
Is There a Constitutional Path to Scottish Independence?

BY NEIL MACCORMICK

Is there a constitutional path to Scottish independence, and, if so, what it is. ‘Clearly, yes’, from my point of view since I am a Vice-President of the Scottish National Party, one of the two SNP Members of the European Parliament, and have been for many years involved in SNP constitutional policy-making, was indeed the chief drafter of the SNP’s draft Scottish Constitution of 1977 and of its last major revision in 1991. More important to me is the conviction that no other path than a constitutional one ought to be taken. A rigorous constitutionalism has always characterised the SNP’s approach to its central policy objective of re-establishing Scotland’s position as an independent state, in contemporary terms as a member state of the European Union. So many similar movements have been tempted into paths of violence to achieve their end that one is perhaps entitled to claim it as a very particular virtue of the Scottish national movement always to have discountenanced any apparent shortcuts. Instead, it has stuck doggedly to a democratic and constitutional path, whatever obstacles this involves in the way of electoral disadvantage under the dominance of hostile media. The peaceful and friendly character of Scottish–English relations over two and a half centuries is a legacy greatly to be valued and to be sustained in whatever new constitutional relationships develop between the two countries.

So much for ‘Clearly Yes’—what then of ‘Yes, clearly’. I do not by any means wish to cast doubt on the proposition that law has the ‘interpretive’ character ascribed to it by Ronald Dworkin,¹ nowhere more so than in constitutional law. Thus all legal claims are disputable and defeasible to some extent, and the claim to have found a clear proposition or solution is no doubt always capable of being problematised by some partner in argument. Nevertheless, it does seem to me to be as clear as it can possibly be, on any of the convincing interpretations of constitutional doctrine in Scotland or in England, that the Union constitutionally achieved in 1707 between the Kingdom of England and the Kingdom of Scotland is one that can equally constitutionally be dissolved by appropriate measures, should the political will to do so be exercised. The question is not whether this can be done but how, and what would be the effects of bringing this about in the European context. I shall attempt an answer that draws on three bodies of law:

domestic constitutional law, European Union law and public international law. But the three may in fact be four, if we allow for the possibility that the UK constitution may be susceptible of a different interpretation in the perspective of Scots law from that which prevails under the English common law.

Before I move to discussing legal doctrine, I must explain by what process I believe the question will arise as a live issue, for that has a considerable bearing on the meaning of the question and thus the appropriateness of any answer to it. I take it as axiomatic that the political trigger for raising the issue of Scottish independence as a concrete practical question rather than a speculative one will be an electoral victory by the Scottish National Party, either in the UK general election of 2001 or 2002 or in the second Scottish parliamentary election in May 2003 (or in some later election). Suppose that the SNP achieves a majority of the Scottish seats in Westminster, or is the largest single party, or a majority party, in the Scottish Parliament. The latter hypothesis, under proportional representation, would involve actually or very nearly achieving an overall majority of votes cast. The SNP will have contested these elections on an explicit commitment to hold a referendum, preferably one conducted by the Scottish Executive as authorised by legislation enacted by the Scottish Parliament. The referendum would be as clear as possible a 'yes/no' decision on the principle of independence. For constitutional reasons, such a referendum would, as a formal legal matter, be advisory rather than itself legislatively binding. In this respect, however, it would parallel other referendums previously conducted by UK governments under parliamentary authority. Those eligible to vote would be those who are eligible to vote in Scottish parliamentary elections. Provided the polls give a clear majority verdict one way or the other, the appropriate response to the electorate's advice will be clear. The question of the present discussion is relevant only in the event of a clear 'yes' vote, so I shall assume that.

At one time, I thought, and argued, that a referendum would have to come at a later stage, after a constitutional convention had worked out a constitution, with the referendum posing the question of independence or not as determined by that constitution. As things have turned out, this view seems unduly pedantic, for there is in fact a very broad consensus about key points of a constitution in Scotland. As a result of the Scotland Act, and with the creation of the Scottish Parliament and Executive under its provisions, we have a form of government with the following characteristics: a single chamber parliament, elected by proportional representation; a first minister elected by Parliament and a ministerial team confirmed by election in Parliament; voting rights based on residence not ethnicity; independence of the judiciary, now to be guaranteed by establishing a Commission on Judicial Appointments; restrictions on legislative and governmental power by entrenchment of a charter of rights based on the European Convention. For the moment,

of course, these important principles are enshrined in what is only a devolution settlement. Independence, or 'independence in Europe', would expand the powers exercised by the duly constituted authorities. But it need not involve substantial other change to the constitutional framework in which they are exercised.

