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Scotland and the EU: Eleventh hour thoughts on a contested subject

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Is the 'spectre of disintegration' haunting Europe? Joseph Weiler fears that it is, and that, were an independent Scotland to be admitted as an EU state, this would lead to a domino effect whereby others would demand independence within the EU – testimony of an atavistic, retrogressive mentality, and adverse to the EU's *raison d'etre*. This is a strongly put view, and not all will agree with it. Nonetheless, most of the papers in this highly stimulating symposium address, albeit in very different ways, the concern that lies at the base of Weiler's argument – namely, the character of the EU, the nature of its values, its very reason for being. They also address the more workaday, but nonetheless critical, legal and practical issues that an independent Scotland's membership pose.

The EU and its values

Indeed, this debate has prompted some necessary, timely and diverse reflections on the nature of the EU, and what it stands for. The treaty of Lisbon inserted a statement of *values* into EU law for the first time, but if this is to be anything other than a mere puff, then it should provide guidance for the EU in its actions, and also an indication of what the EU is about. It ought to have some practical resonance, but it must also be meaningful – to use a well-worn phrase, it should capture hearts and minds. But hearts and minds appear to be captured in different ways. Weiler argues that, 'In seeking separation Scotland would be betraying the very ideals of solidarity and human integration for which Europe stands', suggesting that it is this very demand for independence that should disqualify Scotland from the EU. But then what sort of EU would it be, that disqualified a country from membership for making a democratic and legitimate choice of independence? Would it be compatible with the EU's own respect and promotion of democracy if it denied Scotland's EU membership on this basis?

Weiler finds the desire for Scottish independence to be an 'irredentist form of euro tribalism' incompatible with the ethos of a EU identity based on multinationalism and solidarity with other peoples. Yet it is hard to place Scotland, or indeed some other cases of 21st century secession movements, in the mould of nationalism and tribalism. Such movements reveal a lack of essentialist thinking, and focus instead on a democracy that the EU itself shares. This is not the 'Braveheart' caricature of nationalism that the media sometimes like to portray. As Nicolaidis suggests, the *demoi-cratic* spirit of the EU may actually be enhanced by amicable divorce.

There are other ways of understanding the desire for independence than as a nationalist impulse to disintegration and economic self-interest, fuelled by a 'what's in it for us' mentality. An alternative is to notice the ways in which the desire for self-governance is linked to decentralization, localism, but also interconnectedness, and *subsidiarity* – another principle that looms large in the EU treaties. Kochenov argues that the values on which the EU is founded are precisely those intended to disrupt the post Great War tribalist mentality, but this does not mean that they must be unfriendly to self-determination movements. The Scots are seeking to escape the sovereignty of the UK Government, but, as Neil Walker argues, the EU itself changes the significance of national sovereignty, recasting it as something less absolute, something sometimes pooled, voluntarily ceded for principled reasons. The rejection of membership of one union (the UK) need not be inimical to participation in another (the EU). The existence of the EU recasts and

reforms traditional ideas of sovereignty and belonging into something more impalpable.

However, as Closa reminds us, important though democracy is for the EU, it is only one of the values expressed in Art 2 TEU. It is not an absolute value and he insists it should not be expressed in a way detrimental to other values such as the rule of law. Nor should one country's democratic transfer to independence within the EU be at the expense of other member states' rights, nor threaten the integrity of the EU's lawful procedures. Closa cites Hungary as an example of a country in which democratically mandated actions threatened the rule of law. But in what way are other values and legal processes compromised by Scotland's desire for independence? Perhaps the worry is that some sort of special case might be made for Scotland, that Treaty procedures will not be followed – a sort of favouritism of Scotland at the expense of other member states. (Set aside the fact that the EU is a creature of negotiation, and special pleadings, tradeoffs and deals are very much part of its *modus operandi*.) In response to Closa, I would argue that the continued discussion as to whether Art 48 or 49 TEU should be at issue reveal a concern with lawfulness and a determination to ensure actions can be made to conform with treaty procedures.

Questions legal and practical

This leads on to the other broad area of discussion within this symposium – arguments of a legal or practical nature – taken up by Piet Eeckhout, Bruno de Witte, Christophe Hillion and Jo Murkens – for example, the issue of the treaty route into Scottish membership, or its exact terms.

Should we worry whether Art 48 rather than Art 49 will govern the proceedings, if Scotland becomes independent? There is no 'right answer' clearly deducible from the treaties. Nonetheless, it is surely pertinent that Scotland is simply not in the same position as an applicant that has never been a member of the EU. The Art 49 process is premised on outsider status, a starting from scratch, appropriate in the case of countries such as Romania and Bulgaria, which had until recently been subject to very different economic conditions, and needed to demonstrate that they could satisfy the conditions of EU membership. Scotland does not have to do this, having been within the EU for over 40 years.

However, another reason given by Murkens for preferring Art 49, is that under Art 48, the formal application for treaty amendment would have to be made by the UK government (which would be the official member state until Scotland formally achieves independence) and there is a risk of the UK government hijacking this process, having reasons of its own to slow things down, perhaps using it to renegotiate its own membership with the EU, as Cameron has been desirous of doing. However, if the UK were to act in this way it would breach s30 Edinburgh agreement, which requires that '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.' Also, we might ask why the UK would wish to prolong and problematize an independent Scotland's membership – UK companies, students, workers and citizens generally would pay a heavy price for such disruption.

But in reality, one should not be too bogged down by the question of whether Art 48 or Art 49 applies. The EU has for all its history functioned in the context of negotiations and pragmatic solutions. As Piet Eeckhout persuasively argues, it is highly possible that, 'a slightly creative reading of Art 49 would enable a soon-to-be independent Scottish State to make a membership application.' Both Tierney and Keating make a persuasive argument that the *Quebec Secession case* illustrates how the democratic reading of a constitution (in that case the Canadian constitution) may, even in the absence of a clear legal imperative, give rise to a duty to negotiate, and suggest that, by analogy, a similar obligation may be inferred in the case of the EU, especially given that the principle of democracy, along with citizenship, are express EU constitutional commitments.

