Why the EU should welcome an independent Scotland

Sionaidh Douglas-Scott 2014-09-08T08:00:35

With the Scottish referendum vote imminent, every issue of relevance to the debate on Scottish independence takes on crucial significance.

In the context of Scotland's EU membership, there has been a polarisation of approaches, which in the arena of politics is probably only to be expected. The UK Government and 'Better Together' view may be roughly summarized as arguing that standard rules of international law would govern the process of an independent Scotland's EU membership, and that Scotland would have to apply through the standard accession provision in the Treaty, Article 49 TEU, in the same way that totally new countries, such as Croatia, have done. This view assumes that in voting for independence, Scotland would also be voting to leave the EU, an approach vehemently denied by the Yes Scotland campaign.

In contrast, the Scottish Government argue that an independent Scotland's EU membership could take the form of an 'internal enlargement' of the EU, using the procedure for treaty amendment in Article 48 TEU. Alex Salmond's, characteristically trenchant response to arguments that emphasize the difficulties of Scotland's EU membership has been to argue that,

> the only threat to Scotland's place in Europe comes from David Cameron's in-out referendum as Westminster dances to a UKIP tune and flirts with the exit door of the EU.

My approach, set out at length elsewhere, has been to examine the issue from the perspective of *the EU itself and EU law*. Writing as a Scot who lives in England, and thus is not entitled to vote in September's independence referendum, I aim to be neutral on the issue of independence, seeing good and bad arguments on both sides of the debate. However, I might add that I have been influenced by many of the writings of the late Neil MacCormick (an enthusiastic supporter of an independent Scotland within the EU) in the fields of jurisprudence, EU law and public law, fields that I have myself researched and taught for 25 years. MacCormick's work was ever open to the newness and special nature of the EU, as well as to the need for an understanding of law alert to law's relation to public values, and its impact on human beings. The comments below focus on the importance of an EU perspective on an independent Scotland's EU membership, highlighting the EU as a distinctive, *sui generis* and new type of legal organisation. They argue that a strong case can be made for Scotland's continued EU membership on the basis of EU law itself. Bearing this in mind, the crucial issues seem to be these:

1. The issue of a newly independent Scotland's EU membership is not addressed explicitly by EU law

Within EU law, there exists no precedent for what happens when a territory of an existing Member State becomes independent, and wishes to retain EU membership. The EU treaties do not provide for such an event. While Article 49 TEU deals with the situation of new applicant countries, Article 48 TEU deals with amendments to the treaties by existing members, but neither deal with Scottish situation directly or explicitly. The process by which a separate Scotland may become a member of the EU is therefore subject to speculation. Notwithstanding, the UK Government has taken the view that an independent Scotland would have to reapply for EU membership using the Art 49 procedure. This is also the view taken by former Commission President Barroso, and some academics and practitioners. However, this view is not inevitable, and may not even be well reasoned.

2. Barroso and the UK Government view ignores the distinctive nature of EU law

The problem is that this view misconstrues both the EU itself and EU law. In stating that: 'If a country becomes independent it is a new state and it has to negotiate with the European Union', Barroso was looking to international law, rather than the more specific and singular concepts that EU law has built up over its near 60 year history.

The EU is a *sui generis* organisation and the European Court of Justice has long held that, while a creation of international law, it constitutes a distinctive new legal order.As the Court famously stated in *Van Gend en Loos*, 'the Treaty is more than an agreement which merely creates mutual obligations between the contracting parties'. Perhaps the most striking way in which EU law early distinguished itself was by its focus on individual rights (not traditionally a concern of international law). Moreover, EU law does not have a straightforward relationship with international law, in which international law always takes priority. Indeed the European Court has on occasion refused to apply international law measures on grounds of their incompatibility with EU law, such as UN Security Council Resolutions in the 2008 *Kadi* case.