The constitution policy of the SNP, settled in 1977 and adapted rather than radically reconceived in the intervening years, has always had just the characteristics enumerated above. In 1977, this was all somewhat controversial. Unicamerality was regarded by some as doubtful; proportional representation was regarded with suspicion by the two larger parties of state; election of ministers rather than their appointment by the Queen as Head of State was not favoured; the idea of a commission on judicial appointments was considered insulting in view of the historic powers of Lord Advocate and Prime Minister in advising the monarch. Entrenched Bills of Rights were considered anti-democratic by many, because of the discretion they remove from elected politicians and confer on judges. Now, however, there is evident consensus that a Scottish constitution should have these characteristics and other related ones. The remaining question is whether the constitution should remain a devolved one or become an independence constitution. That question could fairly be put to the electorate in a referendum as a clear issue of principle as soon as reasonably possible after the 'triggering' election, and this would avoid a long period of damaging uncertainty and drift. If a 'yes' vote were achieved, negotiations should commence between Scottish ministers and UK counterparts to achieve the constitutional transition from devolution in a union state to independence in the context of European Union.

I find it interesting, at risk of a slight digression, to reflect a little on the issue of incorporating a Charter of Rights by domesticating the European Convention. Times have indeed changed and attitudes with them. The Westminster Parliament of 1974–79, following on the surge of SNP and Plaid Cymru support in the two general elections of 1974, was overshadowed by the attempt first to draft and then to carry legislation that would establish devolved assemblies in Scotland and in Wales. This gave rise to a concern about respect for human rights, and the House of Lords established a select committee to look into the question of a binding Bill of Rights. The SNP gave evidence supporting the thesis that there ought to be provision for the domestic justiciability and enforceability of a charter of rights that would effectively transpose the European Convention into domestic law, with strengthened provisions on such matters as pre-trial detention, where the old Scottish 'one hundred and ten day rule' should be written into the provisions about fair trials. The committee did finally report favourably to the idea of a domestication of the European Convention, but when the devolution issue was dropped after the 1979 election, the proposal for a Bill of Rights was also let lapse. (It will be recalled that

the Scotland Act 1978 was endorsed by a narrow majority in the referendum of 1 March 1979, while the Wales Act was rejected by a four to one majority. The infamous and unprecedented 'forty percent rule' was invoked to justify repeal of the Scotland Act by the Thatcher government. The campaign for a Scottish Parliament then became one rallying point for opposition to Thatcherism in Scotland, steadily growing in strength over the eighteen years of Conservative rule that ended in a total wipe-out of the Conservative Party in Scotland in the election of 1997.)

A person of considerable authority once remarked to me that the prospect of a devolved Scottish assembly or parliament was the only thing that would prompt the UK Parliament to enact a Bill of Rights, hence it was no coincidence that a loss of momentum for a Bill of Rights accompanied the repeal of the Scotland Act 1978. It was as though senior Westminster politicians felt uneasy about trusting Scottish parliamentarians operating in Edinburgh to show adequate respect for human rights. Something of that spirit may have animated the decision to incorporate the 'Convention rights' into the Scotland Act 1998, so that the Scottish Parliament would never sit with any power to override the Convention of Human Rights. The Human Rights Act 1998 was timed to come into effect for the whole UK and with reference to Westminster legislation more than a year later than the 1 July 1999 implementation of the Scotland Act.

However that may be, there is a certain irony in the way that the Convention rights now in force in Scots law have cut into the devolved powers. The defects that have been shown up are not in any new laws devised by the Scottish Parliament but in old practices and laws bequeathed by Westminster. A conviction by a temporary sheriff has been quashed on the grounds that the office of temporary sheriff is such as to make its holder too dependent on the favour of the Lord Advocate, the ministerial head of the prosecution service. The career prospects of a temporary sheriff hoping for a permanent appointment are dependent on the good opinion of the chief prosecutor (a role expressly reserved to the Lord Advocate by the 1998 Act). Therefore the arrangements have been found incompatible with the Convention guarantee of the right to a fair trial before an independent and impartial tribunal. On another noteworthy occasion, the right of the police to demand of a car-owner an answer to the question about the identity of the driver was held to contravene the right to freedom from self-incrimination. The relevant context was of a case of suspected drunk driving, where a woman's car was seen to be in the supermarket car park, and she was smelling of drink and had initially been reported on suspicion of shoplifting. At the police station, she was asked to name the driver of the vehicle, in circumstances in which a refusal to answer would attract a criminal penalty, but the answer that she was herself the driver would result in prosecution for driving with a blood alcohol level higher than

the statutory limit. The Lord Justice-General of Scotland held this to be a breach of the right against self-incrimination.

