A Tale of Two Referendums

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A Tale of Two Referendums: Scotland, the UK and Europe

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I. Introduction

On 18 September 2014 Scots were asked the question: ‘Should Scotland be an independent country?’. 55% said No on a turnout of 84%. The referendum on Scottish independence produced much debate concerning how an independent Scotland would come to membership of the European Union. In this chapter we will reflect upon this debate since it is of on-going significance for a number of reasons. The first is the way in which it opened up discussion about membership of the EU for sub-state territories, a debate which has resonance beyond the borders of the UK, most obviously in Spain. Secondly, the Scottish independence debate is unlikely to go away and may well be revived by Scottish nationalists in the medium term, reviving the whole debate about how a region of Europe can join the EU from within. Thirdly, the referendum has led to a process to devolve more and more powers, particularly fiscal responsibility to the Scottish Parliament, which may well see Scotland seeking to develop specific, bilateral economic ties with its European partners as it seeks to use these powers to develop a distinctive economic trajectory. And fourthly and most dramatically, the plans by the Conservative Party to stage an in/out referendum following the 2015 General Election could well reawaken the issue of Scotland’s place in Europe, particularly if Scots are faced with withdrawal from the European Union.

I will not turn to how the issue of EU membership became so central to the Scottish independence debate, exploring the issue of whether and if so how Scotland would have achieved membership of the EU. In Part III we will turn to the question of how the current debate over the UK’s membership of the EU has a territorial dimension within the UK, and the potential scenarios that might follow respectively a Yes or No outcome in a referendum on whether or not the UK ought to exit the European Union.

II. The Impact of EU issues upon the Scottish Independence Debate

Background: the status of EU law in Scots law

The law of the European Union has effect in Scotland. The European Communities Act 1972 provides that all rights, powers, liabilities, obligations and restrictions created by or arising under EU treaties will be recognisable and given effect to in UK law.¹ The Act also ensures that courts in the UK are bound by decisions of the Court of Justice of the European Union (CJEU).² The primacy of EU law, in areas of EU competence, is further reinforced by Section

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¹ European Communities Act 1972, Section 2(1).
² European Communities Act 1972, Section 3.
2(4) of the Act which provides that any legislation passed after the entry into force of the Act should be construed and given effect to in accordance with EU law. This hierarchical relationship reflects the doctrine of the supremacy of EU law as developed by the CJEU. The domestic jurisprudence of the UK courts has also evolved in light of the Strasbourg case law, to the point where national courts are prepared to disapply primary legislation of the UK Parliament which is inconsistent with EU law. The jurisprudence of the CJEU also affords individuals the right to rely on EU law in national courts under the principle of direct effect.

In Scotland, which has its own legal system, the jurisprudence of the Factortame and related cases has been fully accepted. Furthermore, EU law is accorded specific primacy in relation to the executive and legislative organs of Scottish government by the devolution settlement of 1998.

How would an Independent Scotland have negotiated membership?

It was the intention of the Scottish Government that, following a Yes vote on 18 September 2014, negotiations would begin to bring about an agreement with the UK Government as to the terms of Scottish independence, leading to a declaration of independence in March 2016. The Scottish Government intended that negotiations would also take place with the European Union during this interim period to bring about Scottish membership of the EU on the same date as independence from the UK is achieved.

A crucial issue during the referendum campaign was how steps would be taken, concurrently with these domestic negotiations, to secure Scotland’s membership of the European Union. This issue was of considerable significance for the UK as a whole, given the commitment of the Conservative Party to hold a referendum on EU membership, provisionally scheduled for 2017. This chapter is concerned principally with Scotland’s membership of the EU, but the uncertainty relating to the UK’s commitment to the EU could well have been a factor in negotiations both between the two governments and in Scotland’s discussions with the EU itself, and may well keep the independence debate alive.

