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(How easily) COULD AN INDEPENDENT SCOTLAND JOIN THE EU?

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The prospect of an independent Scotland raises many issues. This paper focusses on just one of them – the question of an independent Scotland’s EU membership. While it may have taken longer for this issue to reach the bubbling and boiling point that other issues of Scottish independence have attained - such as ownership of North Sea oil rights, or whether an independent Scotland might maintain sterling as its currency. Scotland’s EU membership has become no less contested and polarised than these other issues.

This paper maintains that despite assertions to the contrary from UK lawyers, EU lawyers and EU officials, any future independent Scotland’s EU membership should be assured, and its transition from EU membership *qua* part of the UK, to EU membership *qua* independent Scotland relatively smooth and straightforward. In other words, it would take the form of an *internal enlargement*² of the EU using the procedure for treaty amendment in Article 48 TEU. These arguments are made on the basis of *EU law itself*, which, it is argued, provide all the resources necessary to assure an independent Scotland’s EU membership through EU treaty amendment, and not through a cumbersome accession process as a new member state. In particular, the values, norms and ‘special ethos’ of the EU, expressed in concepts such as EU citizenship, fundamental rights and duties of loyalty, combine to provide a reasoned justification for such internal enlargement.

1. POLARISATION OF DEBATE

There exists a great polarisation of the debate as to if, and how, an independent Scotland could become part of the EU. At first sight, there are two sides with very different stories to tell, and an apparent reluctance to budge from a preferred view.

¹ This paper is an expanded version of a talk given by the author as part of a panel discussion with Graham Avery and Michael Keating at the invitation of the Foundation for Law and Justice and Society at Wolfson College Oxford, on ‘Could Scotland join the EU’ on 4 June 2014. A podcast of that discussion is available here: <http://podcasts.ox.ac.uk/could-scotland-join-european-union>

² This term has become increasingly popular, with a number of articles and blogs using it in their titles. Neil MacCormick was however, already using the term over a decade ago – see eg its inclusion in N MacCormick, ‘The European Constitutional Convention and the Stateless Nations’, (2004) 18 International Relations at 331.

The view from London

The view from London, as I will call it for want of a better description, includes pronouncements from Her Majesty's Government,³ but also from the Westminster Parliament. Several parliamentary select committees have pronounced on the difficulties of an independent Scotland's continued membership of the EU,⁴ most recently the UK House of Commons Scottish Affairs Select Committee, in its report, published in May 2014.⁵ In this report, the Scottish Affairs Committee warned that 'a separate Scotland would face protracted and uncertain negotiations when attempting to secure its position in the European Union, and . . . it is likely Scotland will lose all or most of the special arrangements presently enjoyed as part of the UK.' The Committee argued that it would be 'wishful thinking to believe otherwise'.⁶

The UK Prime Minister, David Cameron, joined the fray, asserting in June 2014 that Scotland would find itself behind Serbia, Montenegro and Macedonia in the queue to join the EU if it broke away from the UK.⁷ At the same time, a business group, *Business For a New Europe*, warned that an independent Scotland would have to wait until 2019 at the earliest to re-enter the EU because several member states would veto an accelerated process, and that Scotland would face a 'long and winding road' back into the EU.⁸

Ahead of the referendum, the UK government produced a series of reports,⁹ one of which, *Devolution and the implications of Scottish independence* appended a specially commissioned *Opinion* from two senior international lawyers, James Crawford and Alan Boyle, which specifically considered the effect of independence on Scotland's membership of international organisations.

Their *Opinion* does not bring particularly welcome news for those who wish an independent Scotland to benefit from an uncomplicated transition to an EU member state in its own right. While stating that it is 'not inconceivable' that Scotland could automatically become a member of the EU, the jurists' *Opinion* is that Scotland would have to apply for membership of the EU through the standard accession provision in the Treaty, Article 49 TEU, just in the same way as totally new countries, such as Croatia or Romania or Bulgaria have done. And they believe that standard rules of public international law govern this process. The remainder of the UK (from henceforth in this paper rUK) would be the *continuator* state, maintaining its previous rights and obligations. Scotland would be a new sovereign state, and would have to

³ See for example, a series of papers 'informing the debate about Scotland's future', published by the UK Government and available at: <https://www.gov.uk/government/policies/informing-the-debate-on-scotlands-constitutional-future/activity>

⁴ For example the House of Lords Constitution Committee, 8th Report of Session 2013–14, Scottish independence: constitutional implications of the referendum; House of Commons Foreign Affairs Committee on the foreign policy implications of Scottish independence, and the Scottish Affairs select Committee.

⁵ Scottish Affairs Committee - Twelfth Report: 'The Referendum on Separation for Scotland: Scotland's Membership of the EU' Summary, p3.

⁶ *Ibid* at paragraph 58.

⁷ 'Scottish independence: Scotland 'would be put at the back to the queue to join EU' says David Cameron', *The Independent* 3 June, 2014.

⁸ See Daniel Furby, 'A Long and Winding Road? Scottish Independence and EU Accession,' Brussels Briefing, *Business for a New Europe*.

⁹ For the collection of these papers, see the UK Government's Scotland Analysis webpage at <https://www.gov.uk/government/collections/scotland-analysis>

apply anew for memberships such as the EU or UN. The view that Scotland would have to use the Art 49 procedure to apply as a new country, has also been strengthened and advanced by EU lawyers such as Kenneth Armstrong; Patrick Layden QC TC, a member of the Scottish Law Commission; Jean-Claude Piris, former Director-General of the Council Legal Service; as well as by other well-known constitutional lawyers such as Adam Tomkins and Stephen Tierney.

The Scottish Government's view

Not surprisingly, the view from the Scottish Government is somewhat different. The reports produced by the Scottish Parliament are also more optimistic than those of UK Parliament about an independent Scotland's place in the EU.¹⁰ Scotland's First Minister Alex Salmond gave a speech at the College of Europe in Bruges in April 2014,¹¹ relating how he believed an independent Scotland should be rapidly admitted to EU membership on the same terms as the continuing United Kingdom. Salmond's argument was that negotiations over Scotland's EU membership could be concluded within 18 months – a high-reaching timetable designed to coordinate with the target date for independence of March 2016. According to the *Scotland's Future*:

‘Following a vote for independence the Scottish Government will immediately seek discussions with the Westminster Government, with member states and with the institutions of the EU to agree the process whereby a *smooth* transition to independent EU membership can take place on the day Scotland becomes an independent country.’¹²

Alex Salmond's characteristically trenchant response to the *Business for a New Europe* report was to state that: ‘The only threat to Scotland's place in Europe comes from David Cameron's in-out referendum as Westminster dances to a UKIP tune and flirts with the exit door of the EU.’¹³

Nor have international lawyers brought only bad news for Scottish separatists. Commenting specifically on the Boyle and Crawford HMG *Opinion*, international lawyer David Scheffer wrote:

‘The HMG Opinion repeatedly emphasizes the scale and complexity of legal issues flowing from Scottish independence . . . One cannot help but observe a political objective at work in HMG Opinion, namely to make the legal implications appear so burdensome and traumatic for Scotland and its people, particularly under the presumptive continuator theory for rUK, that voters will decide it is not worth the effort and vote ‘no’ on the independence referendum.’¹⁴

¹⁰ See eg European and External Relations Committee, 2nd Report, 2014 (Session 4), ‘Report on the Scottish Government's proposals for an independent Scotland: membership of the European Union’, Published by the Scottish Parliament on 23 May 2014, SP Paper 530 Session 4 (2014)

¹¹ This speech ('Scotland's Place in Europe') is available on the Scottish Government website – see: <http://news.scotland.gov.uk/Speeches-Briefings/Scotland-s-Place-in-Europe-bdf.aspx>

¹² See *Scotland's Future: A Guide to Independence* at 220.

¹³ See, ‘Scotland warned of Three Years in Wilderness’, *The Scotsman*, 3 June 2014.

