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THE SCOTTISH SECESSION: CENTURIES IN THE MAKING

John Lamont[†]

I. INTRODUCTION: GETTING TO THE EDINBURGH AGREEMENT

“EDWARDUS PRIMUS SCOTTORUM MALLEUS HIC EST. PACTUM SERVA.” Translated, this means “This is Edward the First, Hammer of the Scots. Honour the Vow.”¹ These words are indicative of the historical tension between England and Scotland and demonstrate the fragility of that union. And, on September 18, 2014, it appears that many in Scotland may vote to secede from the United Kingdom, thus continuing the centuries-long episodes of union and divorce between the two nations.²

This note will briefly recapitulate the historical developments regarding the independence and subsequent union between Scotland and England. Next, the focus will be on the events leading up to the Edinburgh Agreement in 2012. Then the primary focus of this article will examine the legality of Scottish secession under the Edinburgh Agreement, other remedies the Scots may have for secession if the Edinburgh Agreement fails to provide the necessary legal framework, and what international implications will occur if Scotland becomes independent from the United Kingdom.

A. The First Independence

For the past two millennia there has been an inherent border dividing England and Scotland. This border is due to both natural

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¹ DAN JONES, *THE PLANTAGENETS: THE KINGS WHO MADE ENGLAND* 362 (Harper Press, 2012).

² Scotland's Referendum, <http://www.scotreferendum.com/> (last accessed Feb. 22, 2014).

geography³ and cultural strife. However, throughout these two millennia there has also been constant struggle between the creation of two independent nations and the creation of a united Britain. From the Roman conquest to the Edinburgh Agreement this struggle has played out in a variety of fashions. For much of the past two thousand years, this struggle has manifested itself in the forms of military conquest or political necessity. But, in the twenty-first century the drive for Scottish independence has come in the form of nationalism, while the enemy of Scottish nationalism appears to be the law.

Northern Britain has historically been an area nearly impossible to tame and consequently kept free of turmoil. The Romans conquered modern day England easily enough, but as they came closer to the current Anglo-Scottish border they only encountered more and more trouble.⁴ The Romans struggled so immensely to pacify northern Britain that they eventually erected Hadrian's Wall in order to provide stability and safety against the native resistance⁵. After Roman troops retreated from Britain in 410 A.D., the area that marks the modern Anglo-Scottish border did not become any more peaceful.⁶ Struggles amongst the kingdoms of Northumbria, East Anglia, Mercia, Wessex, the Picts, and the Britons made violence a common occurrence on the island.⁷ With the arrival of marauding Vikings in the late eighth century, the native people of Britain struggled to preserve their heritage and lives.⁸

Eventually, Alfred the Great, the King of Wessex, was able to find military and diplomatic success the Vikings and "establish" the nation that would become England.⁹ However, the formation of the kingdoms of England and later Scotland did not cause violence to cease. Almost every Plantagenet king waged a military campaign in one form or another

³ See generally England and Scotland Border on the A86 at Carter Bar, <http://www.scotlandinfo.eu/england-scotland-border-a68-carter-bar.html> (Scotland and England are divided by the Cheviot Hills and the Tweed River).

⁴ See generally, Magnus Magnusson, SCOTLAND: THE STORY OF A NATION, c. 2 (Grove Press 2000).

⁵ MICHAEL GRANT, THE ROMAN EMPERORS, A BIOGRAPHICAL GUIDE TO THE RULERS OF IMPERIAL ROME 318BC-AD 476, 78 (Barnes & Noble Press 1985).

⁶ Magnusson, *supra* note 4, at 21.

⁷ See generally, JUSTIN POLLARD, ALFRED THE GREAT: THE KING WHO MADE ENGLAND (John Murray Publishers 2006).

⁸ POLLARD, *supra* note 7.

⁹ *Id.*

against the vassal Scots during their reign.¹⁰ With the exception of Edward I's campaign, the battles between the English and the Scots did nothing but maintain an uneasy stalemate.¹¹ England and Scotland remained hostile and divided.

In 1314 Robert the Bruce's Scottish forces won a decisive victory over the English at the Battle of Bannockburn.¹² The victory for the Scots was a major step for gaining their independence. Six years later in 1320 Pope John XXII supported an independent Scotland by recognizing the Declaration of Arbroath.¹³ The Pope's support for the declaration overturned the previous claim his predecessor, Pope Clement V, granted to Edward I as overlord of Scotland in 1305.¹⁴ In 1328 Edward III signed the Edinburgh-Northampton Treaty that renounced all English claims to Scotland and paved the way for a sovereign Scotland to exist unimpeded for nearly 300 years.¹⁵

B. The Union

After almost 300 years of independence the Scots and the English were to be untied by royal bloodline. The death of Elizabeth I of England in 1603 left the English without a direct heir to the English throne.¹⁶ In order to avoid the pattern of civil war that plagued England in the past, the English had to find a legitimate and respectable monarch. With a legitimate bloodline claim to the English throne, James VI of Scotland, the great-grandson of Margaret Tudor became the choice of the English to succeed the late Queen.¹⁷ However, the smooth accession of James to the English crown did not mean Scotland would reconcile itself with England. With neither England nor Scotland in favor of establishing a

¹⁰ See generally Jones, *supra* note 1.

¹¹ *Id.*

¹² *Id.* at 362.

¹³ The Declaration of Arbroath, 1320, BBC.co.uk, http://www.bbc.co.uk/history/scottishhistory/independence/features_independence_arbroath.shtml

¹⁴ Jones, *supra* note 1, at 432.

¹⁵ See generally Magnusson, *supra* note 4.

¹⁶ PAULINE CROFT, KING JAMES, 49 (Palgrave Macmillan 2003).