Parties to Negotiation

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3 See Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) Case 26/62 where the Court of Justice held that EC law constitutes a discrete system of law which operates with direct effect in Member States, and Costa v Enel (1964) Case 6/64 where the Court held that EC law supersedes national law including the constitutional law of Member States in cases of incompatibility between the two legal systems.
7 The Scotland Act 1998 (s.29) provides that any provision of an Act of the Scottish Parliament is ultra vires if it is incompatible with EU law, and (s.57) that Ministers of the Scottish Government have no power to act incompatibly with EU law.
9 Scotland’s Future, pp. 20, 51, 338.
10 ‘In the period between a vote for independence on 18 September 2014 and independence day on 24 March 2016 agreements will be reached with the rest of the UK, represented by the Westminster Government, and with the EU and other international partners and organisations’. Scotland’s Future, p.338, See also: ‘The UK and Scottish Governments, along with the EU institutions and Member States, will have a shared interest in working together to conclude these negotiations to transfer Scotland’s EU membership from membership as part of the UK to membership as an independent Member State.’ Scotland’s Future, p.53.
In the period immediately following a Yes vote Scotland would not have been an independent state of course and, therefore, if negotiations were to commence in relation to Scotland becoming an independent member of the EU, it was unclear who would take part in such negotiations or how they would be conducted.

The situation was unprecedented. No territory has ever joined the European Union from the inside as it were, seceding from an existing Member State.11 Two main options presented themselves. The first was a bilateral process conducted by the UK on Scotland’s behalf with the institutions of the EU. In these negotiations Scottish representatives could attend on behalf of the UK. In our view a more likely scenario was that the Scottish Government would itself be represented in these talks. Another issue was whether negotiations with the EU would involve only the Scottish Government negotiating for Scottish membership and EU officials, or whether they would include representatives of the United Kingdom whose membership would inevitably be affected by the transition. A tripartite process was the more likely scenario, particularly as it would have been necessary at some point to adjust the UK’s level of representation within European institutions.

**The United Kingdom’s position**

One argument was that it would not have been in the UK’s interests to help negotiate Scotland’s accession to the European Union. And in the course of the referendum campaign, the UK Government certainly set out to accentuate the potential difficulties Scotland would face in seeking to join the EU.12 But we need to distinguish positions adopted during a referendum campaign from those likely to be taken following a Yes vote. While it was clearly not in the interests of the UK Government prior to the referendum to suggest that the process towards Scotland’s EU membership would be smooth (indeed accentuating uncertainty over Scotland’s EU position was a key strategy of the Better Together campaign), following a Yes vote the UK Government would most likely have considered it to be in the UK’s interests to have its close neighbour inside rather than outside the EU, particularly if the two countries continued to share matters of vital interest.

The current devolution arrangements governing relations between the UK government and the devolved governments provides for a spirit of cooperation.13 The Scottish and UK administrations have tended to cooperate well over relations with the EU, even when the

11 The Scottish situation must be distinguished from cases where territories in effect were withdrawn from the jurisdiction of the European Communities, as were Algeria and Greenland: Stephen Tierney, ‘Legal Issues Surrounding the Referendum on Independence for Scotland’, (2013) European Constitutional Law Review 359-390, p.382.

12 In a policy paper the UK Government argued that Scotland’s negotiations to join the EU ‘could be complex and long, and the outcome could prove less advantageous than the status quo’. It contended that Scotland will face difficulties in negotiating membership of the EU, in particular in any attempt to secure similar terms to the existing membership arrangements which the UK enjoys as a Member State. The UK Government argued that Scotland would not be able to secure the same terms in relation to monetary union, Schengen, the budgetary rebate, and would no longer have the guaranteed support of the rest of the UK in relation to matters of common interest such as fisheries policy. ‘Scotland Analysis: EU and International Issues’, (HM Government, January 2014), p.55.

13 Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee’, 2000, as updated in September 2012. This Memorandum also informs the approach underpinning the Edinburgh Agreement by which the UK and Scottish Governments agreed terms for the holding of the referendum: ‘Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland’, 15 October 2012.
parties in office in Edinburgh and London have been ideologically very different. This may have changed following a Yes vote since the principles of cooperation were based upon common interests within one state. Nonetheless, there are strong reasons to believe that an independent Scotland and the rest of the UK would have continued to share many common interests in relation to the EU, not least a resistance to monetary union through the Euro and a common approach to border controls.  