¹⁴ D Scheffer, ‘International Political and Legal Implications of Scottish Independence’, University of Glasgow, Adam Smith Research Foundation, WP 2013/01 at 16.

The conclusion that might be drawn from this brief trawl through recent contributions on the question of Scotland's future in Europe might be that the issue has hardened into 2 approaches, one separatist and one unionist. Unionists argue that Scottish independence would jeopardize its future in the EU, perhaps postponing membership indefinitely, and certainly endangering the benefits of Scotland's current membership as part of the UK, such as participation in the UK's EU Budget Rebate. Scottish separatists, however, seek to present a trouble-free continuation of EU membership, with greater autonomy for Scotland to argue its own case in the EU, and point to the successes of small states that appear to punch above their weight in the EU.¹⁵

Such a conclusion presents a somewhat agonistic, adversarial portrait. But isn't that just politics? However, to borrow a famous phrase, 'There were three people in this marriage'¹⁶ or perhaps it should be divorce, given the issue of independence. And the 3rd participant is the EU itself, a not inconsiderable player. What view has it taken of Scottish independence?

The remainder of this paper seeks to focus on the question of an independent Scotland from the perspective of *EU law*. And this paper is highly critical of some contributions by EU figures to date.

2. THE THIRD PARTY – THE EU

Of course, it is a difficult matter to determine just what *the EU* view is, with so many member States and institutions, and no President as such. There is no single figure or perspective that can be identified – as expressed succinctly in a view often attributed to Henry Kissinger – 'Whom do I call if I want to call Europe?'¹⁷ There are just too many Institutions and players.

However, if we look at EU interventions to date, then we can see that some EU Institutions have taken a provocative view on Scottish independence. Notably, the former Commission President, José Manuel Barroso, stated:

'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.'¹⁸

In fact, Mr Barroso was just reiterating what Romano Prodi had said 10 years before, when he previously had been President of the Commission.¹⁹ The President of the

¹⁵ See eg 'SNP say they can do business with Juncker' *The Scotsman*, June 27, a report expressing the SNP's view that Juncker, now President of the EU Commission, from the smallest EU state, Luxembourg, provided a good example illustrated what could be achieved by those from small states.

¹⁶ As famously stated in an interview by Princess Diana – transcript at <http://www.bbc.co.uk/news/special/politics97/diana/panorama.html>

¹⁷ Although see Reuters' report: 'EU says it has solved the Kissinger problem' viewable at <http://uk.reuters.com/article/2009/11/20/us-eu-president-kissinger-idUSTRE5AJ00B20091120>

¹⁸ Available at http://www.parliament.uk/documents/lordscommitteess/constitutionalaffairs/ScottishIndependence/EA68_Scotland_and_the_EU_Barroso's_reply_to_Lord_Tugendhat_101212.pdf

¹⁹ Official Journal of the European Union 3 April 2004 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:084E:0422:0423:EN:PDF>)

European Council – Herman Van Rompuy – expressed an almost identical view in December 2013.²⁰ This is also the view of Viviane Reding, Vice President of the Commission, and Commissioner for Justice, Fundamental Rights and Citizenship.²¹ So there appears to be some uniformity of viewpoint.²²

Barroso also notoriously made a comment on *The Andrew Marr Show* commenting that it would be: '*extremely difficult, if not impossible*' for an independent Scotland to join the European Union. Mr Barroso also drew a perhaps unfortunate parallel between the position of an independent Scotland seeking EU membership and Kosovo.²³

This looks unpromising for the nationalists and those who want a smooth transition. But in fact, I believe that such statements from EU officials overstate the case considerably, and are unworthy to be considered representative of an EU perspective.

EU Law

Within EU law, there exists no precedent for what happens when a territory of an existing Member State becomes independent, and wishes to retain EU membership, and the treaties do not provide for such an event. The process by which a separate Scotland may become a member of the EU is therefore subject to speculation. It is this factor that has created so many uncertainties in the debates over an independent Scotland's EU membership.

Art 49 TEU deals with the situation of new applicant countries. Art 48 TEU deals with amendments to the treaties by existing members. Neither deal with Scottish situation directly or explicitly. Under Article 48, a proposal to amend the treaties would need to be initiated by a Member State, the Commission or the European Parliament. It would require either the convening of a 'convention' or an intergovernmental conference to adopt recommendations on the treaty amendments by unanimity and then ratification by all Member States. Article 49 sets out the procedure for a conventional enlargement where a new candidate country is seeking membership from outside the EU. Such candidate states must demonstrate that they satisfy the *acquis communautaire*—at least 35 chapters of common rules and standards of law, institutions and practices that apply throughout the EU. There then follow detailed accession negotiations which also take considerable time, and require accession states to obtain the unanimous support of the European Council and have their membership approved through an Accession Treaty which would need to be ratified in accordance with the constitutional requirements of each Member State.

²⁰ Comments made by the President of the European Council, Herman Van Rompuy, on 13 December 2013 in a press conference in Madrid in response to a questions about a proposed referendum in Catalonia. Available at

http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/140072.pdf

²¹ As expressed by Reding in a letter in response to a question from the Scottish Parliament of 20 March 2014, available at

http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Inquiries/Letter_from_Viviane_Reding_Vice_President_of_the_European_Commission_dated_20_March_2014_pdf.pdf

²² See also Phoebus Athanassiou and S Laulhe Shaelou, 'EU Accession from Within?—An Introduction', (2014) Yearbook of European Law, 1–50. The first author is listed as Senior Legal Counsel, European Central Bank, and the article takes an opposing view to the argument made here, asserting accession from within not to be possible.

²³ The transcript from the BBC's *The Andrew Marr Show* is available at <http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/1602141.pdf>

There is no clear precedent (Algerian independence from France in 1962, Greenland's separation from Denmark, and German unification do not provide exact parallels) and the EU Treaties are silent on the question of succession to state membership. Notwithstanding, the UK Government (and certain UK Parliament select committees) has taken the view that an independent Scotland would have to reapply for EU membership using the Art 49 procedure. This is the view taken by Barroso and Van Rompuy. However, this view is not inevitable, and may not even be well-reasoned.

3. THE PROBLEM WITH THE ‘BARROSO VIEW’:

In a nutshell: the problem is that the statements from Barroso and other EU officials misrepresent both the EU itself and EU law. In stating that: ‘If a country becomes independent it is a new state and it has to negotiate with the European Union’ and that the UK would not have to reapply given ‘the principle of the continuity of the state’ Barroso was making use of the standard language of public international law, rather than the more specific and singular concepts that EU law has built up over its near 60 year history. But in the context of the EU, Barroso’s statement lacks any reasoned foundation.

Neil Walker recently characterized the issue thus: ‘What is glaringly absent from the debate, both in . . . Barroso’s intervention and in the broader silence of the EU’s main movers and players on the Scottish question, is the articulation of any kind of public philosophy that would provide good reasons, rather than simply motivations of base political self interest’.²⁴

The EU is a *sui generis* organisation and the European Court of Justice has long held that, while a creation of international law, it constitutes a distinctive new legal order.²⁵ As the Court famously stated in *Van Gend en Loos*, ‘the Treaty is more than an agreement which merely creates mutual obligations between the contracting parties’.²⁶ Perhaps the most striking way in which EU law early distinguished itself was by its focus on the rights and obligations of the individual (not traditionally a concern of international law). Moreover, EU law does not have a straightforward, hierarchical relationship with international law, in which international law always takes priority. Indeed the European Court of Justice has on occasion refused to apply certain international law measures on grounds of their incompatibility with EU law, such as UN Security Council Resolutions in the *Kadi* case.²⁷ It has therefore asserted the autonomy of EU law from international law. While there are some jurists who appear to interpret the EU primarily as a creature of international law,²⁸ this is not the view of the European Court, nor of most specialist EU lawyers.

²⁴ N Walker, ‘Hijacking the Debate’, UK Constitutional Law Blog, February 18 2014, accessible at <http://ukconstitutionallaw.org/2014/02/18/neil-walker-on-scotland-hijacking-the-debate/>

²⁵ eg most notably in its early judgment in Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, [1963] E.C.R. 1.