So the result so far of incorporating human rights into the Scotland Act has not been to show up errors concerning human rights or a cavalier attitude towards them on the part of Scottish legislators. It has been to show up the deficiencies of a whole series of practices built up over many years under the shelter of Westminster parliamentary sovereignty. Westminster parliamentarians may have to reflect on the beam in their own eye that shows up the quality of their concern for the mote in their brother's eye. The occasion of their so reflecting will not be long delayed, as the Human Rights Act comes into force in the autumn of 2000. It may turn out that long-standing practices will be found incompatible with human rights, and prior legislation authorising the practices must be held to have been impliedly repealed by the Human Rights Act. (Subsequent legislation that turns out to be incapable of any reasonable interpretation that squares it with human rights will be subject to a judicial 'declaration of incompatibility' and referred back to the Home Secretary for possible fast-track repeal under the procedure laid down in the Act.)

None of this casts any doubt on the desirability of including in the Constitution a proper Charter of Rights including proper guarantees of judicial independence. But it does need to be made clear that what is in issue is not some malign visitation from 'Europe' or some silly abstract European law overruling Scottish (or British) common sense. The fact is that transposing rights of the same tenor as those in the European Convention into our own constitutional law, whether in the context of devolution or in that of independence, turns the issue into one of our own law. Previously, only a European tribunal had jurisdiction to interpret rights in relation to the law of Scotland or any other part of the United Kingdom. Now it is a task for our own courts, implementing laws made by our lawmakers, to see to it that our legal provisions and practices match up to standards that we have, for fifty years as signatories of the European Convention, asserted to be basic requirements of a well-ordered state under the rule of law.

Taking that context for granted, I return to the mainstream of my argument. The idea proposed is to hold a referendum asking the question 'Should Scotland become Independent?'. The idea of independence is clear in the context of devolution, for the proposed independence constitution gives the same institutions full powers rather than restricted ones, save for the limitations implicit in a written constitution with an entrenched Charter of Rights. Absolutely critical, then, is the question whether a referendum could constitutionally be called by a Scottish Executive under the present devolved powers. Ah, says the objector, the Constitution is a reserved matter under the Scotland Act, so how could a Parliament which has no power over the Constitution pose a question about the Constitution and put it to the people? There is an answer to

that, as compelling as it is simple. The Scottish Executive has unlimited powers to negotiate with the Westminster government about any issues which could be the subject of discussion between them, therefore it could seek an advisory referendum. Formally, the question might take some such form as 'Do you advise and consent to the Executive opening conversations with the United Kingdom government to agree terms for Scottish independence on the basis of the constitution envisaged, or on such other basis as the people, by then, choose to put in place?'. That would be a referendum that would be appropriately advisory in form. Politically, however, it would be binding in effect, especially if a very clear majority came out either way.

Most people would accept that a referendum, even though one that is advisory in legal effect, can carry compelling authority in political terms. Surely this was the case with the referendum on the Common Market in 1975, the referendum on the Scottish Parliament in 1979, or even that on the Welsh Parliament in 1997 with its knife-edge majority. Whether the referendum I am envisaging would wholly lack formal legal authority depends on another issue to which I will return later, but even on that view, there would be no reason to deny it the same kind of political authority as the Common Market referendum of 1975 or the devolution referendum of 1979 (or indeed the devolution referendum of 1999, 'won by a decisive minority'). A very narrow majority is, admittedly, much less compelling than a substantial one.

Suppose, therefore, that an advisory referendum is conducted and gives a clear result. That would be a signal for negotiations to commence. Over a period of time, representatives of the Scottish government and of the United Kingdom government, the latter representing the other parts of the present United Kingdom, would work to reach decisions about ways in which the common assets would be divided. They would also work out transitional provisions for a phased hand-over of powers. In the meantime, the Scottish Executive would set about establishing, partly by transfer of resources and personnel, ministries in those areas which are not currently devolved and do not have devolved analogues in Scotland. There is a question how long that sort of process would take. When this was examined in a reasonably dispassionate way by a committee a few years ago, the answer suggested was that a fairly short time would be required to settle the principles of division and to make provision for the vesting of full powers in Scottish institutions of state. There would inevitably be a continuing transitional phase after the attainment of effective mutual independence, but that in itself would not have to be unduly protracted. My own estimate would be for a two-year transitional period. The Czechs and the Slovaks managed their 'velvet divorce' in a remarkably short time, but with continuing negotiations and adjustments afterwards.

