

ESIL Reflections

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Scotland Decides – An International Law Perspective

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Scottish residents headed to the polls on 18 September 2014 to decide whether Scotland should sever its ties with the United Kingdom and become an independent country. The ‘no’ vote obtained a robust 55% majority while the ‘yes’ campaign still managed to attract over 1,600,000 votes from those who exercised their right to cast a ballot.

The Union with England dating back to 1707 remains thus intact, as indeed does the place of Scotland within the United Kingdom. A new referendum on independence is not on the cards for the foreseeable future. And yet, the ‘no’ vote was hardly a vote for the *status quo*. The Westminster political leadership’s last minute pledge to grant more powers to Scotland in the wake of the devolution process that started in the 1990s has already triggered what in the eyes of many observers is bound to be a complex and protracted constitutional debate. The expected outcome is the reworking of the relationship between London and Edinburgh and, ultimately, between Scotland and the rest of the UK. The jury, I suspect, will be out for some time to come.

Leaving these internal complexities aside, one might raise the question of how international law relates to the Scottish case, specifically in the context of the right of ‘peoples’ to self-determination. What does international law have to say about secession, or the identity of the claimant, or autonomy within the state? And, conversely, what could the aftermath of the Scottish vote contribute to the self-determination debate itself? This Reflection will briefly explore three international legal dimensions that directly or indirectly interface with the main themes of the Scottish debate: independence, autonomy, and democratic participation.

I. A Right to Unilateral Secession for the People of Scotland?

One can safely argue that the case for Scottish independence does not change the terms of the debate regarding unilateral secession. If anything, the case reaffirms the

limitations of secessionist claims from an international legal perspective. While the ‘yes’ campaign (and partly the media) occasionally appealed to the notion of ‘self-determination’ for Scotland, unsurprisingly no one ever invoked a right to secede from the UK unilaterally under constitutional or international law. Indeed, leading practice advised against this. As is well known, in the *Reference* case¹ the Canadian Supreme Court, faced with the question of whether Quebec had the right to unilateral secession from Canada as part of Quebec’s ‘right to self-determination’ in international law, had restated the legal mantra against the existence of such unilateral entitlement. The Court conceded the *possibility* of ‘remedial’ secession under circumstances (denial of access to government) that clearly did not apply to Quebec, regardless of the precise international legal status of that particular option. There is no doubt that the same line of reasoning applies to Scotland as well. In short, international law practice – old and new – could not have come to the rescue of the ‘yes’ campaign to frame a positive legal claim to independence.

In reality, that was not the real objective of the independence movement. The process initiated by London and Edinburgh by setting a date for the referendum was meant to foster constitutional conversations between the centre and the periphery, rather than endorse any genuinely unilateral moves. This approach echoes the Canadian Supreme Court’s central concern in the *Reference* case that the relevant parties engage in meaningful and good faith negotiations in order to secure a legitimate process of self-determination which affects the state as a whole. And crucially, those negotiations in the Court’s argument did not require the recognition of Quebec as a ‘people’ for self-determination purposes to the extent that a clear majority within the *Province* of Quebec had expressed the intention to pursue a separatist path.

Arguably, the split within the ‘people of Scotland’ between the ‘yes’ and ‘no’ vote can only confirm the fuzziness of the concept and its multiple variants within established states. Conceptually it mirrors the split within ‘the people of Quebec’ between the French-speaking separatists and other sectors of Quebec that have consistently opposed independence, including English speakers and indigenous groups. Here, again, international law practice, particularly international jurisprudence, could have not provided the pro-independence Scots with an unqualified positive answer to the question of ‘peoplehood’ for distinctive sub-national units within the state as opposed to a general ‘pluralist’ conception of the state population.² Rather both the Quebec and Scottish cases (and by analogy, comparable cases too) seem to suggest the *international legal* elusiveness of that vocabulary to support self-determination claims beyond the context of colonization as long as the viability of self-determination itself (possibly including the option of independence) largely hinges on the *domestic* working out of the relationship between the central government, the sub-national unit and other

¹ *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217.