¹⁷ *Id.*

single united kingdom, James was forced to rule as sovereign of both England and Scotland under the Union of Crowns.¹⁸

The Union of Crowns began in 1603 and a quasi-united Scotland and England continued until 1707.¹⁹ However, with the aging and childless Queen Anne on the throne, there was no known successor that would be able to definitely maintain the Union of Crowns.²⁰ Politicians in London feared that, upon the death of Queen Anne, the Scots might offer their throne to the Catholic James Edward Stuart. Fearing a return of Stuart kingship in Britain, it was decided that a union between Scotland and England should be formalized and secured in the hands of Protestant rulers.²¹ On May 1, 1707, the Acts of Union (*i.e.*, Union with Scotland Act 1706 and Union with England Act 1707) became effective.²² The Acts of Union, which united the Parliaments of Scotland and England, formed what would be called the United Kingdom.²³

C. De Facto and De Jure Divisions

Though law united Scotland and England, Scotland was able to maintain its national identity and exceptionalism. Important for many Scots was the status that the Church of Scotland retained after the Union.²⁴ Since the reign of James I, the Scots had struggled to maintain the independence of their national Church in the face of Anglican clerical encroachments.²⁵ Retaining their national Church allowed the Scots to preserve their heritage and on a political level, made the acceptance of a union with England possible. In addition to the Union allowing for the continuation of legally mandated political and religious institutions, the

¹⁸ *Id.*

¹⁹ Britt Cartrite, The Impact of the Scottish Independence Referendum on Ethnoregional Movements in the British Isles, 50 *Commonwealth and Comparative Politics* 512 (November 2012).

²⁰ LINDA COLLEY, *BRITONS: FORGING THE NATION 1707-1837*, 12 (Yale University Press 2012) (1992).

²¹ *Id.*

²² Cartrite, *supra* note 19.

²³ Union with Scotland Act, 1706, 6, Ann., ch. 11, art. I (Eng.) available at <http://www.legislation.gov.uk/aep/Ann/6/11>; Union with England Act, 1707 (R.S.P. 1706/10/257) art. 1st (Scot.) available at <http://www.rps.ac.uk/trans/1706/10/257>.

²⁴ Union with England Act 1707, Ann ch. 7, § 15 (Eng.), *available at* <http://www.legislation.gov.uk/aosp/1707/7/contents>.

²⁵ See MICHAEL BRADDICK, *GOD'S FURY, ENGLAND'S FIRE: A NEW HISTORY OF THE ENGLISH CIVIL WARS*, ch. 1 (Penguin Books 2009).

Scots were also able to develop a national identity through progress in industry and the arts. During the 1700s Scotland became an intellectual leader in areas such as commerce, law, and philosophy.²⁶ In fact, Scotland was able to boast that it produced two of the greatest intellectuals of the age in David Hume and Adam Smith.²⁷

Another important area of autonomy the Scots retained under the Acts of Union was the Scottish legal system. Since the Union of Crowns, James I wanted to rule his kingdom under one rule of law. However, the great champion of the common law, Sir Edward Coke, and other influential lawyers at the time, feared a possible infiltration of Roman law into the common law.²⁸ Consequently, the possible merger of the Scottish and English legal systems floundered.²⁹ A century later The Act of Union specifically allowed for the continuation of the Scottish legal system.³⁰ The Scots retained their national systems of civil and criminal law, as well as their own courts and judges.³¹ While the English were not anxious to acquire features of the Scottish civil law, the English imposition of the common law on Scotland appeared impracticable. Robbing the Scots of their centuries-long legal tradition would not help incline the Scots to unite with their neighbors to the south. Furthermore, the costs of transplanting the entire Scottish legal system would be enormous. Additionally, even if the Scots wanted to acquire the English legal system, it seems the process of overhauling the entire Scottish legal system could not be accomplished easily. With an established civil law tradition the use of reception statutes, such as those used by American states after independence, would be inapplicable.³² Whether the retention of the Scottish legal system was for the sake of convenience or for

²⁶ Scotland Analysis: Devolution and the Implications of Scottish Independence, Presented to Parliament by the Secretary of State for Scotland by Command of Her Majesty, February 2013, sec. 0.2.

²⁷ Adam Smith was a leading moral theorist and authored *The Wealth of Nations*. Smith is regarded as the forefather of modern capitalism. David Hume was an eminent British empirical philosopher who authored *A Treatise of Human Nature*. Hume's philosophy is known for its skepticism.

²⁸ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 34 (Oxford University Press 4th ed. 2007).

²⁹ BAKER, *supra* note 28, at 34.

³⁰ Union 1706, *supra* note 21, art. 23.

³¹ ANTHONY KING, THE BRITISH CONSTITUTION, 44 (Oxford University Press 2007).

³² Lecture by David Hackney, Florida State Law, at Oxford (July 2012).

appeasement, countless factors ensured that the unique Scottish legal system remained. Nearly four hundred years after the Union of Crowns, the retention of the Scottish legal system would make Scottish devolution a far easier task.

Since the Union of Crowns in 1603, the Scots have been able to maintain a unique culture based on social custom, academic excellence, and legal tradition. However, for many in Scotland a definable culture was not sufficient. The only way to be truly Scottish was to be independent of all other nations.

Almost as soon as Scotland was united with England in 1707 cultural movements arose both to retain Scottish identity and seek autonomy. The eighteenth century saw unsuccessful revolts by Jacobites that led to attempts to suppress aspects of Scottish culture by British authorities.³³ In the nineteenth century, groups such as the Celtic Society of Edinburgh (1820), Vindication of Scottish Rights (1853), the Gaelic Society of Inverness (1871), and Scottish Home Rule Association (1886) were formed.³⁴ But, these groups were mostly in the business of pushing for political reforms under the current governmental structure, not independence.³⁵ The dawn of the twentieth century arrived and with it the Young Scots Society (1900), the Scottish Patriotic Association (1901), and the Scottish National League (1904).³⁶ Like their nineteenth century predecessors, these groups did not contest for true political power, but pushed for cultural identity. It was not until 1934 when the National Party of Scotland merged with the Scottish Party to form the Scottish National Party that the push for Scottish nationalism took on a serious political form.³⁷

D. The Failed Devolution of 1979

In November of 1967 the Scottish National Party (SNP) won its first seat at Westminster.³⁸ Seven years later in the February 1974 general

³³ Cartrite, *supra* note 19, at 514.