Now we come to the question, is there a constitutional path to independence? How do these steps envisaged match with the constitu-

tion or the relevant constitutions? Can the United Kingdom decide to dissolve itself? Can Scotland lawfully secede from the United Kingdom? What would be the effect in the context of the European Union if the United Kingdom could dissolve itself or if Scotland were to secede, two different ways of characterising Scotland achieving independence. Is there a legal path in terms of the several relevant bodies of law? There are issues about the United Kingdom constitution, it raises an issue about the European Union's constitution, and international law.

The United Kingdom constitution is an unusual one, in the sense that it has over 290 years enshrined the existence of two overlapping but distinct systems of law, partly common law, partly statute law. There is what is known as 'English law', which is of course binding in England and Wales, and there is Scots law. (There is also Northern Ireland law, a remnant of the old law of Ireland as a part of the United Kingdom of 1801–1922, also containing norms surviving from the legislation of the Stormont Parliament and special laws passed by delegated powers during the past quarter century of direct rule, but that is a complication that need not concern us here.)

There is no doubt that we have a single state, but it is at least possible that we have two interpretations, two conceptions, two understandings, of the constitution of that state. This is because the state as a law-state, a 'Rechtsstaat', is recognised within two at least partly distinct systems of law. There is no doubt whatever that the English common law conception of the constitution is that it is founded upon the sovereignty of Parliament. That sovereignty (strictly, of the Monarch in Parliament) is interpreted as a continuing sovereignty which was undeniably in existence not later than 1688 and which continued through the events of 1706–7 to the present time. That perspective shapes one understanding of the Union with Scotland which was achieved by negotiation rather than conquest in 1707. The constitutional path involved the establishment of Commissioners representing each Parliament, the negotiation and agreement by these Commissioners of Articles of Union, and then the approval of those Articles first by legislation of the Scottish Parliament and then by legislation of the English Parliament. The Scottish Parliament annexed 'An Act for securing the Protestant Religion and Presbyterian Government in Scotland' to the Treaty and stipulated that this was to be 'held and observed in all time coming as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms'; the English legislation had to acknowledge this, while reciprocating with legislation securing in England the English form of church governance. Nevertheless the English enabling legislation has always been referred to simply as the Act of Union, rather than reference to the Acts of Union, far less the Articles of Union or the Treaty of Union.

It is easy to see why. If you take the standpoint of, as it were, the majority shareholder, the majority enterprise, the manager even of a

friendly take-over bid, the one decisive act-in-law that caused the union to take place with full legal effect was the legislation enacted to that end by the English Parliament. This legislation of course refers both to the Treaty and to the Act for Securing the Protestant Religion and Presbyterian Government. But from the standpoint of the English Common Law, these become of legal relevance for one reason only; the Act of Union passed by the Parliament of England. By that Act it transformed itself into the Parliament of Great Britain, in which seats might lawfully be taken by the 45 Scottish representatives in the House of Commons and the 16 representative peers of Scotland in the Lords. This also made lawful the creation of a single Crown of Great Britain and its settlement on the Electress Sophia of Hanover 'and the heirs of her body being Protestants', thereby confirming for the new monarchy of the United Kingdom of Great Britain the settlement that had been made in respect of the Crown of England by the Act of Settlement of 1701.²

In one perspective, therefore, that of English law, you have a continuing legal system which subsumed another one within it, but not unconditionally. There was an express condition that Scots law, especially in matters of private right, was to continue, and that no courts sitting in Westminster Hall were to have any power of hearing appeals from the Scottish Court of Session or the High Court of Justiciary. And the law governing the Church of Scotland was not to be altered in its fundamentals. To a considerable extent, though far from perfectly or completely, the UK Parliament has observed these conditions: Scots law, the Scottish Courts, and the Church of Scotland are still there to prove the point. All sorts of reasons can be given for this respect for the foundational conditions of the union, but logically they could not include the concept of a binding legal requirement to respect them. For in this perspective there could not be any legal requirement of a binding character affecting the powers of a Parliament which, according to the central constitutional doctrine, enjoys the attribute of absolute sovereignty. Again, in the historical perspective, one should insist that sovereignty really vests in the Monarch in Parliament, for in the eighteenth century the monarchy still exercised a substantially greater personal input into the process of law-making and executive government than do its twentieth century successors.