² It is quite telling that the Arbitration Commission on Yugoslavia, the Canadian Supreme Court and the International Court of Justice have all shied away from these matters: European Community Arbitration Commission, *Opinion No. 2* (1992) 31 ILM 1497; *Reference Re Secession of Quebec*, n. 1; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, paras 51, 56, 82.

affected parties, no matter how that unit has styled itself (people, nation, region, province, national minority, or otherwise).³

II. Scotland as a Case of Internal Self-determination in Human Rights Law

While the failed push for Scottish independence does not detract from the lack of an international legal basis for unilateral secession (leaving the matter to internally-negotiated solutions), for its part the 'no' vote, when seen through the prism of international human rights law, does confirm 'autonomy' as a viable, albeit not exclusive, form of internal self-determination within diverse societies.

This has been openly acknowledged in a variety of global and regional human rights settings. In *Katangese Peoples' Congress*,⁴ for example, involving a claim to independence by Katanga under Article 20 of the African Charter on Human and Peoples' Rights, the African Commission emphatically noted that self-determination could be exercised in ways that included self-government, local government or federalism, among others, as long as that was in tune with the wishes of the people. Tellingly, the Commission declined to dwell on the Katangese as consisting of one or more ethnic groups.⁵

Similarly, international human rights standards on 'minorities' and 'indigenous peoples', while deliberately foreclosing rights to secession, either justify various models of autonomy as legitimate methods of securing group participation and representation within the wider polity or explicitly endorse self-government as the central dimension of internal self-determination for the relevant group.⁶ In both cases autonomy regimes are presumed to be compatible with the principle of equality. And international jurisprudence too broadly echoes this pattern: international courts have generally assumed the legitimacy of minority autonomy regimes subject to certain individual rights guarantees (from the minority regime in Italy's Trentino to Northern Ireland's power-sharing arrangements), or even required appropriate forms of indigenous self-government as a way of effecting rights to land and resources.⁷

³ It is worth noting that the UK is a party to the Council of Europe's Framework Convention for the Protection of National Minorities and, within this framework, it recognises the Scots as a 'national minority'. For a broader argument about self-determination, including indigenous groups, see Gaetano Pentassuglia, 'Ethnocultural Diversity and Human Rights: Legal Categories, Claims, and the Hybridity of Group Protection' (2014) 6 Yearbook of Polar Law 192, 208-216 (forthcoming).

⁴ *Katangese Peoples' Congress v Zaire* African Comm Hum and Peoples' Rights, Comm No 75/92 (1995).

⁵ For a thoughtful review of regional human rights practice, see e.g., Dinah Shelton, 'Self-determination in Regional Human Rights Law: From Kosovo to Cameroon' (2011) 105 American Journal of International Law 60.

⁶ See e.g. Conference on Security and Co-operation in Europe (CSCE), 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' (1990), para 35; UNGA 'United Nations Declaration on the Rights of Indigenous Peoples' (13 September 2007) UN Doc A/RES/61/295, particularly arts 3,4,5,18,19.

⁷ For examples and discussion, see Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff 2009) 125-133; Pentassuglia, 'The

Thus, in a sense Scottish autonomy is one of many ways in which self-determination can be articulated within the state. However, what problematizes autonomist stances (especially when linked to claims to ever-greater territorially-based powers) is their relational dimension, that is, their impact on the rights of others, be they individuals or groups, within specific contexts.⁸ From this point of view, international human rights law provides the London-Edinburgh parties with a major framework for not only enabling self-government within the state but also calibrating properly its scope on a case-by-case basis.