EU law therefore manifests itself as a new and singular legal order that goes beyond the traditional state-based concerns of international law, differentiating itself from other international organisations. EU law also characteristically takes a *pragmatic and purposive* approach to pressing issues that are not dealt with by specific treaty provisions. There was no explicit provision in the treaties capable of dealing with the situation of German unification in the 1990s. But the (then) EEC Institutions responded to this event in a practical and expedient manner, enabling a united Germany to become a member of the EU without long drawn out negotiations, accession proceedings or legal wranglings. I argue that such a pragmatic approach should be applied in the case of Scotland.

3. EU law rather than international law governs the issue of an independent Scotland's membership

In any case, those who provide support for the UK Government's view, such as Alan Boyle and James Crawford, acknowledge that membership of international organizations such as the EU, 'depend on the particular constitution or rules of each organization',[1] rather than deriving from one comprehensive rule of international law. It all depends on the rules and practice of each organization and is often determined by negotiation and agreement rather than law. And many international organisations automatically recognise secession states as members.

However, in spite of acknowledging that even under international law, the practice is to look to the distinct rules of the specific organization, for some reason Boyle and Crawford do not consider that EU law provides an affirmative answer to the continuation of Scottish membership. In contrast, I argue that the particular constitution and rules of the EU provide sufficient resources for an independent Scotland to continue EU membership through the treaty amendment route in Art 48 TEU. I shall now consider this argument in more detail.

4. EU law provides the resources for Scotland's continued EU membership

There are sufficient resources in EU law to deal with Scotland's continued EU membership, a matter for which Boyle and Crawford – and others – do not make allowance. The relevant provisions in particular are Arts 4(3) and 50 TEU, but EU citizenship and EU values and principles also provide some pretty compelling reasons.

a) The principle of sincere cooperation and the relevance of Art 50 TEU

Art 4(3) TEU sets out a 'principle of sincere cooperation', by which the EU and Member States shall 'assist each other in carrying out the tasks which flow from the Treaties'. It is clear that one of the most significant tasks that flows from the EU Treaties is the promotion of the EU's Single Market.

A salient objection to the Barroso and UK Government position is that it would foster immediate discontinuity within the Single Market. For, according to this view, on becoming independent, Scotland would, as a non-EU state, be ejected from the EU. Its exodus would be automatic. Yet it is not clear from which treaty basis such an automatic ejection derives.

Automatic ejection certainly stands in contrast to the formal procedure for withdrawal from the EU in Article 50 TEU. Indeed, Article 50 is the only provision in the EU treaties for withdrawal from the EU, and it sets out procedures and obligations that apply to both the withdrawing Member State and the EU institutions, with the aim

of minimizing dislocation and disorder. It obliges them to negotiate and to conclude an agreement, providing a 2 year period to do so, thus confirming that withdrawal is not to be automatic. The example of Greenland, which took well over 3 years to withdraw from the EEC as then was, illustrates just how long it can take for a territory to withdraw.

The presence of Article 50 acknowledges that acquired EU rights and mutual dependencies cannot be immediately extinguished. For example, nationals of other EU member states have directly enforceable EU law rights in Scotland regarding free movement of workers, free movement of goods, and freedom of establishment. Scottish nationals possess corresponding rights in other Member States. If Scotland's membership were automatically terminated they would become illegal immigrants. The existence of Art 50 evidences the lack of any capacity in EU law automatically to terminate such rights, and Art 4(3) illustrates the obligation of EU institutions and states to recognise acquired rights and obligations through a duty of sincere cooperation.

b) EU citizenship

A separate but related argument relies on the privileged position of individuals as subjects of EU law, to emphasize the crucial importance of EU citizenship. According to Article 9 TEU and Article 20 TFEU, 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.' However, in 2001 *Grzelczyk* case, the European Court famously declared that 'Union citizenship is destined to be the fundamental status of nationals of the Member States', and, from the relatively humble roots of EU citizenship in the Treaty of Maastricht, the European Court has added flesh to the bones of this concept through a series of cases, most recently *Rottmann* (2010) and *Zambrano* (2011).