³⁴ Cartrite, *supra* note 19, at 514.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ King, *supra* note 31, at 187.

election the SNP won 21.9 percent of the Scottish vote and seven seats.³⁹ The success of the SNP was due to newfound Scottish nationalist sentiment, the discovery of oil in the North Sea, and the general decline of both the Labour and the Conservative Party's influence throughout Great Britain.⁴⁰

The decline of the traditionally strong Labour Party in Scotland made future SNP electoral successes more likely. The likely continued success of the SNP made it probable that in the future, the SNP would gain the majority of the Scottish seats at Westminster and use their position as a platform to remove Scotland from the rest of the United Kingdom. The Labour Party recognized the sentiment of the electorate and felt they needed to respond quickly. After the publication of a government White Note called *Democracy and Devolution: Proposals for Scotland and Wales*, the Labour Party promulgated the October manifesto that committed the party to home-rule cause.⁴¹

In the 1970s with the major parties in Scotland backing devolution, a variety of bills calling for devolution were proposed in Parliament.⁴² However, each bill failed for different reasons.⁴³ The initial legislation treating devolution for Scotland and Wales failed in the House of Commons.⁴⁴ The second attempt passed the legislature, but the referendums in both Wales and Scotland failed.⁴⁵ The Scottish referendum carried a pro-devolution vote of nearly fifty-two percent.⁴⁶ However, the referendum failed because the requisite of 40 percent of the electorate did not come out to vote on the matter.⁴⁷ Shortly after the referendum failed the Conservatives, led by Margaret Thatcher took control of Parliament.⁴⁸ Unlike their predecessors, the Conservatives had

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ King, *supra* note 31, at 188.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

no sympathy for devolution and the cause for greater autonomy in Scotland and Wales would be dead for nearly two decades.⁴⁹

E. The 1997 Devolution

David Butler referred to the results of the 1997 referendum as a “turning point in the history of the United Kingdom.”⁵⁰ After a failed referendum in 1979, Scottish voters went to the polls to decide if the country should have its own national Parliament.⁵¹ The Scottish Parliament would be answerable to the Scots under certain powers devolved from Westminster, which previously contained all Parliamentary power. In the referendum, the Scots with a seventy-four percent margin voted in favor of establishing a new Parliament in Scotland.⁵² The result of the 1997 referendum seemed to be a foregone conclusion.⁵³ The political climate in Scotland had changed significantly since the last referendum in 1979.⁵⁴ In general, the new generation of voting Scots had more nationalistic feelings than the previous generation. Across Scotland in the 1990s, more Scots identified themselves as Scottish rather than British, which could only mean more sympathy for devolution.⁵⁵ With pro-devolution measures the Scots would gain the most autonomy they had since the Acts of Union in 1707.⁵⁶ However, many scholars think that the 1997 referendum may have demonstrated a watershed in Scottish political thought, but it did not change their constitutional status.⁵⁷ Devolution was not a serious concern for the Scots in 1997; the political objective for the Scots was to bring the government closer to the people.⁵⁸ For many in London acquiescence to a Scottish Parliament took place because it was the best way to “tame the beast of

⁴⁹ *Id.*

⁵⁰ R.D. Kernohan, *Scotland's Referendum in Retrospect*, CONTEMPORARY REVIEW 226 (Oct. 1, 2000).

⁵¹ *Id.*

⁵² Kernohan, *supra* note 50, at 226.

⁵³ *Id.*

⁵⁴ *Id.* at 227.

⁵⁵ *Id.*

⁵⁶ The Acts of Union dissolved the Scottish Parliament, *See* Act of Union 1707, *supra* note 22, §3.

⁵⁷ Kernohan, *supra* note 50, at 226.

⁵⁸ *Id.* at 228.

Scottish Nationalism.”⁵⁹ For both the Scots and English the 1997 referendum was a measure of political ideology that dictated a subsequent legislative compromise upon that ideology. But, the result of the referendum was by no means an attempt to bring about a constitutional overhaul. Neither the Scots nor English were contemplating such a dramatic action.

Due to the results of the 1997 referendum the Scotland Act of 1998 was enacted.⁶⁰ The Act provided for the establishment of a Scottish Parliament that would have the power to legislate over matters devolved to it from Westminster.⁶¹ The simplest way to understand what power the Scots had to legislate over would be to look at what matters were still reserved to Westminster and what powers were specifically given to the Scottish Parliament at Holyrood. Those areas reserved to Westminster, which the Scottish Parliament cannot legislate upon, are:

- (a) the Crown, including succession to the Crown and a regency,
- (b) the Union of the Kingdoms of Scotland and England,
- (c) the Parliament of the United Kingdom,
- (d) the continued existence of the High Court of Justiciary as a criminal court of first instance and appeal,
- (e) the continued existence of the Court of Session as a civil court of first instance and of appeal.⁶²

Even with the stipulation of enumerated powers in the Scotland Act there is nothing in the initial Act that would prohibit Westminster from legislating upon matters that were devolved to Holyrood. Westminster still retains all legislative power, even though Holyrood can legislate upon certain matters. Section 28, clause 7 of the Scotland Act specifically states that “This section does not affect the power of Parliament of the United Kingdom to make laws for Scotland.”⁶³ By law, Westminster could at any time repeal the Scotland Act and abolish the Scottish Parliament and Executive. However, during the passage of the

⁵⁹ Caroline M. Hood, *A Tale of Two Cities: Devolution, a Referendum and the Constitution*, 3 ABERDEEN STUDENT L. REV. 100, 101 (2012), available at <http://www.abdn.ac.uk/law/student-activities/aberdeen-student-law-review-95>.

⁶⁰ King, *supra* note 31, at 190.

⁶¹ See Scotland Act 1998, § 5 para. 1(b).

⁶² *Id.*

⁶³ *Id.* at § 28 cl. 7

Scotland Act it was announced that a convention would be called to establish that the Westminster Parliament would not normally legislate upon the matters devolved to the Scottish Parliament.⁶⁴ The agreement became known as the Sewel Convention.⁶⁵ The purpose of the Sewel Convention was to reflect and respect the devolution settlement and the role of the devolved institutions.⁶⁶ The Sewel Convention ensures that Westminster will legislate upon devolved matters only with the express agreement of the Scottish Parliament and after proper consideration and scrutiny of the proposal in question.⁶⁷

While there are enumerated and reserved powers clearly established between the Parliaments of Westminster and Holyrood, as well as the agreement of the Sewel Convention being in effect, it is acknowledged that there will be instances where the demarcation between what is devolved and what is reserved is blurred. "It has been recognized that the scheme of devolution means that it is not possible for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap will be inevitable."⁶⁸ However, it was well understood, especially after the agreement of the Sewel Convention, that the Scottish Parliament was meant to be a legislative body subordinate to Westminster and not its equal.⁶⁹

In 1999 the devolved Scottish Parliament established itself at Holyrood.⁷⁰ Legally speaking, the Scottish Parliament at Holyrood is entirely a statutory creation from a single piece of legislation.⁷¹ The power of the Scottish Parliament is entirely due to a grant of power from Westminster in the Scotland Act of 1998. The power of Holyrood is largely found in exercises of tax and police power. All exercises of power by the Scottish Parliament are subject to judicial review by the United Kingdom Supreme Court solely on statutory grounds and not on

⁶⁴ *The Sewel Convention: Key Features*, SCOTTISH GOVERNMENT, <http://www.scotland.gov.uk/About/Government/Sewel/KeyFacts> (last visited October 18, 2013)

⁶⁵ *Id.*

⁶⁶ *Sewel Convention*, *supra* note 64.