This leads also to the Edinburgh Agreement, the terms of which provided that the two governments would work together in the best interests of the people of Scotland and of the rest of the UK following the referendum. This did not expressly commit the UK Government to helping facilitate Scotland’s membership, but it was widely viewed that the mutual interests of both peoples would have been best served by Scotland’s membership of the EU.

Attitude of the European Union

The position of the EU institutions was not entirely clear. Former President of the European Commission, Jose Manuel Barroso, said it would be ‘extremely difficult, if not impossible’ for an independent Scotland to join the European Union. This view was heavily criticised by observers, and was neither substantiated nor elaborated upon by Mr Barroso. On the other hand, Jean-Claude Juncker, elected on 15 July 2014 to succeed Mr Barroso as the new President of the Commission (his appointment as President took effect from 1 November 2014), was reportedly ‘sympathetic’ to an independent Scotland joining the EU. Although Mr Juncker took the general view that there should be no further enlargement until 2019, clarification from EU officials indicated that this ‘ban’ on further enlargement did not apply to an application for membership by a newly independent Scotland which would be treated as a ‘special and separate case’ as it already meets ‘core-EU requirements’. One of Scotland’s MEPs, David Martin, also suggested that the EU Commission would recommend membership for an independent Scotland and that this process towards accession could begin on an informal basis before independence.

Treaties and Admission

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14 We should also note of course that the currency union issue was contentious and that there could be other pressure points. For example, if the Scottish Government sought to charge UK students tuition fees higher than those charged to other EU citizens. See Niamh Nic Shuibhne, ‘University Fees and rUK Students - the EU Legal Framework’, Scottish Constitutional Futures Forum Blog, 18 December 2013. http://www.scottishconstitutionalfutures.org/OpinionandAnalysis/ViewBlogPost/tabid/1767/articleType/Article View/articleId/2759/Niamh-Nic-Shuibhne-University-Fees-and-rUK-Students--the-EU-Legal-Framework.aspx


It was always highly likely that in the event of independence the rest of the UK would have continued in membership of the European Union, although there would also have been a need for treaty amendments to accommodate a smaller UK in a proportionate way within European institutions. But how would Scotland have been admitted to membership? The European treaties do not provide for the situation of a territory joining from the inside as it were.

In light of the uniqueness of the Scottish situation we saw a debate among commentators concerning whether Article 48 or 49 TEU would offer the more appropriate route. Article 49 provides the process for new applicant States, joining the EU from the outside (hereafter ‘formal accession’). By this provision a new State needs to apply for EU membership leading to an accession agreement that would require to be sanctioned unanimously and ratified by all Member States. There are a number of criteria laid down in Article 49 and if these are met then accession is effected by the unanimous decision of the Council, a majority decision of the European Parliament, and subsequent ratification of the accession treaty by the Member States in accordance with their own respective constitutions. It was argued by some that this was the only feasible route by which Scotland could accede to the EU. Another possibility was that accession could be arrived at by way of treaty amendments, deploying Article 48 in a process which would be, on the face of things, less cumbersome.

It would appear that both Articles 48 and 49 offer plausible routes to membership for sub-state territories seeking to join the EU from within, with the Article 48 route endorsed as a possibility by, for example, David Edward. Both of these routes were discussed at some length by Tierney in an earlier paper. It seems that in the end Article 49 may, however, be the more plausible route for membership for a sub-state territory moving to independent statehood. Herman Van Rompuy, President of the European Council, took this view.

Another reason is that the case law of CJEU establishes that specific articles have preference over general ones. While Article 48 provides a general route to membership, Article 49 is the only article which specifically deals with accession and admission of a State as a member of the EU. And on this basis it would seem to be the default route.

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22 Crawford and Boyle, para 150.

23 Jean-Claude Piris, unpublished paper presented at European University Institute, 2 July 2014 (on file with the authors).