²⁶ Case 26/62, *Van Gend en Loos*, [1963] ECR1.

²⁷ Joined Cases C-402/05P & C-415/05P *Kadi v. Council of the European Union*, [2008], E.C.R. 1225.

²⁸ For example, Boyle and Crawford appear to take this approach generally in their ‘Opinion: Referendum on the Independence of Scotland – International Law Aspects’ appended to the February 2013 HM Government *Scotland analysis: Devolution and the implications of Scottish independence* mentioned above.

EU law therefore manifests itself as a new and singular legal order that goes beyond the traditional state-based concerns of international law, differentiating itself from other international organisations. EU law also characteristically takes a pragmatic and purposive approach to pressing issues that are not dealt with by specific treaty provisions. There was no explicit provision in the treaties capable of dealing with the situation of German unification in the 1990s. But the (then) EEC Institutions responded to this event in a pragmatic and expedient manner, enabling a united Germany to become a member of the EU without long drawn out negotiations, accession proceedings or legal wranglings. I argue that such a pragmatic approach should be applied in the case of Scotland. But in contrast, the traditional, international law view, which I shall for simplicity's sake name the 'Barroso' approach, is unsatisfactory, and particularly so for the following reasons.

First, it is inconsistent with previous Commission pronouncements on the issue of Scottish independence. Second, it threatens to cast out Scotland from the EU, thus fracturing the Single Market, ignoring acquired rights and obligations of good faith. Third, it ignores the existence and growth of EU citizenship as elucidated in caselaw of the European Court. Lastly, it is difficult to reconcile with the EU's values and norms as enshrined in the general principles and spirit of the Treaties. I shall take each of these objections in turn.

In the course of their consideration, I argue that it is crucial to focus on the EU's role as defender of rights, values, and citizens more closely at a time when the EU is underrated by its own citizens and highly susceptible to Eurosceptic critique, rendering parties such as UKIP, dominant. Rebuffing or alienating a country such as Scotland, that wants to maintain EU membership, and is keen to stress its European credentials,²⁹ will hardly do much for the EU's image. The EU ought to be showing what it can do for its citizens, not rebuffing them.

4. INCONSISTENCY WITH PREVIOUS COMMISSION OPINIONS AS TO SCOTTISH INDEPENDENCE.

It might be queried what weight the Barroso opinion carries, as that of an unelected (and now past) Commission official.³⁰ However, the Commission has always been a powerful player in EU affairs, whose President may be highly influential, and thus the President's opinion cannot simply be ignored.

This first argument against the 'Barroso view' is somewhat of a preliminary one but it is still worth making. The first step is to underline that the Barroso view is not the only view ever presented by EU Commission officials. In his written evidence to the Scottish Parliament's European and External Affairs Committee, Hugh McLean (a former European Commission official) drew attention to a different and distinct position that had been taken in relation to the 1979 referendum for devolution in Scotland. He explained that at that point in time, the Secretary-General of the European Commission had considered there to be two successor states—

²⁹ As evident from Alex Salmond's Bruges speech mentioned above: 'an independent Scotland would be an enthusiastic, engaged and committed contributor to European progress'.

³⁰ Albeit one appointed on the proposal of the Council whose governments are for the most part directly elected, and now with the consent of, and taking into account the distribution of votes in, the European Parliament – see Article 17 TEU.

‘During the late 70s in the run up to the referendum in 1979 to establish a Scottish Assembly Mr. Émile Noël, the original and highly respected Secretary General of the European Commission, was asked what would happen in the event that one day Scotland and England would separate . . . He stated quite clearly that both nations were and would remain members of the European Economic Community but obviously there would have to be modifications both for administrative and judicial reasons. These two aspects would be the subject of negotiations for both nations. Since 1979 both Scots and English have acquired rights and as yet no legislation has ever been passed to expel a nation, whose citizens have been European citizens for decades not to mention those of us who were employed in the European institutions over that period.’³¹

We may also look to the opinions of Graham Avery, honorary Director-General of the EU Commission, who believes that Scotland could use the ‘internal’ procedure under Article 48 of the Treaty. Avery has written the following:

‘Many years ago I was a junior member of the British team negotiating the United Kingdom’s membership of the EC. Later I went to Brussels to work for the European Commission, where I was one of the architects of the enlargement that brought the Central and East European countries into the EU. If there’s a topic on which I have some expertise, it’s how to join the EU.

So I listened with interest to what politicians and commentators began to say two years ago about Scotland joining the EU. The more I heard, the more puzzled I became. The idea in London was that, on independence, Scotland would have to leave the EU, apply for membership from outside, and spend years trying to join. What’s more, Scotland would be obliged to join the euro and the Schengen zone for free movement of people.

This kind of argument struck me as absurd. It seemed to me that depicting the EU as a major handicap to Scottish independence was incorrect. To use it as a ‘weapon of mass dissuasion’ would be wrong. So I decided to try to contribute some common sense to the debate by submitting written evidence to parliamentary committees in London and Edinburgh.’³²

Avery has argued persuasively that Art 48 TEU may be used to ensure Scotland’s membership continues on independence. Notably also, the SNP did not take Mr Cameron’s aggressive stance to Jean Claude Juncker’s candidacy for EU Commission President, but instead hailed Juncker’s ‘sensible’ stance on Scottish independence and said they could ‘do business’ with him.³³ These statements seemed to be based on the belief that Mr Juncker would take a less negative view of an independent Scotland’s chances of smooth transition to EU membership.

So the Commission’s view is less monolithic than is sometimes presented, and

³¹ Hugh McLean, written evidence to ‘Report on the Scottish Government’s proposals for an independent Scotland: membership of the European Union’, Published by the Scottish Parliament on 23 May 2014, SP Paper 530 Session 4 (2014)

³² Quoted on <http://www.futureukandscotland.ac.uk/blog/scotland's-independence-eu-what'sproblem#ptlink.fid=13859&isc=1&did=bookmark.1089d4bda15678355a33fb61d2b89a5030798963&ctp=article>

Some of Avery’s opinions may be found at http://www.scottish.parliament.uk/S4_EuropeanandExternalRelationsCommittee/Meeting%20Papers/Graham_Avery_Written_Evidence.pdf

And http://www.epc.eu/documents/uploads/pub_4487_scotland_and_the_eu.pdf

³³ ‘SNP: we welcome EC president-elect and his views on independence’, *The Herald*, 27 June 2014.

certainly not determinative of an ‘EU view’ on the matter.³⁴

5. EU LAW AND NOT INTERNATIONAL LAW GOVERNS THE SITUATION OF AN INDEPENDENT SCOTLAND IN EUROPE AND EU LAW REQUIRES GOOD FAITH NEGOTIATION

Boyle and Crawford, in their *Opinion* for the UK Government, assert that ‘Public international law is the proper law for answering questions of state continuity and succession . . .’³⁵ They take the view that an independent Scotland would not automatically succeed to previous memberships and rights of international organisations. However, unlike the Scottish Government, they do not think that Article 34 Vienna Convention on the Succession of States in Respect of Treaties 1978, applies. Article 34 provides that successor states will continue to be bound by treaties that were in force over the entire territory at the date of succession, and such a view would clearly be beneficial for an independent Scotland’s continuing EU membership.

Boyle and Crawford’s objection to the application of Art 34 appears to be based on the fact that the UK is not a signatory to the 1978 Convention, and that in any case, Article 34 provoked controversy by departing from the ‘clean slate’ principle under international law. However, it might equally be argued that the 1978 Treaty has customary international law status, and overrides the now somewhat outdated clean slate principles which applied in the immediate post colonial era.³⁶

But Boyle and Crawford then argue that reliance on Art 34 is, in any event, precluded by Article 4 of the same Convention, which expressly states that succession to constituent instruments of an *international organization* is: ‘without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.’ Thus, according to Boyle and Crawford, ‘the prevailing view [is] that principles of succession to treaties have no application to membership of international organizations’ and will instead “depend on the particular constitution or rules of each organization”.³⁷ The conclusion they draw is that there is no one comprehensive answer to the question of which law governs the issue of succession to international organizations and that it is necessary to consider the practice of each individual organization. And many international organisations automatically recognise secession states as members.