So much for the perspective of English law. If we turn to that of Scots law, the waters are, if not muddy, at least somewhat less clear.³ The best evidence for the claim that there is, or might be, a distinct conception of the British state in the eyes of Scots law is the opinion of Lord President Cooper in the case of *MacCormick v Lord Advocate*.⁴ He argued that the Treaty of Union constituted fundamental law for the United Kingdom, hence such of its provisions as imposed what were expressed to be unalterable conditions of the Union did have effect in law to impose limits on what the Parliament can properly do. Hence, if

the Parliament were to legislate through the Royal Style and Titles Act to enable Queen Elizabeth to assume a title which presumed a continuity of the English Crown with the British, this would be unlawful, and legislation prescribing such a title should be declared null and of no effect.

As is well known, the case failed on the specific point in issue concerning the Queen's title, which was held to be a matter for the monarch's own choice under the royal prerogative. But on the underlying constitutional question, Lord Cooper delivered some highly significant judicial dicta about the principle of the absolute sovereignty of Parliament. That doctrine, he said, was an exclusively English doctrine, which had no counterpart in Scots law. There was, in his view, no reason why the Parliament of Great Britain should simply be assumed to have inherited the characteristics of the previous English Parliament and none of the Scottish. It was thus possible, from the standpoint of the Court of Session, to acknowledge that the Treaty of Union did constitute a body of fundamental law, albeit somewhat skeletal. It did not, however, follow that a Scottish court would have jurisdiction to enforce the terms of such a treaty, though special consideration could be reserved for the provisions concerning the courts themselves and the law administered in them.

It has to be said that neither in *MacCormick*, nor in any subsequent case, nor indeed in the highly material nineteenth-century decisions concerning the status of the Church and the Presbyterian form of government, has any challenge to an Act of the UK Parliament on the argument that it infringes fundamental law looked at all likely to succeed before a Scottish court. Nevertheless, the fact is that Scottish courts acknowledge it to be a distinct question of Scots law to determine the effect of the Articles of Union and the Acts (the plural is deliberate here) of Union. Thus there is a possibility of an interpretation of the character of the British constitution in the perspective of Scots law that need not in all particulars be identical to the interpretation grounded in English common law.

The Scots view draws on a constitutional tradition that goes back before the Union, ultimately to the Declaration of Arbroath of 1320 which set out the fundamental claim to the independence of the Scottish Kingdom and the conditional position of Scottish kings, whose right was dependent on their actively defending their own liberties and their subjects. These were kings by active consent of their subjects, not kings by conquest. A nearer root, and in some ways a clearer one, is in the constitutional writings of George Buchanan and others in the late sixteenth century, followed by Locke and others in the seventeenth. (In England, by contrast with the USA, Locke's ideas never really caught on, and especially not after British thinkers abandoned any affection for doctrines of revolution—no more 1688 and all that—in the wake of the American and French Revolutions.) The picture is one in which

sovereignty belongs to the people who entrust sovereign powers to rulers therefore limited by the express or implied terms on which the powers are entrusted to them. Armed with such a fundamental doctrine, it is easy to see that the Articles of Union or other like instruments could be considered to be fundamental terms that are binding on the Parliament which is created by them and conditionally entrusted with sovereign powers.

This doctrine of popular sovereignty as prior to the constitutional powers of agencies of state, and capable of setting limits thereon, is an integral part of the SNP constitutional thinking. The first Article in the draft constitution declares that the Scottish people enjoy sovereignty over the territory of Scotland, shall exercise it in accordance with the constitution they adopt. The idea of popular sovereignty is by no means exclusive to the SNP among contemporary Scottish politicians. The Claim of Right of March 1989, subscribed by all members of the Scottish Constitutional Convention, asserted as a fundamental principle the sovereign right of the Scottish people to choose a frame of government suited to their own circumstances. All the Labour MPs (save one) and all the Liberal MPs representing Scottish constituencies signed up to that, among them the present Chancellor of the Exchequer (Gordon Brown) and the present Foreign Secretary (Robin Cook), as well as the Presiding Officer of the Scottish Parliament, Sir David Steel, and the first First Minister of Scotland, Donald Dewar. To say that the people have this sovereign right is not, of course, incompatible with advocating that they exercise it through the institutions of devolution rather than those of a full independent state. Be that as it may, one can argue that there are two possible interpretations of the UK constitution. Even if the point is not an open-and-shut one but subject to rival interpretations and argument, it must be taken into account in order to be sure of covering all the possibilities.