See also Bruno de Witte, ‘Seamless Transition? Scottish Membership of the EU by Means of Treaty Revision Rather than Accession’, unpublished paper presented at European University Institute, 2 July 2014 (on file with the authors), who also considered the Article 48 route to be feasible, as did Sionaidh Douglas-Scott, ‘Why the EU Should Welcome and Independent Scotland’, Scottish Constitutional Futures Forum blog:


We see the expression of this view in advice to the Scottish Parliament by Jean-Claude Piris, the former Legal Counsel of the European Council and of the EU Council and Director General of the Legal Service of the EU Council (1988-2010):

‘On a formal legal point of view, the case law of the Court of Justice of the EU establishes that one cannot choose freely an article of the EU Treaties to adopt an act or make a decision. The Court refers to «the aim and content» of an act or decision as being the only way to determine the correct choice of its legal base. It also stresses that specific articles have priority upon general ones. Article 49 is the only article in the EU Treaties which provides the specific procedure to be followed for the admission of a State as a member of the EU. Article 49 specifically mentions that adjustments to the Treaties will be entailed by the admission procedure, and that they will be dealt with at the same time and in the same international agreement which will contain the conditions of admission. The sole aim and content of the decisions to be made in the present case would be the admission of Scotland in the EU. Article 48 does not deal with the issue of the admission of a State as a member of the EU but, in general, with possible amendments to the EU Treaties. I will thus conclude that, from a formal legal point of view, article 49, which deals specifically with admission, must be followed in any case of admission…’

This is of course the position as Mr Piris sees it from a ‘formal legal point of view’, and it is open to the EU to adopt a different process if it sees fit, applying Article 48 if this is preferred. This could be the case if the process were not to be treated as one of formal accession for example, but as a way of realigning the treaties to admit Scotland and perhaps at the same time adjusting the UK’s representation within EU institutions. But in such processes it seems wise not to assume that formal legality will hamstring political decision-making. As Michael Keating has noted: ‘European leaders do not normally look to law to tell them what to do. They decided what they want to do politically and then find a legal means.’

So while Article 49 looks the more plausible route, Article 48 remains a feasible alternative for sub-state admission. Regardless of whether Article 48 or 49 is used, a crucial factor is that the ratification of all Member States will still be needed either for a new accession treaty or for treaty amendments.

**Period of Negotiation and Process of Membership**

As noted, it was the Scottish Government’s intention that negotiations with the EU, as well as ratification of any treaty or treaty amendments, would be concluded within 18 months in order to achieve Scotland’s full membership of the EU at the same time as independence from the UK.

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28 See de Witte op. cit.
A number of commentators were sceptical of this time frame, although they tended also to point out that EU rights and obligations in relation to Scotland could be protected by way of interim measures. For example, Nick Barber argued that the proposed timescale of 18 months was ‘unrealistically tight, and likely to harm Scotland in a number of ways’ as Scotland would be negotiating from a place of ‘comparative weakness’ within a restrictive timeframe with both the UK and the EU. Barber predicted that Scotland would be more likely to be able to negotiate EU membership by 2020 with an international agreement in place to preserve Scotland’s legal position in the interim period:

Whilst the timeframe of Scotland’s Future is unrealistic, it is highly likely that Scotland would be able to join the EU before 2020. It is in no-one’s interest to exclude Scotland from the Union. If, as is almost certainly the case, Scotland cannot complete the Article 48 process before the 2016 deadline, it is conceivable that some sort of international agreement could be reached between Scotland and the EU to preserve Scotland’s legal position. Perhaps Scotland would then be treated a little like Norway: possessing many of the privileges and duties of EU membership, but not able to return MEPs to the European Parliament or appoint Commissioners.’

A similar view was expressed by Kenneth Armstrong. He argued that accession could not occur until after independence and suggested that 18 months was unrealistic. Although again, like Barber, he considered it conceivable that core substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification through an interim international agreement under Article 218(5) TFEU. Again, David Martin MEP, who dismissed the suggested period of 18 months as ‘nonsensical’ (bearing in mind his membership of the Labour Party which is opposed to Scottish independence), conceded that ‘temporary solutions could be found to smooth the transition.’

On the other hand James Crawford, co-author of a report for the UK government setting out the constitutional and international implications of Scottish independence, expressed the view in a Radio 4 interview that the ‘Scottish estimate is about 18 months, and that seems realistic’.