³⁴ See also the view of Jim Currie, former EU Commission Director-General, who also gave evidence to the Scottish European and External Affairs Committee, and who characterized Barroso’s comments as ‘unwise and inaccurate,’ reported on *BBC News* 24/02/2014, ‘Scottish independence: Barroso comments ‘inaccurate’ says former EU official.’

³⁵ *Opinion* at para 184.

³⁶ See eg D Scheffer, ‘International Political and Legal Implications of Scottish Independence’, University of Glasgow, Adam Smith Research Foundation, WP 2013/01 at 23: ‘Welcome to 2013, for the time has arrived to challenge that (the clean slate) presumption. Modernity and surely the will of the international community suggest that Scotland embrace the continuation of treaty obligations, within a pragmatic political framework.’

³⁷ *Opinion* at para 126.

I argue that such a conclusion in no way hampers the claim that an independent Scotland should be able to continue EU membership³⁸ through the Treaty amendment route in Art 48 TEU. For the particular constitution and rules of the EU enable this very procedure. I shall now consider this argument.

1. EU law: a new legal order

The argument below is derived from, and follows closely along the lines of an argument made by Professor Sir David Edward, former UK judge at the European Court of Justice,³⁹ and proponent of a very different view from that of former Commission President Barroso. In particular, this argument highlights the practical and economic difficulties of suspending Scottish membership of the EU on independence, and insists that EU law has the necessary resources to avoid such a suspension.

The first step of this argument is to acknowledge that while the EU is a creature of international law, it has become ‘a new legal order’ in the words of the European Court of Justice in the *Van Gend* case. It can be distinguished from international law in that it generates both rights and obligations for individuals as well as states, and therefore consequently, Edward argues that:

‘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. Only if the Treaties can provide no answer would one resort to conventional public international law (including doctrines of state succession).’⁴⁰

2. EU has sufficient resources to deal with the matter

The second step is to argue that there **are** sufficient resources in EU law to deal with the problem, a matter for which Boyle and Crawford – and others – do not make any allowance. The relevant provisions that Edward focusses on in particular are Arts 4(3) and 50 TEU.⁴¹ What is the content of these provisions? And how do they assist the argument here?

a) *Art 4(3) TEU reads:*

‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out the tasks

³⁸ For example, both the IMF and World Bank recognised the successor states to Yugoslavia. Human rights treaties are particularly notable in this respect and discussed below.

³⁹ See for example, D Edward, ‘Scotland and the European Union’, *Scottish Constitutional Futures Forum*, (2012):

<http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/e/ArticleView/articleId/852/David-Edward-Scotland-and-the-European-Union.aspx>

also David Edward, *EU Law and the Separation of Member States*, 36 Fordham Int’l L.J. 1151 (2013). Sir David Edward has also given oral evidence along these lines to a number of parliamentary enquiries into Scottish independence.

⁴⁰ David Edward, *EU Law and the Separation of Member States*, 36 Fordham Int’l L.J. 1151 (2013) at 1162.

⁴¹ David Edward also makes mention of provisions on citizenship in Art 20 TFEU. However, I am leaving these aside for the time being and shall discuss them fully in the next section.

which flow from the Treaties'.

As a recent *Common Market Law Review* editorial states, Art 4(3) 'refers to the Union as a special ethos: Member States are bound to adopt a certain attitude towards the other actors. Reflected in Article 4(3) TEU, it mainly consists of a principle of sincere cooperation, full mutual respect, and a duty of mutual assistance. It also means that Member States must have due regard to the Union system as a whole.'⁴² The Court of Justice has made clear that the duty of loyal co-operation extends to all areas of the EU's relationship with its Member States.⁴³ It is, and has always been, clear that one of the most significant tasks that flows from the EU Treaties is the support and furtherance of the EU's Single Market, which has been at the centre of the EU's (and former EEC) existence, so much so that the very term, 'Common Market' formerly acted as a metonym for the EEC itself. The EU has sought to increase the well-being of its peoples through economic growth and stability.⁴⁴ A very salient and practical objection to the Barroso (and UK Government) position is that it would provoke immediate discontinuity within the Single Market. For according to the Barroso view, Scotland would retain its EU membership, as part of the UK, until independence but would then, on becoming independent, be ejected from the EU. It would then be open for an independent Scotland (but not before that date, as Scotland would not possess the necessary statehood) to begin the accession process under Article 49 TEU. But there would be considerable economic difficulties if Scotland's EU membership were to be suspended. In the words of David Edward,

'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.)'⁴⁵

b) The Barroso view results in Scotland's automatic involuntary withdrawal and ignores Art 50 TEU

If we accept the 'Barroso' view, this would mean that Scotland would be immediately ejected from the EU. Its exodus would be automatic. Yet it is not clear on what treaty basis such an automatic withdrawal exists. It certainly stands in contrast to the formal procedure for withdrawal from the EU in Article 50 TEU. This is where we see the relevance of Article 50.

Indeed, Article 50 is the only provision in the EU Treaties for withdrawal from the European Union. It was added by the Lisbon Treaty to provide for the situation where a Member State voluntarily decides to terminate its EU membership. Prior to Lisbon

⁴² Editorial comments: 'Union Membership in times of crisis', 51 *Common Market Law Review* (2014) 1–12.

⁴³ The good faith principle also exists as a customary international law principle established in Articles 26 and 31 Vienna Convention on the Law of treaties.

⁴⁴ On some occasions more successfully than others, as the Eurozone crisis has illustrated.

⁴⁵ David Edward, *EU Law and the Separation of Member States*, 36 Fordham Int'l L.J. 1151 (2013) at 1166.

there was no such mechanism in the treaties. Article 50 sets out procedures and obligations that apply to both the withdrawing Member State and the EU institutions, with the aim of minimizing the dislocation and disorder caused by withdrawal. It obliges them to negotiate and to conclude an agreement, providing a 2 year period to do so, thus confirming that withdrawal is not to be automatic. So, for example, if the United Kingdom decided to withdraw from the EU, it could use Article 50 to give notification of that intention to the European Council, and then would have a period of time in which to conclude negotiations. However, Article 50 would not be a procedure that Scotland would follow, as the Scottish Government has asserted that it would not withdraw Scotland's EU membership following independence.⁴⁶

The example of Greenland illustrates just how long it can take for a territory to withdraw from the EU. The Greenland electorate voted on 23 February 1982 on whether to stay in the EEC (as it then was), but it took a further 3 years until Greenland finally withdrew from the EEC on 1 February 1985. There were laborious and lengthy negotiations between the Greenland Government and the Danish Government, and between the Danish Government and the European Commission, particularly with regard to fisheries.⁴⁷ The European Commission stated that, upon Greenland's withdrawal, the rights acquired by Community nationals in Greenland, and by Greenlanders in other EEC countries, should be protected and that 'new arrangements must contain a clause allowing the Council, on a proposal from the Commission, to adopt transitional measures as may be required'.⁴⁸ What this makes clear is that withdrawal must be carefully negotiated. It cannot be automatic.⁴⁹

3. EU law does recognise acquired rights and interdependencies

The presence of Article 50 acknowledges that the EU treaties establish systems and structures of rights and obligations between member states, but also with regard to the nationals of those States. Such acquired rights and mutual dependencies cannot be immediately and directly extinguished. Thus Article 50 makes provision for negotiated withdrawal. There is no provision in EU law for automatic ejection or withdrawal.

For example, nationals of other EU member state have directly enforceable EU law rights in Scottish courts regarding matters such as free movement of workers, free movement of goods, and freedom of establishment. Scottish nationals possess corresponding rights in other Member States. If Scotland's membership were automatically terminated they would become illegal immigrants. An automatic withdrawal from the Common Agricultural Policy (CAP) would cause immense disturbance to Scottish farmers. Similar issues would be encountered regarding projects, or joint ventures, such as those in the field of research, which were funded under one of the EU's part long-term programmes.