Realpolitik

Some responses, forceful and heated in their identification of pitfalls and problems for independent membership, aim to contribute a cold shower of *realpolitik*. In particular, the term 'seamless transition' appears to have enraged some, becoming a term of derision. But 'seamless transition' is not an expression I have ever used, although it may have figured in some of the Scottish Government's materials on this subject. Treaty amendments and negotiations there will have to be, but none of them I believe fatal to the enjoyment of acquired rights of EU citizens (Scottish or otherwise, and, *contra* Weiler, I do not believe that Scots are likely to lose their status as EU citizens, as the UK government has made no explicit statement that it will strip them of UK nationality).

Murkens argues that I fail to acknowledge the current political context in which 'Germany, France, Italy, and Spain can have no interest in witnessing the diminution of the UK and in setting a precedent for other European secessionist movements', noting that 'Spain, Slovakia, Romania, Greece, Cyprus did not recognise Kosovo's unilateral declaration of independence in 2008 in order not to set a precedent for separatists in their own countries.' A comparison with Kosovo was also made by Barroso in his now infamous comments about Scottish EU membership. It is an irrelevant and unfortunate comparison. The Edinburgh Agreement states that a referendum will 'deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect.' Any decision by the Scots on independence will possess a legitimacy that it would be impossible for the EU to ignore.

The key point here is that an independent Scotland would be the result of a legitimate referendum process secured with the full agreement of the UK government and fully constitutional. It is not remotely comparable to a unilateral declaration of independence. No EU member government has yet stated that they will veto Scottish membership. Indeed, the consequences of so doing could be very unpalatable – nationals of other EU member states have directly enforceable EU law rights in Scotland. If Scotland's membership were automatically terminated they would become illegal immigrants, find their students charged much higher university fees at Scottish Universities, and lose access to valuable resources such as fishing rights in Scottish waters. Therefore, although a Hobbesian view of the EU might dictate a vision of self-interested member states vetoing Scotland's membership, both principled reasons (the legitimacy of the independence process) and practical reasons (disadvantages of suspension of Scottish membership) argue against a bumpy process whereby Scotland's membership is vetoed.

Some contributions raise concerns that that an independent Scotland would not be fully compliant with the EU *acquis*. But Scotland has been a member of the EU for 40 years. Is it really likely that Scotland cannot, in its own right, ensure stability of institutions guaranteeing democracy, rule of law, human rights and respect for and protection of minorities (key values of EU law, which are also to be found in the Copenhagen criteria for membership of new member states)? If East Germany and Bulgaria and Romania could be absorbed into the EU despite huge structural differences, would an independent Scotland be denied membership on account of lack of economic convergence? To argue otherwise would be to discriminate against Scotland. It is true that it has thus far complied with the *acquis* as a member of the UK, rather than as independent country, but how significant a distinction is this? De Witte notes that there are still matters to be settled, for example who will represent Scotland in the EU's various institutions and working groups. These may be sometimes taxing issues, but surely not insurmountable.

The *acquis* argument really boils down to the position an independent Scotland would take on a small number of specific opt-outs which the UK has negotiated, such as opt outs from the euro, Schengen and the UK budget rebate. While these are not simple issues, they are not intractable. Space prevents a detailed discussion here, however, so I give just one necessarily brief example.

For example, take the case of Schengen. Would Scotland have to sign up to the Schengen agreement as is required of new member states, notwithstanding the opt-out it currently enjoys as part of the UK? Given that Protocol 20 expressly recognizes the particular circumstances of the Common Travel Area between the UK and Ireland, it seems unlikely that Scotland's special relationship with rUK and Ireland would be denied by a mandatory imposition of Schengen rules. Indeed, if Scotland wished to adopt Schengen, this would be far more complicated than remaining within the CTA, and it is unlikely that the EU would accede to such a request immediately on Scottish independence.

Enthusiastic, engaged or eurosceptic?

Lastly, Murkens faults me for 'provid(ing) no answer to the question as to what kind of member an independent Scotland would be'. I feel this is a bit unfair, as the stated purpose of my paper was to consider what the EU position on Scottish membership should be, and to rebut arguments of those EU officials who had taken a negative position on the subject. To have then taken on board this very large subject would have led to a different and very long paper indeed!

However, I believe we can be confident that an independent Scotland's attitude to the EU would be more positive than that of the current UK government. Alex Salmond stated in the College of Europe in Bruges 2014, (and reiterated more recently) that 'an independent Scotland would be an enthusiastic, engaged and committed contributor to European progress'. UKIP support was much lower in Scotland at the 2014 EU Parliament elections than in English constituencies. Is there any reason to believe that Scotland would perpetuate the fractious relationship that the UK has recently maintained with the EU? Michael Keating has argued persuasively that Scotland, as a small state in the EU, could enjoy a positive relationship with the EU, and I find much that is attractive in his arguments.

In conclusion, I believe that we should not overestimate the obstacles that a newly independent Scotland would face in securing EU membership in its own right. Yes, there would be a need for negotiation, but the history of the EU as well as its (necessarily) pragmatic bent, should enable these negotiations to be carried out without a suspension of Scotland's membership. The obstacles that other member states, acting in self-interest, might raise should also not be overstated. EU membership should not become another element in a politics of fear.

In a couple of days we will know exactly how pressing and actual these issues are. But the Scottish example forces us to confront squarely the question of what is this 'unidentified political object', the EU. May this debate continue!

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