III. The Scottish Debate as Best Practice in Political Participation

If that is the case, then the Scottish referendum and the subsequent proposals for Scotland's enhanced autonomy in the context of an emerging federal structure within the United Kingdom are bound to enrich the body of material practice that has contributed to distilling power-sharing models over a considerable period of time, particularly in Western Europe. In this respect, the impact of the Scottish scenario on the reach of (internal) self-determination is expected to be twofold. It is likely to represent an important example of 'best practice' for broadly comparable contexts. While there was a sense that Scottish independence might have set a dangerous precedent for other separatist entities to follow, thereby creating havoc and further fragmentation within an already fragile European architecture, quasi-federal solutions to the Scottish case might be usefully explored in other contexts where 'self-determination' claims have been made – from Catalonia to eastern Ukraine.⁹ This is even more so if one looks at Scotland as an arguably successful case of peaceful reconciliation of regional identity and pro-European stance.¹⁰

But even more fundamentally, the Scottish debate reveals the crucial importance of participatory approaches to central and regional governance, particularly in cases of historically 'less-than-voluntary' processes of state formation.¹¹ Just as Canada's French-speaking community was pivotal to the development of a multinational democracy in that context, so Scotland's participation in the Union remains a

Strasbourg Court and Minority Groups: Shooting in the Dark or a New Interpretive Ethos?' (2012) 19 *International Journal on Minority and Group Rights* 1, 11-13.

⁸ Inevitably some power-sharing cases will prove more controversial than others from a human rights perspective: in relation to the Bosnian case see, e.g., Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations or How Human Rights Courts May De-stabilize Power-sharing Settlements' (2013) 24 *European Journal of International Law* 477.

⁹ It is worth noting that, as a result of constitutional and political difficulties, Catalonia has cancelled its referendum on independence and will be holding an unofficial poll instead. Ashifa Kassam, 'Catalonia to Hold Unofficial Poll instead of Independence Referendum' *The Guardian* (Madrid, 14 October 2014) <<http://www.theguardian.com/world/2014/oct/14/catalonia-calls-off-november-independence-referendum>> accessed 6 November 2014.

¹⁰ Serge Schememann, 'Fostering National Identity but not Nationalism', *The New York Times* (25 September 2014) <http://www.nytimes.com/2014/09/26/opinion/fostering-national-identity-but-not-nationalism.html?_r=0> accessed 6 November 2014, 8.

¹¹ Rainer Bauböck, 'Liberal Justifications for Ethnic Group Rights' in Christian Joppke and Steven Lukes (eds), *Multicultural Questions* (OUP 1999) 134, 140.

foundational component of the United Kingdom as a state. In both cases (and far beyond them), internal self-determination processes become inevitably intertwined with the role of group protection (on a political-institutional or more loosely cultural basis) in addressing distinctive power deficits arising out of the establishment of multinational states.¹² International law has supported such processes through an increasingly sophisticated notion of representative government as first articulated in the 1970 Declaration on Friendly Relations and then revisited in the 1993 Vienna Declaration on human rights and a range of subsequent specialized instruments – from generic rights to participation in public affairs to special forms of involvement in decision-making, including complex arrangements in deeply divided societies.¹³

In this sense the Scottish debate over how to reconfigure the relationship between the centre and the peripheries (reaching out to all of the UK's constitutive 'nations') – and, crucially, how far such a reconfiguration can go¹⁴ – speaks to the need for an inclusive multi-layered process of participation and accommodation as a way of remedying endemic imbalances within the state.

¹² For a more general argument, see Patrick Macklem, 'Minority Rights in International Law' (2008) 6 *International Journal of Constitutional Law* 531; Rene Kuppe, 'The Three Dimensions of the Rights of Indigenous Peoples' (2009) 11 *International Community Law Review* 103.

¹³ Gaetano Pentassuglia, 'State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View' (2002) 9 *International Journal on Minority and Group Rights* 303.

¹⁴ For example, there is probably an argument to be made that a federal solution of sorts that secures the overall dominance of the English unit would hardly serve the equality purposes that any majority-minority relationship needs to address: see e.g. the early pronouncement of the Permanent Court of International Justice in *Minority Schools in Albania* (Advisory Opinion) PCIJ Rep Series A/B No 64, 3.