⁶⁷ *Id.*

⁶⁸ Hood, *supra* note 59, at 104.

⁶⁹ *Id.*

⁷⁰ King, *supra* note 31, at 190.

⁷¹ Hood, *supra* note 59, at 104.

common law grounds⁷². The powers granted to Holyrood under this act include everything that is not reserved to Westminster in the 1998 Act.⁷³ In regard to reserved matters, Westminster retains absolute sovereignty. Furthermore, all potential legislation from Holyrood could be struck down if it is deemed to have an effect that would violate a reserved matter. Of particular importance from the aspect of Scottish independence is Schedule 5 paragraph subparagraph (b) of the Scotland Act which states that the Union between the Kingdoms of Scotland and England is a reserved matter.⁷⁴ Under the terms of the 1998 Act only the power of Westminster could allow for a separation of the Kingdoms. Neither a referendum nor a piece of legislation from Holyrood bring about any type of action that would further Scottish independence since such actions would likely be deemed to violate reserved matters.

F. 2007 Minority and 2011 Majority

After the success of the 1997 referendum nationalism became a bigger player in Scottish politics. Momentum for Scottish independence received a tremendous boost in the 2007 election. The SNP won 47 seats and formed a minority party in Holyrood.⁷⁵ That same year the Scottish Parliament elected Alex Salmond as First Minister.⁷⁶ As the newly elected First Minister, Salmond made his agenda clear when he told Members of the Scottish Parliament at his instillation, "I believe Scotland is ready for change, ready for reform."⁷⁷ But, the power of the SNP was extremely limited because an informal parliamentary alliance of the British parties in Holyrood continued vetoing any legislation from the SNP that could have provoked conflict with London.⁷⁸

However, in May 2011 the electorate seemed to react with hostility to the British alliances maintained by some members of Holyrood after the 2007 election and voted out many members of the

⁷² *Id.*

⁷³ *Id.* at 105.

⁷⁴ Hood, *supra* note 59, at 105.

⁷⁵ *Timeline: Scotland's road to independence referendum*, BBC, <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20546497>.

⁷⁶ *Id.*

⁷⁷ Hood, *supra* note 59, at 105.

⁷⁸ R.D. Kernohan, *Scotland: Long Wait for a Referendum*, CONTEMPORARY REVIEW, 287, Sept. 1, 2011.

Labour and Tory parties.⁷⁹ As a result, the SNP won an absolute majority in Holyrood after the 2011 election.⁸⁰ With an absolute majority in Holyrood the SNP gained the ability to legislate how it liked within the constitutional limits of Holyrood's devolved powers. The electoral success of the SNP under the guidance Alex Salmond set a clear agenda for Holyrood to exercise its devolved power to the fullest and if possible to gain more power.⁸¹ This is the crux of Scottish independence question, namely, whether the independence agenda of the SNP can be realized through the current constitutional agreements between Holyrood and Westminster. And if not, what can the Scots do to gain independence.

II. THE EDINBURGH AGREEMENT

A. The Provisions

On October 15, 2012 Prime Minister David Cameron and First Minister Alex Salmond met in Edinburgh and agreed to the terms of the Scotland Act of 2012, also known as the Edinburgh Agreement.⁸² The Edinburgh Agreement is believed to be the legislation that gives the Scots the ability to determine their national status.⁸³ This Agreement allows the Scots to vote in a referendum that could change their constitutional status.

The guidelines for the referendum are that it should:

- have a clear legal base;
- be legislated for by the Scottish Parliament;
- be conducted so as to command the confidence of parliaments, governments and people; and

⁷⁹ *Id.*

⁸⁰ Kernohan, *supra* note 78.

⁸¹ *Id.*

⁸² Scotland's Referendum, The Edinburgh Agreement, <http://www.scotreferendum.com/2012/10/the-edinburgh-agreement/> (last visited October 18, 2013).

⁸³ Lallands Peat Worrier, *The Edinburgh Agreement: Legally What Does it Mean?*, <http://lallandspeatworrier.blogspot.com/2012/10/the-edinburgh-agreement-legally-what.html> (last visited October 18, 2013).

- deliver a fair test and a decisive expression of the views of the people in Scotland and a result that everyone will respect.⁸⁴

The agreement also states the Scottish Parliament has the authority to legislate for the referendum, which will be in the form of a single question (*i.e.*, Yes or No for Scottish independence), and be conducted before the end of 2014.⁸⁵ The agreement creates a legal basis for the Scots to hold a referendum, but a basis for gaining independence is less that certain. The pertinent legal language of the Act states that “[t]he Order will put it beyond doubt that the Scottish Parliament can legislate for that referendum” and “[i]t will then be for the Scottish Government to promote legislation in the Scottish Parliament for a referendum on independence.”⁸⁶ The language of the Agreement restricts Holyrood in that it provides legal power for holding a referendum only, not for any subsequent independence legislation. Under both the Scotland Act of 1998 and the Edinburgh Agreement the Scottish Parliament is not empowered to unilaterally legislate for independence.⁸⁷

The question remains as to what is the legal power in the Edinburgh Agreement? The power seems to be limited to holding a referendum and the ability to regulate it. The Agreement grants power to hold a referendum including its purpose and principles.⁸⁸ Additionally, the Agreement outlines how the referendum is regulated in terms of time and substance.⁸⁹ The other major features are the rules on the Electoral Commission and campaign finance.⁹⁰ The only section of the Agreement that shows any possibility of potential future independence legislation is paragraph 30. Paragraph 30 states:

The United Kingdom and Scottish Governments are committed, through the Memorandum of Understanding

⁸⁴ *Id.*

⁸⁵ Lallands Peat Worrier, *supra* note 83.

⁸⁶ Agreement between the United Kingdom Government and the Scottish Government on a Referendum on Independence for Scotland, U.K.-Scot., Oct. 15, 2012, *available at* <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence>.

⁸⁷ *See generally* “Memorandum of Agreement,” Edinburgh Agreement, *supra* note 82, para. 1,2,& 6.

⁸⁸ *See id.*

⁸⁹ *See id.* “Memorandum of Agreement” at para. 4.