Other perspectives that must be considered are those of the European Union and international law. Would a process of independence of the kind described above be constitutional in their light? I said at the beginning, my answer is 'clearly yes and yes clearly'. Of course, we are dealing here with deep and abstract questions of constitutional law focusing on very particular and concrete questions. In the light of much legal scholarship of present and recent past, even some from farther past, it has to be acknowledged that there are not in one sense of the term 'clear', answers either way. There is no single authoritative text from which one can derive an answer. One must infer answers grounded in principles and in authoritative legal texts and the principles that you argue underlie them. When I argue that there is a clear answer, therefore, it is because I think that the decisive weight of the principles tells in favour of the answer I am going to give. Others will put counter-arguments. That is not a special feature of the Scottish situation, or Scottish or English constitutional law, but a feature of law, in particular

feature of law at its more abstract level. Law at the level of railway station by-laws can be pretty exact; law at the level of constitutions, because it governs many acts over many times, is less exact, although not necessarily less clear.

Supposing, then, that we get to the point where there has been a referendum and governments have negotiated in the way sketched above, could the United Kingdom Parliament lawfully cease to exist as a Parliament with authority over Scotland? It seems that the answer would be a convincing affirmative answer if you take the English reading of the constitution. The Parliament that sits at Westminster pre-existed the Union, and if the Union ceases, will continue to exist despite its ceasing. From the point of view of the common law of England and Wales (or of the common law of England in relation also to Wales if a similar settlement emerged there), future legislation by the Westminster Parliament will, by its own decision, cease to apply in relation to Scotland (or Wales). All that is required to this end is an Act to repeal the Act of Union with Scotland, since by our hypothesis the negotiators have reached a negotiated settlement with which the Parliament is content. This is an answer one can give with complete confidence, because an essentially similar thing has happened so often before: in Australia, in Canada, in New Zealand and, most of all, in Ireland.

There is, as jurisprudential scholars know, a technical question in relation to the 'dominions' mentioned: Could Parliament not unilaterally repeal the statute of Westminster and other legislation that granted independence to such former colonies? If Parliament is absolutely sovereign according to the English common law, surely it is a necessary consequence of its sovereignty that it could repeal any grant of independence and reassert its continuing sovereign authority over Canada, New Zealand, South Africa, Zimbabwe, Zambia or Malawi. The answer is: If Parliament is omnipotent, as a matter of law, then it can do so. All that this amounts to is that the English courts might have to behave as though the Canadians (or others) still observed English law as their ultimate, sovereign governing law, but it is in the highest degree unlikely that they would so observe it. Indeed, they would protest the point most indignantly and grave political damage might ensue.

In short, there is an abstract legal answer a grant of independence cannot be irrevocable from the point of view of the legal doctrine of the sovereignty of Parliament, but it could be effective so long as it was not repealed. And being effective in that sort of *pro tempore* way is in fact conclusive of the issue. For all that is needed is such an interval of time (quite a short one in this case) as is required for a new constitutional order to be brought definitively into existence and to become the focal point of legitimacy in the new, or restored, state. And from the point of view of the citizens of that new or re-established state, the view of the matter that would be appropriate would be in terms of their constitution in the light of its underlying legal doctrines and traditions. In that

view, there would be no question of ascribing constitutional validity to a future unilateral act of the English (or England/Wales/Northern Ireland) Parliament that purported unilaterally to repeal its own prior repeal of the Act of Union, thereby reconstituting a United Kingdom that includes Scotland as one of its component territories. It is very obvious why such purported unilateral revocations of independence, even if theoretically possible, never happen.

If the point is thus unproblematic judged from the viewpoint of English law, what about the Scottish view? If it is the case that Scots law does or might give authority for the view that the Articles of Union are fundamental law for the United Kingdom, and are expressed to be perpetual in duration, how then can they be legally repealed? This involves a point about United Kingdom constitutional law as that is interpreted in the perspective of Scots law. Second, there is arguably a point of international law. For the question turns on the Articles of Union being the text of a treaty between two distinct international entities. (Strictly, it might be argued that the Treaty as a treaty was one agreed between Anne Queen of England and Anne Queen of Scots.) Someone might therefore argue, given that the Articles of Union stipulate that the Union is endure in all time coming, given the absence of any provision in them for their own revocation or dissolution, given the absence of any continuing distinct offices of state under whose care which a fair revocation could be brought about, this is simply a case of an irrevocable and indissoluble union — and that is an end of the matter. If it really was an international treaty in the first place, it so effectively extinguished the original nations and built them into a new one that there is no intelligible possibility of dissolving it. There can here be no appeal to such ideas as that of the ‘*clausula rebus sic stantibus*’. For the way things stand now is unimaginably different from the context of those who negotiated the 1707 union, and such doctrines simply cannot get a grip.