If Scotland were to lose its EU membership on date of independence, its citizens would still be EU citizens, because they will still hold UK nationality (unless, for whatever reason, they choose to revoke and disown their UK nationality, or the UK decides to revoke their UK nationality, which seems unlikely).

To be sure, the doctrine of EU citizenship cannot by itself engender automatic membership of the EU for an independent Scotland. It would be necessary for the treaties to be amended. However, we should not underestimate the central importance of EU citizenship to the issue of an independent Scotland's EU membership, which requires that, as Aidan O'Neill argues, 'rather than analyse the matter from the classic viewpoint of public international law (…) EU law requires one to look at the issue from the viewpoint of the individual EU citizen.' Given this importance, it is unlikely that the European Court would consider that Scottish independence deprived Scots of their acquired rights as EU citizens.

c) An EU of values

A focus on the Single Market should not eclipse fundamental issues that inspired the original EEC in the post-war period, namely a search for peace and stability in Europe and the protection of democratic values. Neil MacCormick found an apt description when he described the EU as a 'commonwealth' whose members have certain vital interests of peace and prosperity in common. Scottish self-determination is part of this democratic development, as it has evolved through the devolution process.

Democracy is proclaimed as one of the EU's values in Art 2 TEU and the EU is eager to vaunt its adherence to these values. As such, the EU's very raison d'être is at issue here. How could an organization such as the EU, that has promoted the cause of democracy at home and abroad, act in such a way as to dispossess Scots of their acquired rights and EU citizenship as a result of Scotland using the democratic right to vote for independence? Such a move would seriously undermine the EU's claim to be a promoter of democracy.

The EU's respect for fundamental rights also provides a further argument. There exists a compelling school of thought in international law that human rights treaties automatically bind successor states.[2] The European Court in *van Gend* stressed the importance of rights. While the TEU and TFEU may not be predominantly human rights treaties, the EU Charter of Fundamental Rights is most certainly one, and, under Art 6(1) TEU, it has the same legal value as the Treaties. Moreover, in the 2008 *Centro Europa 7* case, Advocate General Maduro asserted that, 'Protection of the common code of fundamental rights accordingly constitutes an existential requirement for the EU legal order.' In *Kadi*, the European Court stated that respect for fundamental rights is an integral part of the EU legal order. So there is a strong argument to be made that, as a Union based on human rights, EU law requires the recognition of the invocability of EU fundamental rights by Scottish citizens, rather than their termination by independence.

In any case, at the very time that members of the UK Parliament are trying to pass legislation to disapply the Charter of Fundamental Rights in the UK,[3] there is a dignity, if not an irony, in calling on fundamental rights as an added ground for Scotland's continuing membership of the EU.

Therefore the EU and is member states should have regard to the values and principles of the EU, and indeed its very reason for existence, instead of making statements that counter and undermine its character. The case of Scottish independence makes very clear the need for the EU to self-interrogate as to its values, and to use arguments with a public reason character that take it beyond an instrumental economic rationale or a grounding in international law. I believe that the European Court, given its past record for purposive and expansive rulings that stress the importance of individual rights, provides in the rich body of EU caselaw an ally for Scotland in its search for a smooth transition to EU membership in its own right. The EU is very much a creature of law and the law is working in Scotland's favour.

5. A Principled and Pragmatic approach

However, it is not just EU law that can provide support for the Scottish case. More generally, the EU adopts a pragmatic, serviceable and functional approach that has enabled it to weather many apparently intractable crises, in which the treaties have been lacking in specific guidance. This ad hoc, practical approach is also helpful to Scotland, ensuring that both it, and the EU, can get through the issue of Scottish independence without a full-blown crisis. A way would be found, despite all the Cassandra like warnings emanating on this matter.

I have argued that the principled and practical route to take, should Scotland choose to become independent in September 2014, is that of Article 48 TEU, that deals with Treaty amendment. This would be a form of internal enlargement for the EU, and in this way, Scotland's uninterrupted membership of the EU could be preserved. Such a route takes account of both member states' and EU Institutions' obligations under Article 4 TEU, as well as taking seriously the EU's proclaimed statement of values, which include democracy and fundamental rights.

