Scotland and the EU: a Comment by JOSEPH H.H. WEILER

Joseph H.H. Weiler

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The Scottish referendum on independence is upon us. At some levels it is an easier and 'cleaner' case than that of Catalonia: The United Kingdom, in a mature political decision, has allowed this referendum thus removing any objection from either a British constitutional perspective orfrom public international law.

The people of Scotland, many of them at least, resent 'outside interference' in what they consider their internal business – the exercise of a right to self-determination. It is indeed their business; but this does not mean that outsiders cannot, or should not, have a view and express that view driven by both prudential and normative considerations.

The issue of greatest concern outside Scotland and the United Kingdom concerns the future, or otherwise, of an independent Scotland within the European Union. Membership would not be automatic – I find the argument for automaticity based, as it has been by some, on the fact that the people of Scotland are citizens of the Union unpersuasive. Citizenship of the Union is predicated on being nationals of a Member State. And if Scotland becomes independent, her people, by their own sovereign decision, would no longer be nationals of a Member State. They are becoming independent from the United Kingdom. (Let me open a first parenthesis. In part the matter is one of framing: If, say, Belgium were to decide to split, it would not be nearly as clear which, if any, of the two – Wallonia, Flanders – would "remain" a Member State and which would have to accede. Perhaps neither.)

Be that as it may, there should be no legal impediment for Scotland to become a Member State if she satisfies the condition for Membership, political and legal, one of which is a unanimous decision of all Member States. On the technical side it should be a relatively easy accession, since the European legal *acquis* is part of the political and legal fabric of Scotland. The adjustments necessary will be, for the most part, of a technical nature. (A second parenthesis: It is said that for Scotland to accede she would first have to be an independent State i.e. forcing her into an interregnum of non-membership. That is why some lawyers suggest Scottish "accession" through Treaty amendment rather than through Accession. I think Treaty amendment is a circuitous way, and normal Accession is the correct route; but I do not think a real interregnum would be necessary. The would-be independent Scotland could negotiate her accession in her current status, go through all the European constitutional hoops save the final signature of the Act of Accession. That can be planned to take place, literally on the very same day that Scotland becomes formally an independent State. One would first complete the last formal act of independence – some piece of paper will be signed by, presumably the British Monarch and the Scottish authorities and immediately the Act of Accession could be signed. Scotland would be a non-Member State for the duration of it takes to sign those two pieces of paper. This is of course a short-hand for a fairly complex procedure but it could be done.)

The issue, therefore, is not legal but political. Should the Member States of the European Union embrace an independent Scotland? In an Editorial in EJIL some time ago I took a dim view of plans for Catalan independence – which earned me the ire of many. I do not think that any editorial I wrote provoked so much hate mail. I take a similarly dim view of the Scotland case. Make no mistake: I harbor great affection for Scotland and its people. My father admired them, as he did any small people living in the shadow of a giant and yet managing to preserve a keen and rich sense of distinct national identity. I also do not doubt their distinctiveness as a nation.

Why then this dim view? One consideration, not trivial, is prudential: I am convinced that Scottish independence coupled with simultaneous, or close to

simultaneous, membership of the Union will provoke a domino effect among many nations and regions in Europe. Independence pure and simple is in many cases threatening and unattractive. There is a long list of candidates, in Spain, France, Italy and elsewhere who would be emboldened by the Scottish example. Feeding this frenzy for secession and independence in Europe is the premise that all these new States will somehow find a safe haven as Member States of the European Union. Absent that assumption, appetite for independence would be significantly muted the rough seas of "going it alone" far more threatening.

I do not believe that given the decisional structure of the Union, even on the most optimistic ideas for reform, it would be helpful for Europe to have a growing number of Member States. Saying Yes *to* Scotland would require saying yes at least to all other constitutionally lawful secessions.

But the main consideration is not prudential. I do not take the view, normatively speaking, that having a distinct national identity within a democratic State in and of itself justifies independence. It is simply ethically demoralizing to see the likes of Scotland and Catalonia reverting to an early 20th Century post World War I mentality, when the notion that a single state could encompass more than one nationality seemed impossible – hence the special treaties on minorities which abounded in the breakup of the Ottoman and the Austro-Hungarian Empires. These arrangements were well intentioned but lacking in political imagination and eventually, let us not hide the ugly facts, feeding and leading to that poisonous logic of national purity and ethnic cleansing. Again, make no mistake: I am not suggesting for one minute that anyone in Scotland or Catalonia is an ethnic cleanser. But I am suggesting, that the "go it alone" mentality is associated with that kind of mindset.

More than any other country with which I am familiar, the current constitutional arrangements in the UK allow a full vindication of a Scottish cultural and distinct political identity. Scotland is not a Chechnya. So what is the case for independence? It is precisely that notion that having a distinct national identity justifies secession, a notion fueled in my view by a seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians.

But the reality is more mundane than this. I watched the televised debates. Most of the sparring was utilitarian: Will we better off, especially economically. More employment, yes or no. Better social network, yes or no et cetera et cetera. So this is what will ultimately decide things.

This runs diametrically contrary to the historical ethos of European integration. The commanding moral authority of the Founding Fathers of European integration – Schumann, Adenauer, de Gaspari and Jean Monnet himself – was a result of their rootedness in the Christian ethic of forgiveness coupled with an enlightened political wisdom which understood that it is better to look forward to a future of reconciliation and integration rather than wallow in past historical rights and identity. There were, of course, utilitarian considerations, but they were not at the normative core. The European Union is struggling today with a decisional structure which is already overloaded with 28 Member States but more importantly with a socio-political reality which makes it difficult to persuade a Dutch or a Finn or a German, that they have a human and economic stake in the welfare of a Greek or a Portuguese, or a Spaniard. Why would there be an interest to take into the Union a polity such as an independent Scotland predicated on a regressive and outmoded nationalist ethos which apparently cannot stomach the discipline of a multinational nation? The very demand for independence from the UK, an independence from the need to work out political, social, cultural and economic differences within the UK, independence from the need to work through and transcend whatever gripes there might be, disqualifies morally and politically Scotland and the likes as future Member States of the European Union. Do we really need yet another Member State whose decisional criterion for Europe's fateful decisions in the future would be "what's in it for us"?

Europe should not seem as a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union. Thus, the assump-

tion of Membership in the Union should be decisively squelched by the countries from whom secession is threatened and if their leaders, for internal political reasons lack the courage so to say, by other Member States of the Union.

It would be hugely ironic if the prospect of Membership in the Union ended up providing an incentive for an ethos of political disintegration. There really is a fundamental difference to the welcoming into the Union of a Spain or a Portugal or a Greece or the former Communist countries emerging from ugly and repressive dictatorships and a Scotland, which is part of a functioning democracy which recognizes in word and deed the distinctiveness and wide and deep autonomy of Scotland and its people. In seeking separation Scotland would be betraying the very ideals of solidarity and human integration for which Europe stands.

I hope the people of Scotland will reject the seduction of separatism and tribalism. And if they do not – well, let us wish them, as I wished the Catalans, a Bon Voyage in their separatist destiny.

ABOUT THE AUTHOR

Joseph H.H. Weiler

Joseph H.H. Weiler ist Professor an der NYU School of Law, Senior Fellow am Harvard Centre for European Studies und ehemaliger Präsident des European University Institute, Florenz (2013-2016).Joseph H.H. Weiler is a Professor at NYU School of Law, Senior Fellow at the Harvard Centre for European Studies, and former President of the European University Institute, Florence (2013-2016).

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