In the end, I do not think these difficulties add up to much. The argument about the Articles of Union as fundamental law was shown to depend upon, or to include, the thesis about popular sovereignty as legally presupposed in any claim to constitutional authority. That is a contestable thesis in itself, and contestable as an interpretation of Scottish constitutional thought. Only if it is accepted, however, does the argument for the ‘fundamental law’ view get off the ground as a seriously sustainable proposition. On the other hand, if we accept it and then assume that a Scottish constitution based on the principle of popular sovereignty is to be brought back into existence, it is absurd to set up an obstacle to that presumed sovereignty. Provided the repeal of the Articles of Union were carried out on the basis of a referendum enabling the clear present will of the people to be expressed, there would be no reason at all to deny that they are repealable. The point is perfectly straightforward.

Again, if you tackle the question from an international law point of view, one has to take that in terms of international law as it stands now. The principle of the right of peoples to self-determination is acknowledged as a fundamental human right by the United Nations Covenant on Civil and Political Rights and elsewhere. Again, therefore, if the peoples of the United Kingdom agreed by currently valid constitutional processes (especially according to the dominant view of the constitution, that from the standpoint of English law) to dissolve their union, there could be no objection to this. It is arguably a different matter to determine whether in a non-colonial situation the self-determination principle applies so as to impose an enforceable obligation on the state as presently configured to accede to the independence of one of its component elements. But the assumption here has been of agreement on that, once the will of the Scottish people had become clear and assuming it was clearly in favour of independence.

So, both from the point of view of Scots law and from the point of view of English Law, the existence of a constitutional path to independence is clear. In fact, it is even clearer from the point of view of English law. Since it is something of a contested question whether any validity can attach to a separate interpretation of the constitution from the standpoint of Scots law, those who doubt my thesis on that point will be wholly untroubled by the possibility that such a separate interpretation governs in this case. They will give no thought to the fact that it makes it superficially harder to sustain the thesis that the Articles of Union are, in law, validly repealable by legislation which would transfer the authority of the present unitary-but-devolved state to mutually independent successors. Anyway, this is only a superficial point, and one that does not survive reflection on the impact of the fundamental principle of the 'Scots law' interpretation, namely a version of the doctrine of popular sovereignty.

Next to be addressed is the issue of independence within the European Union. Recently, addressing the European Parliament in the context of contemporary concern about extreme right participation in government in Austria, President Prodi stated in plain terms that there is no provision in the Treaty on European Union (or in the Community Treaty, for that matter) for the departure or expulsion of a state. All that is provided for is a suspension of rights of membership in case of proven violation of human rights or other fundamental value of the EU, using the criteria and processes stipulated in Articles 6 and 7. This is simply the most recent statement of a fundamental truth of EU constitutional law. There is no provision for unilateral secession from the treaty, nor any for compulsory expulsion. If any state were to seek to leave the Union, this could be achieved lawfully only after a process of negotiation and by the unanimous will of all the other parties to the Treaties. Also instructive is the process whereby Greenland ceased to be a territory within the Union, though remaining a part of the Kingdom

of Denmark, which continued in membership in respect of its principal European territories. This took an arduous process of negotiation and a special treaty.

It is controversial what exactly the Greenland precedent establishes. At a minimum, though, one could say that supposing Scotland in its present condition as a devolved part of the United Kingdom sought to leave the European Union, the negotiation would be no less arduous than that involved in the case of Greenland. The United Kingdom could by no means unilaterally declare Scotland to be a territory outside of the jurisdiction of the European Union, and could not do this even with one hundred percent support for the proposal in Scotland. This is a clear proposition of European law. There is no reason to doubt that it applies in the case of independence. The United Kingdom could not unilaterally legislate for Scottish (or English, or Welsh) independence in such terms as unilaterally to remove the relevant territory from EU jurisdiction. Again, if the upshot were to be one that resulted in a departure from the EU and perhaps accession to the European Economic Area like Norway or Iceland, this would have to be negotiated in detail. As a generalisation, it seems possible to say this: 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.

In the last few years, conditions for achieving membership have become equally clear, and indeed are laid down in the so-called 'Copenhagen criteria' for aspiring members: It is necessary for a state to have demonstrated a commitment to democratic self-government under the rule of law and with due respect for human rights and the rights of minorities. It is further necessary for a state to have shown itself capable of accommodating the 'acquis communautaire' in its law. Finally, it must have established a successfully functioning market economy. Ten or so new member states are expected to sail into membership under the 'regatta' principle enunciated by the European Council in Helsinki in December 1999. Negotiations will concern any derogations from normal conditions of membership, and will involve scrutiny of the fulfilment of the Copenhagen criteria.