⁴⁶ See *Scotland in the European Union*, p 14.

⁴⁷ 'Leaving the EU' House of Commons Research Paper 13/42 1 July 2013 at 12. See also M Nash, 'Could Britain leave the European Union? The Greenland Option', 146 NLJ, 6752.

⁴⁸ *Status of Greenland: Commission opinion*, COM (83) 66 final, 2 February 1983, 12.

⁴⁹ Neil MacCormick recognised this point. He wrote: 'whenever the Treaties, as the Constitutional Charter of the EU, have come to be in force in respect of a state, extending to every part of its territory, they remain in force for the whole territory or territories in question, until such time as any variation of this or derogation from it is determined by an Intergovernmental Conference and enshrined in an appropriate treaty.' N MacCormick, 'Is there a constitutional path to Scottish independence?' 53 Parliamentary Affairs (2000) 734.

Such acquired rights under EU law would have to be respected. The European Court of Justice stated as long ago as 1963 that such rights are part of individuals' 'legal heritage'.⁵⁰ EU law provisions on legality and legal certainty would require EU Institutions, member states and Scotland to agree on the protection of acquired rights. If the EU were to take an act suspending Scotland's membership then this could be subject to judicial review under Article 263 TFEU. Legal certainty is a general principle of EU law, which has various aspects such as the protection of legal expectations, non-retroactivity and acquired rights.

Moreover, international law also recognizes the status of acquired rights. Sir Gerald Fitzmaurice has written that:

'It is an accepted rule of treaty law that the termination of a treaty, for whatever cause and in whatever way, can only affect its continuing obligations, and cannot *per se* affect or prejudice any right already definitively and finally acquired under it, or undo or reverse anything effected by any clause of an executed character in the treaty.'⁵¹

Furthermore, according to A.D. McNair, 'any right already definitively and finally acquired under [a treaty]' would include, for these purposes 'not only rights acquired at the time of, and as a result of, the conclusion of a treaty, but also rights which a party has acquired later, for itself or for its nationals, during the currency of the treaty and before termination [or, presumably, withdrawal], in pursuance of a power conferred on it by the treaty'.⁵² McNair asserts that such rights would be protected by the 'well-recognised principle of respect for acquired rights'.

Thus, any rights acquired prior to any termination, or withdrawal, would continue to be effective. This is particularly so, considering the mutual obligations of loyalty and good faith of the member states and EU Institutions under Article 4(3) TEU.

4. The Commission has duty under Art 4(3) to safeguard the Single Market

Loyalty rests on mutual duties, which bind not only the Member States but also the Union institutions. As provided by former Article 1(3) TEU, 'The Union's task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples'. According to Article 17 of the TEU, the Commission 'shall promote the general interest of the Union'. It is the duty of the Commission to safeguard the integrity of the Single Market, which it would not be doing if Scotland's membership were suspended and the possibility of internal enlargement denied.

The Scottish Government *Scotland's Future* paper states that 'Historical examples such as the reunification of Germany in 1990 and independence for the Czech Republic and Slovakia in 1993 show that after a democratically agreed and accepted expression of political will, countries can make significant constitutional changes happen in months rather than years.' That German unification may have some

⁵⁰ ECJ, Case C-26/62, *Van Gend & Loos*, 1963 ECR 1

⁵¹ *The law and procedure of the International Court of Justice*, 1986

⁵² A.D. (Lord) McNair, *The Law of Treaties*, p 532, fn 4.

See also *Oppenheim's International Law*, (Ninth Edition, p 1311, para 657), which states that termination "...releases the parties from any obligation to perform the treaty further, and does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination [or the withdrawal]".

relevance for Scotland has not been missed. It has been suggested that: ‘The Commission would do well to revisit its actions during German unification. Faced with a potentially troublesome territorial development — in essence the *opposite* of internal enlargement in which the territory of the Union expands without a new Member State being added — the Commission acted to broker a deal with the key parties, ensuring the smooth functioning of the single market and helping to ensure the required changes were agreed by the Council and Parliament. Such activity is far more in tune with the duty of the Commission than its current policy is.’⁵³ This is evidence of the capacity of EU Institutions and member states to reach a pragmatic agreement in the absence of a specific treaty article governing the situation at hand. Why may we not compare the position of a newly independent state such as Scotland, to that of an extended state, such as unified Germany in 1990, whereby acquired rights and established laws would continue in force.⁵⁴

Boyle and Crawford suggest that the argument that the EU would be bound to negotiate in ‘good faith’, ‘would have to rely on a creative and expansive reading of EU treaty provisions that has no legal precedent. There is no provision that obviously gives rise to such a requirement.’⁵⁵ However, expansive and purposive interpretation has been the lifeblood of EU law as developed by the European Court of Justice. And there are most certainly provisions, namely Article 4(3) TEU, that give rise to such requirements.

Weatherill predicted in 1994 that Article 4(3) (then under the old treaty numbering, Article 5 EEC) ‘is likely to be vigorously employed by the Court as a basis for an obligation to manage the varying patterns of integration so that the Community structure does not fragment’.⁵⁶ It has also been argued that ‘This principle, despite the innocuous wording in what is now Article 4 (3) TEU, has produced some of the strongest ‘ties that bind’ the Member States within the European Union. It is thus no exaggeration to claim that loyalty has been central to the development of Union law since the 1960s, and that it still shapes its structure today.’⁵⁷ Notably, this provision has often been analysed in connection with other fundamental principles, such as effectiveness and primacy.

Furthermore, the European Court of Justice employs quite different principles of interpretation from those traditionally employed by common law judges. This is the purposive or teleological approach, expanded in the *van Gend en Loos* case, in which the European Court held that it is necessary to consider ‘the spirit, the general scheme and the wording,’ supplemented later by consideration of ‘the system and objectives of the Treaty’.⁵⁸ In carrying out such interpretation, the Court of Justice does not hold itself bound by the exact wording of Treaty provisions, or secondary legislation. The Court has also held that it is necessary to consider ‘not only its wording, but also the context in which it occurs and the objects of the rules of which it is a part.’⁵⁹ This

⁵³ Daniel Kenealy, How Do You Solve a Problem like Scotland? A Proposal Regarding ‘Internal Enlargement’, (2014) *Journal of European Integration* at 11.

⁵⁴ Also one of the first alterations of borders in post-war Europe occurred in 1957, whereby the Saarland was transferred from France to Germany, without renegotiation of the ECSC treaty.

⁵⁵ *Op cit* at para 177

⁵⁶ S. Weatherill, ‘Beyond Preemption? Shared Competence and Constitutional Change in the European Community’, in D. O’Keeffe and P.M. Twomey (eds), *Legal Issues of the Maastricht Treaty* (London: Chancery Law Publishing, 1994), 13–33, 32. Cited in Klamert

⁵⁷ M Klamert, *The Principle of Loyalty in EU Law*, (Oxford University Press, 2014) 1.

⁵⁸ Case C-26/62, *Van Gend & Loos*, 1963 ECR 1.

⁵⁹ Case 292/82 *Merck* [1983] ECR 3781

context includes the preamble to the measure in question, even although preambles are not binding as such. What this amounts to is that such acts of ‘interpretation’ of the Court of Justice have, in a number of cases, in reality inserted new provisions (or sometimes even ignored explicit wording) into the Treaties – such as direct effect of EEC law in the *van Gend* case, or supremacy of EEC law in the *Costa* case, neither of which concepts was, nor to this date is, to be found in the explicit wording of the treaties themselves.