However, perhaps I am perhaps not so very far from those of my colleagues who insist on the Article 49 route. While preferring the Article 48 internal enlargement route, the primary concern is that Scotland's EU membership remain uninterrupted, and that acquired rights and obligations be preserved. The fear is that the Article 49 route, by transforming an independent Scotland into a non-EU, candidate state, would cast Scotland into a non-EU wilderness. However, as noted, the EU characteristically takes a pragmatic approach to pressing issues that are not dealt with by specific treaty provisions. There was no explicit provision capable of dealing with German unification in the 1990s. But the (then) EEC responded to this event in a pragmatic manner, enabling a united Germany to become a member without protracted negotiations. I argue that such a pragmatic approach should be applied in the case of Scotland.

Some warn of the danger of a challenge to an Art 48 treaty amendment being made by another member state, leading to protracted litigation, during which time Scotland's membership remains in legal limbo. But even if there were to be such a challenge, would it be likely that Scotland's membership be suspended in the interim? I doubt it.

While undesirable from the point of legal certainty, it is likely that, if legal challenges were made to Scottish membership, or if negotiations over Scotland's membership were not completed by March 2016, or even if the Art 49 accession route were to be followed, then a provisional arrangement would be made to continue Scotland's existing relationship with the EU, to ensure that EU citizens' rights and obligations were respected, and the Single Market not compromised. This would not be the same thing as a Scotland ejected from the EU, as warned by disaster mongers of the UK government. The very nature of EU law, and its pragmatic and purposive approach, lead me to be skeptical as to any alternative result, other than continuity and respect of acquired rights and obligations.

6. Conditions of membership

Finally, problems in securing certain conditions of Scotland's EU membership are often cited as insurmountable obstacles to continued Scottish membership – in particular the issues of the UK Budget Rebate and opt-outs from the euro and Schengen. Space prevents any detailed consideration of these matters here. However, while these raise some important issues, I do not believe them to be the huge obstacle that some do, largely on the basis of the arguments already made elsewhere, namely the likelihood of a pragmatic and practical approach being taken by the negotiating parties. I do not, however, see any way that an independent Scotland could continue to charge university fees to rUK students. Such a measure would simply be inimical to key provisions of EU law on free movement and non-discrimination.

7. Conclusion

In closing, we might remember the words of the late Neil MacCormick, who wrote of the EU in the following words:

> For this is a new form of political order, a new kind of 'commonwealth', which offers the hope of transcending the sovereign state rather than simply replicating it in some new super-state . . . It creates new possibilities of imagining, and thus of subsequently realizing, political order on the basis of a pluralistic rather than a monolithic conception of the exercise of political power and legal authority.'[4]

I cite MacCormick at length because I believe the nature of the EU – this 'new kind of commonwealth' – to be crucial here. EU law is not just a branch of international law. It is a new kind of legal order, very much concerned with individuals and their rights. It cannot ignore those individuals and their rights in the case of an independent Scotland. This issue should not be straitjacketed by existing modes of international law, nor by the exigencies of the 'monolithic conceptions' of political power of which MacCormick writes. Whatever the result on September 18, the EU would do well to remember its heritage, its special nature and its mission for the peoples of Europe, if it wishes to capture the hearts and minds of its citizens. Otherwise, the causes of euroscepticsm will flourish, and arguably, we will all be worse off.

[1] Boyle and Crawford, in their *Opinion* at para 184, refer to Article 4 Vienna Convention on the Succession of States in Respect of Treaties 1978, which expressly states that succession to constituent instruments of an international organization is: 'without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization.'

[2]Such a view is evidenced by the UN Human Rights Committee's General Comment No. 26 on the continuity of obligations

[3]House of Commons European Scrutiny Committee, 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' Forty-third Report of Session 2013–14.

[4]N MacCormick, Questioning Sovereignty (OUP, 1999) at 191.

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