⁹⁰ *See id.*

between them and others, to working together on matters of mutual interest and to the principles of good communication and mutual respect. The two governments have reached this agreement in that spirit. They look forward to a referendum that is legal and fair producing a decisive and respected outcome. The two governments are committed to continue to work together constructively in the light of the outcome, whatever it is, in the best interests of the people of Scotland and of the rest of the United Kingdom.⁹¹

The lingering question remains as to whether this paragraph requires either government to promote independence legislation after a successful referendum. From the text of the paragraph there seems to be no legal requirement for any type of independence legislation. Paragraph 30 seems to allow for a dialogue on independence, but has no legal basis. So, the power of the Edinburgh Agreement remains to holding a regulating a referendum. However, it may be implied that Westminster is obliged to legislation in due regard to the results of the referendum.

B. The Legal Impediments

1. The Power of Holyrood Under the Referendum

Nothing in the Edinburgh Agreement expressly overrules any reserved matters set out in the 1998 Act, namely altering the Union of the Kingdoms of England and Scotland.⁹² Therefore, the issue of independence seems to still be reserved to Westminster even though the Scottish Parliament has been given the ability to hold a referendum. Furthermore, the results of the referendum are only a barometer of political opinion, that is, the results of the referendum have absolutely zero legal effect.⁹³ The referendum essentially is a public opinion poll sanctioned by a piece of legislation.⁹⁴

⁹¹ "Memorandum of Agreement," *supra* note 82, at para. 30.

⁹² *Id.*

⁹³ Hood, *supra* note 59, at 102.

⁹⁴ *Id.*

While not having legal effect, the results of the referendum are not insignificant. If the voting results show that the majority of Scots are against independence then essentially the issue dies there. There will be no grounds for any legislation related to Scottish independence. However, if the requisite sixty percent of the population votes in favor of independence then more work will need to follow to get independence legislation. Under the current agreement even with the necessary amount of votes cast in favor of independence it is still up to Westminster to empower Holyrood to legislate for independence.⁹⁵ Legally, speaking it is within the power of Holyrood to legislate for independence or not to legislate for independence after the referendum has produced the needed majority. So the possibility exists where the Scots vote in favor of independence but the Scottish Parliament, if *ipso facto* empowered, could decide not to enact independence legislation. Such a result would be a political catastrophe for Holyrood, but nonetheless a possibility and a further (yet non-legal) obstacle to Scottish independence.

2. Is the Edinburgh Agreement *Ultra Vires*?⁹⁶

The potential for an act from Holyrood to be declared *ultra vires* is found in section 29(3) of the Scotland Act of 1998 which states:

For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.⁹⁷

The gray area includes when the substance of legislation and whether it will be deemed to have an effect that infringes on reserved matters.

⁹⁵ *Id.* at 105.

⁹⁶ See BLACK'S LAW DICTIONARY 1559 (8th ed. 2004) (in this context *ultra vires* means beyond the scope of power).

⁹⁷ Christine Bell, The Legal Status of the 'Edinburgh Agreement', SCOTTISH CONSTITUTIONAL FUTURES FORUM (1/22/2013, 1:38pm)

<http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/ArticleView/articleId/431/Christine-Bell-The-Legal-Status-of-the-Edinburgh-Agreement.aspx>.

By legislating for something that would be *ultra vires* the act of legislating itself would be *ultra vires*. Legislation from Holyrood for independence can be viewed as *ultra vires* in two ways. The most explicit way legislation can be *ultra vires* is by the fact it is altering the union between the Kingdoms of Scotland and England, since such an act is specially enumerated as a reserved power to Westminster.⁹⁸

The second and more difficult way of determining when legislation is *ultra vires* is due to its effect. The note in the Modification Order makes it clear that legislating for an independence referendum is no longer forbidden as a reserved matter.⁹⁹ Simply put, the current Scottish Parliament can only legislate for a referendum. The significance of the *ultra vires* aspect of the referendum is its effect on legislation. As section 29(3) says legislation can interfere with reserved matters due to its effect.¹⁰⁰ The issue we now face is what is the effect of the referendum? Would a successful referendum cause *ultra vires* actions in Holyrood? Legally speaking the referendum does nothing but gauge political opinion on independence and gives no consequent power. But, a successful referendum may embolden the Scots to legislate upon matters which are still reserved, that is, the effect of the referendum violates a reserved matter. However, these assumptions are highly speculative and it seems the powers granted in the Edinburgh Agreement are well defined and restricted to holding a referendum. Additionally, the absolute power of Westminster to legislate for independence could preempt any contrary legislation from Holyrood.

3. International Implications

The Scotland Act of 1998 clearly reserves matters of international affairs to the Parliament in Westminster. Schedule 5 Part I Paragraph 7 (1) states: "International relations, including relations with territories outside the United Kingdom, the European Union (and their institutions) and other international organizations, regulation of international trade, and development assistance and co-operation assistance are reserved

⁹⁸ *Id.*

⁹⁹ Scotland Act 1998 (Modification of Schedule 5) Order 2013, Explanatory Note (reserved matters are laws that can only be legislated upon by the UK Parliament in London).

¹⁰⁰ Scotland 1998, *supra* note 61, § 29(3).

matters".¹⁰¹ Therefore, the Edinburgh Agreement clearly cannot constitutionally be considered an international obligation because international relations are a matter reserved to the UK Parliament. Accordingly, Holyrood cannot enter into a binding international agreement. Consequently, this provision should make it clear that the Edinburgh Agreement cannot be enforced as an international treaty or agreement.¹⁰²

The Edinburgh Agreement cannot be viewed as a treaty under international law. The Vienna Convention on the Law of Treaties states that a treaty is "an international agreement concluded by states."¹⁰³ This requires that each party to a treaty is a sovereign state. In the case of the Edinburgh Agreement only one party, UK Prime Minister David Cameron, was the head of a sovereign state.¹⁰⁴ However, the Vienna Convention does make concessions for 'international agreements concluded between states and other subjects of international law'.¹⁰⁵ But, the 'subject of international law' is not defined, and the parties need for their obligation to be binding internationally.¹⁰⁶ In the case of the Edinburgh Agreement, it seems obvious the effect is simply to change the constitutional status of Scotland, not to change international relations with the United Kingdom or add any to Holyrood.