Against this background, how does European law apply to the possibility of a consensual and democratically determined dissolution of the British union? It seems safe to make two points, one positive and one negative. The positive one is that the Copenhagen criteria are fully satisfied in respect of all parts of the United Kingdom, and both central and devolved governments have shown a capacity to maintain the conditions they stipulate. A transition to independence by, say, Scotland would not involve a sudden abandonment of the 'acquis', or an attack

on those very rights that will be written into the Scottish constitution and are already binding under devolution. Nor will it lead to the collapse of the market economy. The negative point is that there is no power by any unilateral act to exclude the jurisdiction of the EU from any part of it. Citizens of the EU would not cease to be citizens of it. Recognition of their democratic and other rights settled in the fundamental principles and values of the Treaties would mandate a Treaty revision to allow for membership of the institutions on appropriate terms such as are enjoyed by existing member states or are on offer to candidate countries. The institutional revisions that will be undertaken late in 2000 to open the way for enlargement will have the effect of making more straightforward a process which has hitherto had no precedent in the EU.

These arguments relating to the law of the European Union are unaffected either way by the issue, which has been considerably debated, of the correct way to analyse a process of Scottish independence. Some see this as a case of secession of a smaller part from a larger whole. Others, myself included, argue for a different view, namely that the case is one of a consensual dissolution of a union that was initially established by agreement also. The United Kingdom is a union state, not a unitary state, and the countries which came together to form the union can recover their former independence if they agree to dissolve it.

On the view argued above about European law, the rights and obligations of continuing membership in the European Union would apply to the independent parts of the former UK whether the 'dissolution of union' view or the 'secession of smaller state' view prevailed, though with a difference. The dissolution concept implies that each of the resultant states stands in equal need of a Treaty revision to determine its participation in the institutions, with numbers of MEPs, relative weight of Council votes and so on. The secession concept implies that the larger part of the former union, England with or without Wales and/or Northern Ireland, would have continuous membership in the institutions while the smaller would have to have such membership conferred by Treaty amendment (such amendment also being required to scale down the numbers and weighting of the larger part proportionally to diminution in population). The argument seems well founded on the principles of European law, and this takes some of the point out of the 'secession versus dissolution' debate.

There remains a final point about the relevance of international law to the present subject. European constitutional law retains a hybrid character to the extent that revision of the 'constitutional charter' can only proceed by Intergovernmental Conference resulting in Treaty amendments. What is from one point of view—that of the European Court of Justice—internal constitutional law can also be seen from the outside as having also the character of treaty law under public international law. So far as this holds good, the law concerning state

succession governs the question of the European Union rights and obligations of successor states to the United Kingdom. The relevant body of law is in some degree uncertain at present, as the 1978 Vienna Convention on Succession of States in Respect of Treaties has not yet been ratified by the required minimum of fifteen states for it to come into force. But it is arguable that the terms of the Convention can already be relied on as declaring what is current customary law among states. So far as that is the case, all successors would be bound by all obligations and entitled to enjoy relevant rights under the European treaties, and indeed any others. Moreover, it does not appear that the answer would differ greatly as between the secession view and the dissolution view.

As always, the questions we face have to be judged on weight of arguments, not by open-and-shut deductions from simple and univocal texts of undisputed authority and indubitable plainness of meaning. But I have tried to show how I see the arguments and evaluate their weight. To the question 'Is there a Constitutional Path to Independence?' I said 'Clearly yes, and yes clearly'. The answer depends on arguments concerning four bodies of law that all interact with each other in ways that fall well short of complete identity. I hope, however, that I have succeeded in showing exactly why that is my answer and that you will think on balance correct.

1 R. Dworkin, *Law's Empire*, Harvard UP, 1986, passim.

2 These are points on which it is material to dwell while there is public discussion whether or not to repeal 'The Act of Settlement'. Strictly speaking, the 1701 Act of Settlement regulates the succession to a non-existent object, namely the Crown of England, which ceased to exist in 1707. And it is the legislation that put into effect the Articles of Union that now regulates the succession to the Crown of Great Britain, or as it has become by later similar processes, the United Kingdom of Great Britain and Ireland, Great Britain and Ireland, now finally the United Kingdom of Great Britain and Northern Ireland.

3 For a more extended account of these matters, see MacCormick, 'The English Constitution, the British State, and the Scottish Anomaly', *Proceedings of the British Academy*, 1998/101; also MacCormick *Questioning Sovereignty*, Clarendon Press, 1999, ch. 4.

4 1953 S.C. 396. To avoid confusion, the leading petitioner in the case was my late father, John M. MacCormick.