the law of the acceding State into line with the *acquis communautaire*. In the case of separation of an existing Member State, already compliant with the *acquis*, this would not be necessary. In any event, the very word ‘accession’ presupposes the correctness of the theory that the ‘new’ State has ceased to be part of the EU and must apply to ‘accede’.

It may be objected that negotiations might fail and that Treaty amendment would in any event require ratification by the Member States. But the fact that the outcome of negotiations cannot be predicted does not alter the obligation of all parties, *including the Member State in the process of separation*, to negotiate in good faith and in accordance with the Treaty principles of sincere cooperation, full mutual respect and solidarity. Maintaining the territorial and political integrity of the EU and the vested rights of its citizens is surely of greater importance than blind acceptance of doctrines of public international law whose application is in any event open to question.

That is as far as the Treaties can take us, but it is at least a solution more rational and consistent with the spirit of the Treaties than the Barroso/Van Rompuy theory. (It does not resolve the case of Catalonia since, as noted above, it is to be assumed that Spain would regard the separation of Catalonia as constitutionally impossible. Even in that case, however, it is difficult to see how an acceptable solution could be found

without negotiation in which the EU might reasonably claim to have a part to play.)

The existence of an obligation to negotiate does not, of course, imply anything as to the outcome of those negotiations, except that their purpose would be to avoid the consequences of the Barroso/Van Rompuy theory. There would not be a 'seamless transition' for Scotland, but there might not be a seamless transition for RoUK either. To mention only one thorny problem, there would be the matter of the budget rebate which other Member States might well wish to reopen.

For that reason, it is important to keep in mind that, as already noted, it would be the government of the United Kingdom that would be responsible for negotiating on behalf of the whole UK (as existing) and all its inhabitants, including all the inhabitants of Scotland (whether they voted Yes or No) as well as the inhabitants of England, Wales and Northern Ireland. To arrive at a satisfactory negotiating position for the UK to adopt in the EU negotiations would clearly require complex and difficult internal negotiations.

The necessary sequence of negotiations within the UK, and between the UK and the rest of the EU, can perhaps be illustrated by reference to the question whether (as is sometimes suggested) an independent Scotland would be obliged to join Schengen and adopt the Euro. The legal basis for that suggestion is questionable. But, as a practical matter, it would clearly be necessary first to determine whether (as the Scottish Government claims) Scotland could remain part of a Currency Union with RoUK and part of the Common Travel Area with RoUK and Ireland. The other Member States could reasonably refuse to discuss the matter until that question had been resolved.

If internal agreement on either or both of these points were achieved (a big 'if', at least as regards a Currency Union), it is not credible that the other Member States and the EU

institutions would refuse to accept that solution and insist on Scotland joining Schengen and/or adopting the Euro, even if they could do so as a matter of EU law. On the other hand, if the intra-UK negotiations were to fail, then Scotland would (or at any rate might) have to look for refuge in Schengen or the Euro.

That illustrates the high degree of uncertainty that remains, even if, as argued here, there is a duty to negotiate in good faith to achieve a rational and acceptable solution. Indeed, as far as EU law is concerned, the only certainty (apart from the obligation to negotiate) is uncertainty. But that, at least, the people are entitled to know.

Finally, the question has been raised whether the issue of continued membership of the EU could be brought before the European Court of Justice before the moment of separation. This could not be done before the Referendum and could be done thereafter only if the vote were in favour of independence, since the question would until then be purely hypothetical.

But if the answer were Yes, then it is possible to envisage that an individual or company could raise a declaratory action seeking to ascertain the extent of his, her or its continuing rights and obligations after the moment of independence. A national judge faced with that issue could refer the question to the Court of Justice, and it is at least possible that the Court would accept the reference and answer the question. But even that remains uncertain!