Moreover, the Court of Justice has stressed the principle of *effet utile* (or effectiveness) of EU law, enabling it to extend purposive interpretation beyond that of a specific provision and instead to look to the aims or purpose of the Treaties as such instead. In this way it has been able to justify the direct effect of directives. This approach was also illustrated by the Court in the *CILFIT* case, when it stated that ‘every provision of Community law must be placed in its context and interpreted in the light of the provisions of EEC law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.’⁶⁰

Therefore, in the words of Aidan O’Neill, ‘the fact that the Court of Justice is frequently prepared to ignore the literal meaning of a provision in favour of an interpretation which furthers its own view of the guiding objectives of the foundation Treaties, broadens considerably the scope for legal argument about provisions of EU law.’⁶¹ This undermines the Boyle and Crawford argument that such a interpretation would require an impossibly ‘creative and expansive reading’.

5. Internal Enlargement

In summary, then, David Edward’s argument is that, in accordance with their obligations of good faith, sincere cooperation and solidarity under Article 4(3) TEU, the EU Member States and EU institutions would be under a duty to enter into negotiations, *before Scotland became fully independent*, to determine the future relationship within the EU of the separate parts of the former UK and the other Member States. This would be a form of *internal enlargement* of the EU.

The outcome of such negotiations, unless a total failure, would be amendment by consent of the existing Treaties, and *not* a new Accession Treaty. (The simplified revision procedure provided by Article 48 TEU would not apply, so ratification of the amended Treaties would be necessary.) Edward concludes, ‘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 theory.’⁶²

6. THE CITIZENSHIP ARGUMENT

A separate but related argument relies on the singular nature of the EU legal order,

⁶⁰ Case 283/ 81, *Cilfit v. Italian Ministry of Health*, 1982 E.C.R. 3415, 3430.

⁶¹ O’Neill, ‘Scotland, independence and the EU: the Sturgeon response’ Eutopia law blog, accessed at <http://eutopialaw.com/2012/12/14/scotland-independence-and-the-eu-the-sturgeon-response/#more-1695>

⁶² David Edward, *EU Law and the Separation of Member States*, 36 Fordham Int’l L.J. 1151 (2013) at 1168.

and in particular on the conspicuous and privileged place given to individuals as subjects of EU law to emphasize the crucial importance of *citizenship* of the EU.

According to Article 9 TEU and Article 20 TFEU, ‘Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.’ Therefore, one cannot become an EU citizen without first being a national of one of its member states. However, the European Court of Justice has famously declared that ‘Union citizenship is destined to be the fundamental status of nationals of the Member States’,⁶³ and has shown itself willing to overlook, or look beyond, the rule that matters of citizenship and nationality are internal matters for the Member States only. From the relatively humble roots of EU citizenship in the Treaty of Maastricht, the European Court has added flesh to the bones of this concept through a series of cases dating back to the 1990s. In more recent cases— notably *Rottmann* and *Zambrano*⁶⁴—it set aside the internal rule that excluded EU’s law’s application and curtailed Member States’ freedom of action on matters of nationality.

If Scotland were to lose its EU membership on date of independence, its citizens would still be EU citizens, because they will still hold UK nationality (unless, for whatever reason, they choose to revoke and disown their UK nationality). There will also be other EU nationals who live and work in Scotland, and Scots who live and work in other EU member states. What of their rights? European court judgments make it clear how hard it is to revoke EU citizenship. Aidan O’Neill has argued that there exists ‘not just an obligation of good faith but a commonsense requirement to try to resolve the instability of having 5 million people who are EU citizens but whose state has no status within the EU.’ What of their acquired rights and obligations?

In responding to a question in the European Parliament in 2012, Barroso argued against the ‘citizenship’ argument, by simply restating the treaty’s language that ‘EU citizenship is additional to and does not replace national citizenship (that is, the citizenship of an EU member state)’, and that ‘in the hypothetical event of a secession of a part of an EU member state, the solution would have to be found and negotiated within the international legal order’.⁶⁵

Such an approach ignores the jurisprudence of the European Court and the accompanying scholarship. The Barroso approach interprets the EU conventionally as merely a contract between states, giving rise to ancillary rights for individuals only as epiphenomena, rather than putting them at the centre of the EU’s mission, as the Court and many scholars have.

As stated, EU citizenship is conditional on the possession of citizenship of one of the EU’s member states. EU law may not interfere with the conditions of acquisition of national citizenship⁶⁶ but it has been established by jurisprudence of the Court of Justice that nationality law is not completely unconstrained by EU law. This is because national law in this field must respect EU law to ensure that it does not affect the individual enjoyment of EU rights, and most particularly those of EU citizenship.

⁶³ Case 184/99 *Grzelczyk* [2001] ECR 1- 6193.

⁶⁴ Case C-135/08 *Rottmann v Freistaat Bayern*, [2010] ECR I-1449; Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi*, [2011] ECR I-0000.

⁶⁵ This can be found on the European Parliament website at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-007453&language=EN>

⁶⁶ Declaration No 2 on Nationality of a Member State appended to the Maastricht Treaty.

The *Rottmann* case is especially relevant here as it concerns the loss of an individual's EU Citizenship as a result of the revocation of nationality. The European Court held that an Austrian man who moved to Germany to avoid criminal prosecution could not have his German naturalization revoked if that would leave him stateless and deprive him of his EU citizenship. The Court's *Rottmann* judgement makes it clear that the withdrawal of EU Citizenship (in contrast to its acquisition) will fall within the scope of EU law, if the withdrawal of member state nationality deprives an individual of EU citizenship and allied rights such as free movement, establishment, and equal treatment). Indeed, Dougan has gone as far as to suggest that, after *Rottmann*, the loss of the nationality of a Member State is 'a restriction on the rights associated with EU Citizenship', which would justify 'personal circumstances scrutiny' under the Treaties 'before it can validly take effect'.⁶⁷

The *Ruiz Zambrano* case is also relevant in this context. In this case, the European Court of Justice held that national measures cannot deprive citizens of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the EU'. In this case a Colombian father of two Belgian children was able to use EU law, and specifically his children's' rights to EU citizenship (the children having been born in Belgium) to regularize his stay in the country. The Court decided that the children would be deprived of the enjoyment of their citizenship rights if their father were to be deported.

In sum, EU law can restrain national law in situations which are capable of causing individuals to lose their status as EU citizens and rights attaching thereto.

Boyle and Crawford dismiss such arguments based on citizenship by stressing the derivative nature of EU citizenship, arguing that citizens of an independent Scotland would no longer benefit from EU citizenship. They rely on Articles 24 and 25 of the ILC Articles on the Nationality of Natural Persons in Relation to the Succession of States (2000) which provide that persons having their place of habitual residence in the successor state will receive the nationality of that state while the predecessor state 'shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State'. Therefore, persons acquiring Scottish nationality would no longer be UK citizens and could no longer avail themselves of the protections of Union citizenship.⁶⁸

However, since the British Nationality Act of 1948, there exists in general no restriction in UK law on a British national being a citizen of another country. Nor has the UK signed up to Chapter 1 of the 1963 Strasbourg Convention on the Reduction of Cases of Multiple Nationality, which stipulates that persons naturalized by another European member country automatically forfeit their original nationality. So international law does not limit the ability of British citizens to become dual citizens of other European countries.

In its January 2014 analysis of the consequences of independence, focusing on borders and citizenship, the UK Government Home Office paper stated: 'The UK has ... been tolerant of plural nationalities, and it is likely there would be no barriers to

⁶⁷ M Dougan, 'Some Comments on *Rottmann* and the 'Personal Circumstances' Assessment in the Union Citizenship Case Law' in J Shaw (ed.) *'Has the ECJ Challenged Member State Sovereignty in Nationality Law?'*, EUI Working Papers, RSCAS 2011/62, 17

⁶⁸ Boyle and Crawford op cit at 114.

holding both British and independent Scottish citizenships.⁶⁹ Individuals who had, or were entitled to, British citizenship on the date of independence should therefore have that right protected, and Scots would in any case remain EU citizens by virtue of retaining UK nationality. The question is how best to ensure that they maintain the attendant rights.