An additional question is whether by holding a referendum and conferred legislative powers to declare independence, Holyrood has been given an exercise of international relations and thus *ultra vires* power. Any action that involves the erection of a new independent nation has international implications. Therefore, one could argue that with Holyrood being granted the power to legislate for independence after the referendum, a legal problem emerges because the power over international relations is still reserved to Westminster. However, this implies the Edinburgh Agreement allows for independence legislation, which it does not specifically. But, section 29(3) of the 1998 Scotland Act could come back into play if the Agreement is seen to effect international

¹⁰¹ Scotland 1998, *supra* note 61, § 29(3) para. 5.

¹⁰² Bell, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Bell, *supra* note 97.

¹⁰⁶ *Id.*

relations, that is, enabling the erection of a new sovereign nation.¹⁰⁷ If Scotland can become an independent due to the results of the referendum, then there is no doubt that the UK's international relations will be altered. If that is the case, the question remains whether Schedule 5 Part I Paragraph (1) of the 1998 Scotland Act opens the door for independence legislation coming from Holyrood.¹⁰⁸ It seems the Holyrood could legislate for independence, but Westminster has the ultimate say. Therefore, any independence legislation must originate in Westminster, regardless of which governmental body actually declares Scotland independent.

4. European Impediments

If Scotland is able to overcome the various domestic obstacles in its path to independence it will then face a new set of potential international obstacles. The first question is Scotland's status in the EU. All indications are that the SNP assumes Scotland will become a full member of the EU. However, some political ministers in Scotland have raised the possibility of membership in the European Free Trade Association (EFTA).¹⁰⁹ Considering the option of EFTA membership is practical because many commentators believe that the Scots are a bit naïve in their assumption of almost automatic full EU membership.¹¹⁰ The Scots would benefit from EFTA membership by gaining access to the internal EU market without the requirements of membership. The downside is the Scots would have no say in the EU Parliament and be absent from EU policy decisions in areas of importance to the future of the Scottish economy, such as green energy. Consequently, Scotland is likely to pursue EU membership and take the steps necessary to achieve that goal.¹¹¹

Another potential impediment to Scottish independence is its practical implementation of Scottish independence. While current

¹⁰⁷ Scotland 1998, *supra* note 61, § 29(3).

¹⁰⁸ *Id.* at sched. 5.

¹⁰⁹ Daniel Furby, In-depth: Scottish Independence and EU Accession, Business for New Europe (March 2012) http://www.bnegroup.org/images/uploads/publications/files/In_Depth_-_Scottish_Independence_and_EU_Accession_-_BNE_March_2012_1.pdf.

¹¹⁰ *Id.*

¹¹¹ *Id.*

international or EU law may in theory give the Scots the ability to gain independence, bodies such as the EU and NATO are concerned what a Scottish independence could mean in terms of stability, finances, and defense in the region.¹¹² The EU is particularly concerned that if its protective umbrella recognizes Scottish independence to go along with full and automatic EU membership, then other nations may follow suit.¹¹³ The “contagion” effect, as it is called, is the belief that other European separatist movements will opt for independence because it seems they have all to gain and nothing to lose in pursuing such a course of action.¹¹⁴ With potential separatist movements in countries like Spain, Cyprus, and Kosovo, the “contagion” effect could destabilize many nations, and the EU as a whole.¹¹⁵

The Scottish independence could have a significant impact on UK military organization and NATO membership.¹¹⁶ British military resources are shared amongst the Scots and the rest of the UK in terms of both locations and personnel.¹¹⁷ An independent Scotland may call for the removal of all UK military resources from the region. Such a move will have a significant impact on both Scottish and UK military strategies. Without a military presence in Scotland there would be a tremendous threat of terrorism and Scotland may initially struggle to provide adequate protection of its economic resources and citizens. For the UK militarily, the breakup of the former kingdom will have little effect on its status as a member of NATO and the EU. However, without Scottish resources the capabilities of the new UK (*i.e.* the nations of England, Wales, and Northern Ireland) military will need to be reevaluated.¹¹⁸ While it is likely Scottish independence will not significantly affect the status of the UK, the adjustment process for the UK within the EU, NATO, and the UN will be cumbersome.

¹¹² Arno Engel and Roderick Parkes, Discussion Paper, *Accommodating an Independent Scotland: How a British-Style Constitution for the EU Could Secure Scotland's Future*, EUROPEAN POLICY CENTER (Oct. 24, 2012).

¹¹³ *Id.*

¹¹⁴ Parkes, Discussion Paper, *supra* note 112.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

III. THE CASE FOR UNILATERAL INDEPENDENCE

A. Self-determination

If the terms of the Edinburgh Agreement impede the Scots from legally seceding under British law does that mean the Scots' independence push is over? Constitutionally, the answer is probably yes. Without future legislation from Westminster the Scottish independence begins and ends with the referendum. However, given the circumstances surrounding the referendum and the philosophy of international law, the Scots may seek independence through a different medium, that medium being international law.

After World War II there was a tremendous push for self-determination and decolonization in which the British government was heavily involved due to its expansive colonial possessions.¹¹⁹ The Charter of the United Nations recognized the concept of self-determination in international law.¹²⁰ Chapter 1 Article 1 Clause 2 of the U.N. Charter states, "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹²¹ While being much more of an ideal rather than law, the concepts of international law could help bolster the case for Scottish independence.

The spirit of the Edinburgh Agreement seems to be on very favorable terms with international principles. The Edinburgh Agreement clearly wants to provide for peace in the United Kingdom by harmonizing the politics of Scotland with a constitutional reality.¹²² By using the referendum process, the terms of the Agreement give the people of Scotland an appropriate forum to determine their national future. For example, Montenegro seceded from Serbia after a majority in Montenegro voted for independence in a referendum.¹²³ By complying and legislating with deference to the results of the referendum, as the

¹¹⁹ Bell, *supra* note 97.

¹²⁰ See U.N. Charter.

¹²¹ U.N. Charter ch. 1, art. 1, cl. 2.

¹²² See generally Edinburgh Agreement, *supra* note 82.

¹²³ Anagh Sengupta and Sanya Parmar, *A Critical Analysis of the Legality of Unilateral Declaration of Independence in the Light of the Right to Self Determination*, 3 KING'S STUDENT L. REV., 189, 190 (2011-12)

case was in Montenegro, one would believe that peace and justice would necessarily follow amongst the Scots and the English if the results of the referendum are honored. On its face it would appear that the Edinburgh Agreement is in compliance with the spirit of international law and these “universal” and international principles should supersede any legal technicalities. On these grounds it may seem that the Scots have a strong internationally recognized foundation to base their claims of independence to overcome any possible obstructions in found in domestic law.

