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Scotland and the EU: Comment by KALYPSO NICOLAIDIS

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A spectre haunts Europe: disintegration. The on-going drama of the Euro-crisis and talk of Xits, from Grexit and Brexit have made it so. This may be why so many EU officials have found it wise to comment on the Scottish referendum and have done so *as* EU officials rather than in their personal capacity, affirming with great aplomb that a YES to independence would likely mean a NO to the EU. Why the urge? As both Sionaidh Douglas-Scott and Joseph Weiler make clear, the *legal* case is, if not exactly clear-cut, at least tractable. This opinion is notable on the part of Joseph Weiler given his passionate disapproval for secessionist movements in mature democratic states, in a Europe which should be about togetherness rather than separation.

"Where there is a (political) will, there is a (legal) way." This is what EU law seem to mean in this case. Of course, one could argue that the law always bends to politics, that Courts prefer to be cautious and relevant than contrarian and ignored. But when it comes to the Scottish issue, lawyers simply cannot lend their weight to the EU officials' line with a straight pen. As argued in Sionaidh Douglas-Scott's crisp contribution, several overlapping arguments converge. The appeal to international law is rather spurious. Even if in theory, seceding states need to renegotiate their membership, in practice, as she reminds us, many international organisations automatically recognize seceding states as members. More importantly, EU law does not automatically follow international law. For sure, there is no Treaty provision that would require Scotland to leave the EU on independence. And there are at least two legal routes for it to retain membership, both of which would involve negotiating terms before formal independence in March 2016, that is during the period when it is still part of the UK and, therefore the EU: simply amending the Treaties to the effect that an EU member state has turned into two (art 48); or good old enlargement (art 49) but of a new and unprecedented kind – an "internal enlargement."

There will be debates about which of the two available legal routes would be best for all parties concerned. On one hand, amending the Treaties would avoid the risk of turning Scotland into a non-EU member for a transition period but will be resisted by some existing member states. On the other hand, the enlargement route, whilst cleaner, would also seem more artificial. Whichever route is chosen, it is clear that the issue is one of political will, as it was when east Germany entered the EU merely by becoming part of a new greater Germany. For Germany then as for Scotland now, the assumption of exclusion followed by highly uncertain negotiation would not have been or be a tenable option.

Negotiating new terms of membership should be technically easy given that the Scottish member-state-to-be already enforces all EU laws and regulations (with the usual failings found in all member states). This has never been the case obviously for "normal" candidate countries. Some have expressed the argument in an indirect way: Scots are EU citizens with entrenched rights and obligations and one simply cannot take these rights and obligations away from them. This is a seductive bottom-up argument supported by Douglas-Scott. But Weiler is right that EU citizenship is derivative of state membership. Grounding the argument on citizenship could bolster the political or even moral case for continued Scottish membership but does not seem to hold on legal grounds. It is the Scottish state that we need to consider here.

Should Scotland fear a veto unmotivated by these technical issues, but driven rather by the domestic considerations of some other member states? Spain's fear of the precedent created for Catalonia is certainly real. But while it might delay accession of the new

Scotland to the EU, it is hard to believe that it could justify an anti-Scottish veto indefinitely. This would be against the collective interest of EU Member States. But more importantly, keeping out a Scotland which fulfils EU membership criteria for such domestic political reasons would be against all previous experiences of EU enlargement (although it may be what happens one day with Turkey). The Scottish Yes campaign argues that throughout its history the guiding principle of the EU has been enlargement of its membership, not contraction. This is not entirely true – Greenland, an independent territory of Denmark, chose to leave the EEC in 1985; and of course Algeria, which had applied EEC law as a French department for four years, left in 1962. Moreover, with the Treaty of Lisbon, the EU formalised and entrenched a right of exit (article 50) which is at the heart of its nature as a polity: the peoples of Europe have come together and will remain together by choice, not under duress. The United States became a federation by force a century and a half ago; our own half-century long civil war (generously shared with the rest of humanity through two world wars) entrenched a contrasting principle: the EU is a federal union of freely associated states, not a federal state where exit is ruled out.

The key principle here is choice. In the same way as the exit clause proclaims loudly and clearly that EU member states and their citizens remain in the EU by choice, leaving the EU should be a collective choice too. It should not be a choice inferred from another choice, that of one part of a country to leave the whole. To state that two choices are conflated in the same referendum, one explicit (leaving the UK), one implicit (therefore leaving the EU) would simply contradict this principle.

It matters that on day one of independence Scotland would become an EU member state, not a good old sovereign nation state. Member-statehood is a highly constraining status which is only compatible with compromise and consensus politics. It cannot but blunt the jingoistic edge to independence movements (in Scotland as elsewhere) that many of us abhor as does Joseph Weiler. It could even be argued that the demoi-cratic spirit of the EU as a Union of peoples (plural) can be enhanced by amicable divorce if a majority of citizens in Scotland have long felt unduly dominated by an English (Tory) majority, ruling the common country in ways that turns Scots into a permanent minority. After all, the story of modern Europe has been that of the creation of smaller nation states out of empires, who, after terrible twists and turns, have learned to better live together as neighbors than they used to live as various groups sharing in the same empires or unions of various kinds. More radically, Scottish self-determination may be congruent with a world where democratic progress is related to decentralization, localism and interconnectedness between autonomous units. I personally believe that devolution-max would give the Scots everything they yearn for in this regard without the pains of outright separation. But I also believe that only the parties in presence can know and decide on the kind of tempestuous marriage or amicable divorce they can each happily live with. In this conversation, the EU should remain neutral.

In the long term, and whatever is decided in the Scottish referendum, the British Isles will express their shared destiny in one way or another through an evolving constitutional settlement. The three nations could become a formal federation à *la Germany,* an uneasy association à *la Belgium,* or a confederation of states à *la* Benelux. Or some other formula that they come up with all on their own! If this happens under a common EU roof, maybe the precise formula will matter less then some either hope or fear today. What is sure is that the "threats" approach to the no campaign isn't working – even if people believe some of the threats, they resent the bullying anyway (as in "try us"). But actually these are not credible threats: Scotland will stay in the bigger Union, even if it leaves the smaller one. Whether it does leave the smaller one ought to be decided on its own merits.

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