However, critics also question the relevance of the *Rottmann* case in the context of Scottish independence. They assert that one crucial distinctive feature of *Rottmann* is that Herr Rottmann risked becoming *stateless* after the loss of German citizenship. In contrast, Scottish citizens of an independent Scotland would never face the prospect of statelessness. It might also be thought that it is too big a step to move from the ratio of the *Rottmann* case, that EU law has an interest in loss of national citizenship, to the conclusion that Scotland should smoothly transition to membership of the EU.

To be sure, the doctrine of EU citizenship cannot by itself engender automatic membership of the EU for an independent Scotland. It would be necessary for the treaties to be amended, at the least according to the procedures in Art 48. However, EU law's developing notion of EU citizenship does have a crucial impact on the issue of an independent Scotland's membership of the EU. In light of central importance of EU citizenship, Aidan O'Neill argues that, 'rather than analyse the matter from the classic viewpoint of public international law – which recognizes only States and international organisations as the subject and object of international rights and obligations – EU law requires one to look at the issue from the viewpoint of the individual EU citizen.'⁷⁰

As O'Neill argues, the critical question here is whether the Court of Justice would consider that Scottish independence deprived Scottish citizens of their acquired rights as EU citizens? Given the importance accorded by the Court to the primacy of EU law, and EU citizenship as being 'the fundamental status of nationals of the Member States', it is unlikely that the Court would hold this to be the case. As O'Neill argues, 'Such a ruling by the Court would affirm the primacy of EU law over national and international law, confirm the role of the Court as the final arbiter on such weighty matters of State(s), and be presented as EU law re-connecting with, and protecting the acquired rights of, individual EU citizens.'⁷¹ So the citizenship argument is a strong one.

6. AN EU OF VALUES

1. The very nature of the EU

The economic nature of the EU may sometimes be over-emphasized, while the traditional or historical premise of the EU is sometimes forgotten. The focus on the Single Market, and economic issues within the EU, should not eclipse the fundamental issues that inspired the original EEC in the post-war period, namely a

⁶⁹ HM Government, *Scotland analysis: Borders and citizenship* (January 2014) Cm 8726 at p75, para 4.71.

⁷⁰ A. O'Neill, 'A Quarrel in a Faraway Country?: Scotland, Independence and the EU', posted on the Eutopia Law blog on 14/11/2011 and available at <http://eutopialaw.com/2011/11/14/685/#more-685>

⁷¹ *Ibid.*

search for peace and stability in Europe and the protection of democratic values. Scottish self-determination is part of this democratic development, as it has evolved over the decades through the devolution process. Neil MacCormick found an apt description when he described the EU as a ‘commonwealth’ whose members have certain vital interest of peace and prosperity in common.⁷² This too, is part of the EU’s *raison d’être*, a feature recognised by the award to the EU of the Nobel Peace Prize in 2012, an award that looked beyond the economic achievements of the EU.

So the nature of Scottish independence within the EU must be understood in the context of the EU’s wider mission to pursue peace and democratic values. Already in 1974, Pierre Pescatore, then Luxembourg judge at the European Court of Justice, identified the essence of supranationality in an ‘idea of order determined by the existence of common values and interests’.⁷³ This requires a closer look at the values espoused by the EU, and most particularly, democracy and fundamental rights. Article 2 TEU provides a basis, setting out the values on which the EU is said to be founded. Article 3 TEU adds to this that the EU shall promote the well-being of its people. Article 2 TEU reads as follows:

Article 2

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 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.

2. Democracy and Self-determination

Self-determination is not mentioned as a value in Article 2 but it is closely linked to the principle of democracy and has given rise to much argument in the context of Scottish independence, so it will be discussed first. Robert Lane has argued that: ‘A Scotland bent upon independence grounded in the clear democratic support of the Scottish people would create a moral and, given the international law principle of self-determination, probably a legal obligation for all member states to negotiate in good faith in order to produce such a result.’⁷⁴

For some, arguments based on self-determination are of little relevance. Boyle and Crawford, for example, argue:

‘Outside the colonial context, the principle of self-determination is controversial. The Canadian Supreme Court has held that “a right to secession only arises under the principle of self-determination of peoples at international law where “a people” is governed as part of a colonial empire”. In metropolitan territories such as Scotland, ‘peoples are expected to achieve self-determination within the framework of their existing state’ and a state that ‘respects the principles of self-determination in its internal arrangements ... is entitled to maintain its territorial integrity under international law’s self-determination of peoples is to be exercised *within* the framework of existing states, so long as there is a representative government based on equality and non-

⁷² N MacCormick, *Questioning Sovereignty* (OUP, 1999), at 143.

⁷³ Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Leiden, Sijthoff, 1974), Preface.

⁷⁴ Lane, ‘Scotland in Europe’ in Finnie (1991) 143, 154–5.

discrimination.⁷⁵

However, in return it might equally be argued that one should interpret the right to self-determination ‘using a modern frame of reference and not the decolonization theories and practices of the past century . . . grounded in the primacy of sustaining national cohesion following decolonization. Scotland is not a case of decolonization and certainly not one of simple “internal self-determination.”’⁷⁶ I would also dispute the relevance of the *Quebec* case in the Scotland context, given that it involved issues of potential unilateral self-determination by the Quebec government, and the attempt to use international law to ground a right to self-determination in the absence of legality under the Canadian Constitution. The Scottish referendum is an entirely different case, involving a constitutionally approved process within the framework of UK Constitutional law. Indeed, in the *Quebec Secession* case, the Supreme Court of Canada affirmed the right to self-determination under the condition that the other Canadian provinces agreed to the secession.

Joseph Weiler has made an argument (in the context of the case for Catalan independence⁷⁷) based around international law and the *Quebec Secession* case. His argument is that because international law recognizes no automatic right to secede in the case of national minorities who enjoy extensive individual and collective freedom, therefore the EU should not be expected to indulge the independence claims of these unoppressed sub-state nations in its accession policy:

‘Europe should not seem like a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. The assumption of automatic membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons, lack the courage so to say, by other Member States of the Union . . . It would be hugely ironic if the prospect of membership in the Union ended up providing an incentive for an ethos of political disintegration.’⁷⁸

But Weiler’s analysis is inapplicable to the case of Scotland for a number of reasons. The first is that no parallel can be drawn between the cases of Scotland and Catalonia. The Scottish referendum is not a unilateral act, but one crafted within the aegis of UK Constitutional law. The Edinburgh Agreement states that a referendum will ‘deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.’ Any decision by the Scots on independence will possess a legitimacy that it would be impossible for the EU to ignore.

Secondly, it is in any case hard to argue, as Weiler does, that separatism (or in Weiler’s terms ‘irredentist Euro-tribalism’) contradicts the ‘deep values and needs of the Union’. The remainder of this section will advance alternative perspectives on the values and purpose of the European Union.

⁷⁵ Boyle and Crawford at para 175, see also *Reference re Secession of Quebec* (1998) 115 ILR 536, 594–5.

⁷⁶ D Scheffer, ‘International Political and Legal Implications of Scottish Independence’, University of Glasgow, Adam Smith Research Foundation, WP 2013/01.

⁷⁷ Joseph H.H. Weiler, ‘Catalan Independence and the European Union’, 23 EJIL Vol.23/4 <http://www.ejiltalk.org/catalan-independence-and-the-european-union/> Scotland is not absent from his discussion: ‘The Basques are lurking in the background and the Scots are not even lurking but quietly forging ahead. And there is ‘Padania’ led by the awful Lega Nord in Italy, and the list does not end there.’

⁷⁸ *Ibid.*

3. Democracy

If Scotland votes for independence in September 2014, this would be a vote to dissolve the constitutional union in the UK. However, the legitimacy of such a vote would not be in doubt, being the result of a fully constitutional process, conducted on a democratic basis. The referendum and processes leading up to it have been conducted under the rule of law, with the full consent of the UK Government. Whatever its outcome, it represents the democratic will of those eligible to vote in Scotland. As a consequence, it would be entirely incompatible with EU general principles and values to eject Scotland from the territory of the EU, (with also the possible consequent loss of EU citizenship, and acquired rights) as a result of the exercise of the Scottish peoples' *democratic* right to self-governance.