Furthermore, the Scots already have the elements needed to be recognized as a sovereign nation under international law. The criteria for statehood are (1) a permanent population; (2) a defined territory; (3) a government; and (4) a capacity to enter international relations with other states. Meeting these criteria is neither necessary nor sufficient for a group of peoples to become a state.¹²⁴ In the case of Scotland, the first element is not an issue. The second element is not issue either especially after devolution. For the third element, the Parliament at Holyrood more than suffices to demonstrate that Scotland has a capable government. The fourth element also seems to be already satisfied by Holyrood through their engagement with the government at Westminster. After an examination of the four elements of statehood it seems that Scotland already has the necessary characteristics of statehood. Meeting the criteria of statehood along with internationally recognized principles of self-determination, it seems Scotland’s demand for independence on its face could easily be accomplished.

However, self-determination does not legally give a group of peoples the ability to unilaterally declare independence.¹²⁵ In fact, the U.N. Charter explicitly states that threats or shows of force should not be used against the territorial integrity or independence of a state.¹²⁶ Here, the Scots’ threat of unilateral secession would be rather benign, but a political threat nonetheless. But, a recent advisory opinion by the International Court of Justice stated that a unilateral declaration of independence is not prohibited by international law, but at the same time

¹²⁴ Parmar, *A Critical Analysis*, *supra* note 123, at 207.

¹²⁵ *Id.* at 201.

¹²⁶ *Id.*

this right is nowhere near absolute.¹²⁷ The right for unilateral secession should be exceptional and a last resort that usually requires the parent state to be participating in “grave human rights violations.”¹²⁸ These violations require a high threshold to prompt unilateral independence. Moreover, recent secession movements have no bearing on international secession law. There is no precedent or international statute to follow for self-determination. International law looks at each situation on a case-by-case basis not by any black letter law.¹²⁹

While international law gives the Scots a basis for independence, European Union (EU) law seems to provide the Scots with more leverage in a bid for independence. In response to criticism that the EU was becoming a centralized super-state, the EU adopted the principle of subsidiarity.¹³⁰ In essence this principle this means that decisions should be made at the lowest political level unless actions by higher powers in the EU would make the process more efficient.¹³¹ As a result, the EU has encouraged national governments to implement decentralization strategies which would distribute powers from the center to the periphery.¹³²

If the Scots legitimately wish to pursue independence via an international remedy (*i.e.* by either U.N. or EU law) then they must focus on their population. For the Scots, the emphasis on secession in international law should focus on the people, not the nation. Self-determination is codified in international agreements as a human right. For example in the case of South Sudan the Machakos Protocol stated “[t]hat the people of South Sudan have the right to self-determination . . . through a referendum to determine their future status.”¹³³ Additionally, when addressing the possible secession of Quebec the Supreme Court of Canada said self-determination was “a people’s pursuit of its political, economic, social and cultural development within the framework of an

¹²⁷ Charles B. Smith, *South Sudan and Declarations of Independence*, 47 TEX. INT’L L.J. 542, 544 (2011-2012)

¹²⁸ *Id.*

¹²⁹ *Id.* at 550.

¹³⁰ Christian Schweiger, *Scottish Independence and Relations with the EU* (Aug. 21, 2013) <http://www.e-ir.info/2012/07/21/scottish-independence-and-relations-with-the-eu/>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Smith, *supra* note 127, at 547.

existing state.”¹³⁴ By emphasizing the human rights (*i.e.* political, social, and economic determination) aspect of secession along with seemingly apparent authority to secede from Westminster, Scotland may believe they can mount a legitimate claim in international court. However, the threshold requirements for a remedy under international law are very high and not likely to be found in this case. With a lack of human rights violations it seems to be an insurmountable burden on the Scots. But, an emphasis on their unique culture must be a consideration.

A final position that may help the Scots in their quest to gain independence via international justice may be through international recognition.¹³⁵ For example, in the *Quebec Case* the Supreme Court of Canada stated the success of unilateral secession may depend on international recognition.¹³⁶ The fact that Kosovo has received eighty-nine recognitions has shown that it is perceived by many as an independent state.¹³⁷ Such recognition can only help in their bid to become an independent state. The Scots may argue that they have been recognized by Westminster. The fact that Scots have been given devolved powers recognized by Westminster since 1998 could help with their recognition internationally. But, more importantly the fact that Westminster has given Holyrood power to determine their international status may be seen as Westminster recognizing the international capacity of Holyrood. But, much more international recognition is needed for the Scots to invoke this principle.

Ultimately, if the Scots look to the international forum for relief it will be a hard burden. Currently, the Scots have the elements for statehood,¹³⁸ but in terms of criteria for a successful unilateral declaration of independence they currently are lacking. However, that could all change after a successful referendum. If the Scots feel that appropriate legislation is not enacted following a successful referendum, then they may gain the necessary criteria for proposing a unilateral declaration of

¹³⁴ Comprehensive Peace Agreement (CPA), also known as the Naivasha Agreement (2005), <http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf>; see also Smith, *supra* note 127, at 551.

¹³⁵ *Id.* at 555.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Sengupta, *supra* note 123, at 190.

independence. But until then, the international law argument is based on speculation and hypotheticals. While the ideals of self-determination seem to be present in both the Edinburgh Agreement and international law, those ideals are determinative of very little legally. This is especially true when there are no violation human rights present. However, recent cases in international law could be analogous and thus advantageous to the situation the Scots may face after the referendum. Depending on the fallout from the 2014 referendum, a unilateral declaration of independence may become a colorable option for the Scots to gain independence. But, questions remain whether the Scots would have the will to undergo such a strenuous process or remain content with devolution.

B. The Moral Obligation

Aside from the possible obligations based on international principles, what about a possible moral obligation from the UK Parliament? What should happen if the Scottish referendum voting results favor independence, but some legal or political impediment negates the validity of independence legislation coming from Edinburgh? Would it be best for this impediment to be ignored? For many it appears that under the current legislation both the UK Parliament and the Scottish Parliament have come to the understanding that should the Scots vote in favor of independence then criteria to further legislation for an independent Scotland has been met. However, the current legislation obligates neither party to anything as the result of the referendum, but it seems to be understood that there should be subsequent legislation that conforms to the results of the referendum. But, there is a big difference between the consequences of what is implied and what is obligated under the Agreement.