Democracy is proclaimed as one of the EU's values in Art 2 TEU and is also one of the principles set out at in the Preamble of the EU Charter of Fundamental Rights. The EU is eager to vaunt its adherence to the values proclaimed in Art 2, and also seeks to promote democracy outside of the EU. While actual achievement in the pursuit of democracy overseas may sometimes have been lacking, and the EU's statements may have the appearance of a rhetorical puff, the EU's commitment to democracy as such cannot be faulted.

As such, therefore, the EU's very *raison d'être* is at issue here. How could an institution such as the EU, that has promoted the cause of democracy at home and abroad, proclaimed it in its post-Lisbon headline statement of values in the treaty, act in such a way as to dispossess Scots of their acquired rights and EU citizenship as a result of Scotland using the democratic right to vote for independence. This would seriously undermine the EU's credibility and its claim to be a promoter of democracy.

4. Fundamental Rights

Lastly, fundamental rights present an interesting case. There exists a compelling school of thought in international law that human rights treaties *automatically* bind successor states. Such a view is evidenced by the UN Human Rights Committee's General Comment No. 26 on the continuity of obligations. Further, many years ago, Wilfred Jenks vehemently argued that there could be no clean slate in respect of multilateral treaties of a legislative or universal character, most particularly those that vest rights in individuals or organization.⁷⁹ Most human rights treaties have no termination clauses (nor did EU law until the Treaty of Lisbon). In the *German Settlers* case,⁸⁰ the Permanent Court of International Justice held that private rights, including rights of property, might be invoked against successor states. In present times, human rights are the most important rights that may be invoked against the state. The doctrine of acquired rights recognised in international law certainly applies to human rights.⁸¹

The ECHR is a salient example of this. Although it is a 'condition precedent' of membership of the Council of Europe, governed by Article 4 of its Statute,⁸² that a

⁷⁹ W. Jenks. 'State Succession in Respect of Law-Making Treaties', 29 *BYIL* (1952) 105, 142.

⁸⁰ *German Settlers in Poland*, (Advisory Opinion) 10 September 1923, PCLJ Series B, No. 6, at 36.

⁸¹ R. Millerson, *International Law, Rights and Politics* (1994) 154-157.

⁸² Art 4 Statute of the Council of Europe.

new state deposit an instrument of accession with the Secretary General, membership of the ECHR itself, however, is a different matter. In the 2009 case of *Bijelic v Montenegro and Serbia*⁸³ the European Court of Human Rights held that the ECHR remained in force over the territory of a successor state (in this case, Montenegro) at all times, despite independence. It explained:

‘given...the principle that fundamental rights protected by international human rights treaties should indeed belong to individuals living in the territory of the State party concerned, notwithstanding its subsequent dissolution or succession ... the Court considers that both the Convention and Protocol No. 1 should be deemed as having continuously been in force in respect of Montenegro as of [the date it entered into force in respect of Serbia and Montenegro through to the date of Montenegrin independence] as well as thereafter.’⁸⁴

This is in keeping with the school of thought that human rights treaties will automatically bind successor states and therefore, it would appear that the ECHR will continue to apply to Scotland uninterrupted.

The ECJ in *Van Gend* stressed the importance of rights. The TEU and TFEU may not be predominantly human rights treaties, but the EU Charter of Fundamental Rights is most certainly one, and it now has the same legal value as the Treaties (Article 6(1) Treaty on European Union). The opening recitals to the Charter’s preamble are in the following terms (emphasis added):

“... the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. *It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.*”

Moreover, Advocate General Maduro in the *Centro Europa 7* case, asserted that, ‘Protection of the common code of fundamental rights accordingly constitutes an existential requirement for the EU legal order.’⁸⁵ In the *Kadi* case,⁸⁶ the ECJ proclaimed the constitutional autonomy and hegemony of the EU legal order, stating that the EU is a community based on the rule of law, and that respect for fundamental rights is an integral part of the EU legal order. So there is a strong argument to be made that, as a Union based on human rights, EU law requires the recognition of the invocability of EU fundamental rights by Scottish citizens, rather than their termination by independence.

In any case, at the very time that members of the UK Parliament are trying to pass legislation to disapply the Charter of Fundamental Rights in the UK,⁸⁷ there is a dignity, if not an irony, in calling on fundamental rights as an added ground for Scotland’s continuing membership of the EU.

Therefore the argument is that the Commission, and indeed the EU and its member states more generally, should have regard to the values, principles and basis of the EU,

⁸³ *Bijelić v. Montenegro and. Serbia*, no. 11890/05, §§ 67-70, 28 April 2009. 39.

⁸⁴ *Ibid.*

⁸⁵ Case C- 380/05 *Centro Europa 7* [2008] ECR I-349 at para 19.

⁸⁶ Joined Cases C-402 & 415/05P, *Kadi & Al Barakaat Int'l Found. v. Council & Commission* [2008] E.C.R I-6351.

⁸⁷ House of Commons European Scrutiny Committee, ‘The application of the EU Charter of Fundamental Rights in the UK: a state of confusion’ Forty-third Report of Session 2013–14.

indeed to its very reason for existence, instead of making statements that counter and undermine the character of the EU. The case of Scottish independence makes very clear the need for the EU to self-interrogate as to its values, and to use arguments with a public reason character that take it beyond an instrumental economic rationale or a grounding in international law.

7. CONCLUSION

In conclusion, it is argued that the principled and practical route to take, should Scotland choose to become independent in September 2014, is that of Article 48 TEU, that deals with Treaty amendment. Proceeding by way of Article 48, as opposed to using Article 49 TEU, which would require a full Accession Treaty, would avoid the risk that a newly independent Scotland would be cast into the wilderness, its ties with the EU cut on the date of independence. This would be a form of internal enlargement for the EU, and in this way, Scotland's uninterrupted membership of the EU could be preserved. (It would, however, be necessary for negotiations to commence immediately upon a Yes vote in the independence referendum so that messy contingency arrangements with between the EU and a new Scottish state could be avoided). Such a route takes account of both member states' and EU Institutions' obligations under Article 4 TEU, as well as taking seriously the EU's proclaimed statement of values, which include democracy and fundamental rights.

It has already been emphasized that the Scottish referendum arrangements are legitimate in that they respect democracy and the rule of law and are sanctioned by, and proceed within, the structures of UK as well as Scottish Constitutional law. This might not be the case in unilateral declarations of independence by other break off states within the EU. In such cases of unilateral independence, good faith negotiations with EU Institutions and other member states, and use of the Article 48 procedure, is unlikely to be possible. This may go some way to allaying the fears of those such as Weiler of 'irredentist Euro-tribalism'.

In a recent editorial, the CMLRev referred to 'the birth of a distinctive form of legal discourse that departs from the traditional law of integration' and which implies a 'major conceptual shift' by understanding that 'EU law is not addressed to Member States [alone] . . . but also their peoples and communities are involved in the European project. This resonates in a textual change introduced by the Lisbon Treaty: Article 1(3) TEU, focusing on the organization of Member States' relations, is substituted by Article 2 TEU that puts forward a model of "society of societies" heavily interconnected and relying on values.'⁸⁸ It is in this interconnected 'society of societies' and its reliance on values, that should predominate over the notion of an EU as a contract of independent states. Let us hope for an elaboration of this distinctive legal discourse.

In closing, we might remember the words of the late Neil MacCormick, himself an enthusiastic supporter of an independent Scotland within the EU, who wrote of the EU in the following words:

⁸⁸ Editorial comments: 'Union Membership in times of crisis', 51 *Common Market Law Review* (2014) 1–12, at 12.

‘For this is a new form of political order, a new kind of ‘commonwealth’, which offers the hope of transcending the sovereign state rather than simply replicating it in some new super-state . . . It creates new possibilities of imagining, and thus of subsequently realizing, political order on the basis of a pluralistic rather than a monolithic conception of the exercise of political power and legal authority.’⁸⁹

⁸⁹ N MacCormick, *Questioning Sovereignty* (OUP, 1999) at 191.