If Westminster finds a legal obstacle to Scottish independence after a successful referendum then what will be the perception of the UK government? The first perception will likely be untrustworthiness. After apparently giving the Scots the tools to forge their own destiny and apparently promising to honor their will, any acts to the contrary would be viewed as a broken promise with significant implications. Secondly, there could be allegations of incompetence. After years of preparation and with the consultation of expensive lawyers if the Edinburgh Agreement fails to uphold legally then it will appear there was some

poor legal work by government officials or a blatant disregard for the law.

A problematic parallel for Westminster - if it withholds a Scottish secession - comes from the case of Montenegro independence. In 2006 Montenegro successfully seceded from Serbia via referendum.¹³⁹ The referendum had a sound legal basis and the results dictated the validity of independence. Such a precedent internationally may help Scotland in terms of public opinion on the international stage. If Westminster obstructs Scotland's secession then the questions will be asked on how can Montenegro conduct a valid referendum but the United Kingdom cannot? Such an incident will reflect badly on Anglo law.

So, could Westminster and the United Kingdom ignore legal impediments or by extralegal means allow for Scottish independence. Historically speaking, Anglo-American law has never found legal technicalities to be an impediment when it was expedient, the execution of Charles I and the American Constitutional Convention being prominent examples.¹⁴⁰ An example that is pertinent to Scottish independence is the Anglo-Irish Treaty.

C. The Anglo-Irish Treaty Precedent

To avoid the possible conundrum that would be the "moral obligation," the British could allow the Scots to follow in the footsteps of the Irish almost a century before. In the early 20th century the Irish rose up in rebellion against the British occupiers that led to a bloody civil war on the island.¹⁴¹ The origin of the conflict began with the election of several Irish Nationalists to Parliament in 1918.¹⁴² The platform of the *Sinn Féin* (Gaelic for "We Ourselves")¹⁴³ party was based on complete Irish separation from Britain and if elected they were determined to take matters of independence into their own hands.¹⁴⁴ After receiving a

¹³⁹ Sengupta, *supra* note 123, at 202.

¹⁴⁰ See Braddock, *supra* note 25, at ch. 28; see generally Pauline Meyer, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION 1787-1788 (Simon & Schuster 2011).

¹⁴¹ John M. Lynch, *The Anglo-Irish Problem*, 50 FOREIGN AFFAIRS 601, 606 (1972).

¹⁴² *Id.*

¹⁴³ Translation provided by Kevin Govern, Professor of Law, Ave Maria School of Law.

¹⁴⁴ *Id.*

majority of the Parliamentary seats in Ireland, the Sin Fein kept their pledge of not taking their seats in Westminster and proceeded to establish an independent Irish Parliament in Dublin.¹⁴⁵ Consequently, a war emerged against British in Ireland.¹⁴⁶ After two years of hostilities in Ireland, Lloyd George passed the Government of Ireland Act of December 1920.¹⁴⁷ The Act called for the establishment of Parliaments in Dublin (Southern Ireland) and Belfast (Northern Ireland), which allowed for more Irish autonomy.¹⁴⁸ However, nationalism in Southern Ireland had gone beyond mere devolution, so the guerilla war continued.¹⁴⁹ The combination of a prolonged war with the Irish nationalists and international pressures eventually forced the British hand. In 1921, British Prime Minister Lloyd George and representatives from the Irish Parliament began negotiations.¹⁵⁰ The agreement that the parties reached, which would give the Irish independence as a dominion in the Commonwealth, was called the "Anglo Irish Treaty."¹⁵¹ However, even in pre-Vienna Convention days its status as treaty was not clear.¹⁵² The parties signed not as members of government but "on behalf of" the British and Irish delegation respectively.¹⁵³ Nevertheless, the validity of the treaty stands to this day.

The conflict with Ireland is not the only one where the British have conferred independence on questionable parties. The precedent of the Anglo-Irish Treaty has been followed during similar situations that arose during decolonization.¹⁵⁴ During decolonization, the colonized nations were given a quasi-state status in order to negotiate for independence.¹⁵⁵ Essentially, with both Ireland and their colonial possessions, the UK government negotiated with sub-state entities that

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 607.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Bell, *supra* at note 97.

¹⁵³ Bell, *supra* at note 97.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

had no treaty making capacity.¹⁵⁶ These emerging nations were states in waiting and their validity as treaty making entities existed only after the treaties were executed.

The solution for Scottish independence seems simple under this theory and has precedent. The current situation between Scotland and the rest of the United Kingdom may not be completely analogous to cases seen in Ireland and during decolonization, but manageable. The referendum legislation between Holyrood and Westminster has a strict domestic character that does not implicate an international relationship between the two. However, that could all change after a successful referendum. Westminster could recognize Holyrood in the same way they recognized the Irish plenipotentiaries in 1921 and give Holyrood a quasi-state status. But again, even taking this route to independence still depends on the willingness of Westminster to legislate for Scottish independence. Even more problematic in this case is that the legislation from Westminster is founded on giving the Scots a quasi-legal status. In this case, the Scots are still relying on Westminster and a legal fiction. Ultimately, the example from the Anglo-Irish Treaty and decolonization is effective, but not exactly legal.

IV. CONCLUSION

The Edinburgh Agreement does nothing to change the constitutional status of Scotland and empower Scotland to legally gain independence. It only allows for a referendum on independence, which is nothing more than a political opinion poll. For legal independence the Scots will need a successful referendum and subsequent legislation from Westminster to give them the ability to determine their sovereign status. Alternatively, the Scots could turn the international community for satisfaction. The burden on the Scots would be high and improbable, but the argument has some merit. Following the Anglo legal tradition the Scots may ultimately gain their independence on the grounds of legal fiction.

¹⁵⁶ *Id.*

If given the opportunity to declare independence Scotland will face the many difficulties that emerging nations face. While Scotland will have more independence in NATO, the European Union, and the international community, it will lose many of the benefits it has being united with the rest of the United Kingdom. To the outsider it may seem Scotland is already independent enough. Scotland has its own Football Association¹⁵⁷, flag¹⁵⁸, culture, legal system, and political system while being a part of the United Kingdom. While this may seem significant for some, to others it is not nearly enough. Does gaining the status of an independent nation outweigh the burdens that independence will bring? On September 18, 2014 the Scottish voters will have told us.

¹⁵⁷ The Scottish Premiership, which separate from the English Premiership and allows Scotland to participate as a nation in the Fédération Internationale de Football Association (FIFA) competitions.

¹⁵⁸ The Cross of St. Andrew is the flag of Scotland and the Flag of England is the Cross of St. George. The flags were combined upon the Act of Union in 1707. *See* Act of Union of 1707, *supra* note 22, § 1.