In the end of course it is now impossible to guess how quickly negotiations might have been concluded. But for Scotland as for any other sub-state territory seeking independent membership of the Union there would have been a number of initial steps in setting up negotiations:

- A request to the EU to open negotiations;
- Planning how these will proceed, and establishing terms;

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33 Crawford and Boyle.
34 Professor James Crawford, Today Programme, Radio 4, 11 February 2013.
• Working out relations between the territory and the Member State vis-à-vis these negotiations, how each would be represented etc.
• formulating negotiating teams on all sides; establishing mandates for each etc.

As noted above, the UK Government clearly had an interest in emphasising that negotiations could be difficult and stated that Scotland’s negotiations to join the EU ‘could be complex and long, and the outcome could prove less advantageous than the status quo’. To some extent this was of course campaign posturing but it is also the case that Scotland would have faced significant challenges in seeking opt outs from the single currency and in relation to the Schengen agreement. There was also the question of the budgetary rebate which the UK currently enjoys but which is due for review in 2020.

Finally, there would have been a need to secure the ratification of all Member States to any accession treaty or treaty amendment. Some have argued that certain states might have opposed Scottish membership and if so they might have tried to use the ratification process either to delay their consent or to refuse it altogether. Spain is an obvious case since it would not want to set a precedent for its own sub-state nations, in particular Catalonia, which has a strong ‘independence in Europe’ movement. Michael Keating observed however that Spanish Ministers when invited to do so declined to state that Spain would veto Scottish accession, and instead distinguished the Scottish case from that in Spain, where, in the central government’s view, the constitution does not permit either acts of secession or referendums on secession. Graham Avery also cites Spain's Foreign Minister García-Margallo who stated: ‘the attitude of the United Kingdom would be the determining factor at the time of deciding our vote’. Avery observes: ‘That is logical, for Spain wants its own voice to be determinant in the case of Catalonia.’ A veto by any Member State in the end seemed highly unlikely. If the UK Government was prepared to recognise an independent Scotland and work towards its membership of the EU with the cooperation of the EU institutions and the overwhelming majority of other Member States, then it was simply unimaginable that this would be vetoed by an individual Member State.

That does not mean of course that the ratification process would have been concluded quickly. It could have been done in a short period of time but it is also useful to consider the situation where either negotiations were not concluded or ratification of all Member States has not been achieved by the date of Scottish independence.

Scotland outside of the European Union?

In the event that the negotiation or ratification processes were not complete by March 2016, what would have happened? One option would have been for Scotland to delay a declaration of independence. This would seem to be unlikely. The Scottish Government was keen for formal independence to be declared before the Scottish Parliament elections scheduled for May 2016. Any proposed delay could also have faced the opposition of the UK Government

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36 The Scottish Government’s aspirations in respect of each of these issues are set out in Scotland’s Future, see e.g. p223.
38 Avery op. cit. p3.
39 Ibid.
which may well have taken the view that if the decision had been taken by Scotland to go then it was in the best interests of the UK if this was done as quickly as possible to end the period of constitutional limbo.

In this event would Scotland, in declaring independence, have found itself outside of the European Union? For a number of reasons this seems an unlikely scenario. Scotland is already part of the EU, it is of economic, strategic and territorial importance to the EU, it is integrated into its institutions, its territory is subject to EU law, and residents of Scotland enjoy the rights of EU citizenship. For these reasons it seems that it would have been in the interests of the EU to ensure that the jurisdiction of EU law and the rights and responsibilities of citizenship continued to apply to Scotland in any intervening period between independence and full EU membership rather than try to deal with the administrative upheaval which the removal of Scotland from the writ of EU law would have brought.

The whole debate also took place at a time of uncertainty for the European Union in light of the economic crisis and problems in Ukraine. As Keating puts it: ‘It is difficult to see why either the European institutions or the Member States would want to add to their troubles by seeking to exclude Scotland, disrupting the internal market and discrediting an eminently democratic means of resolving a self-determination dispute.’

As we discussed in relation to the period for negotiations, a more likely prospect was an interim arrangement which would secure rights and privileges of European citizens in relation to Scotland, but would delay formal membership by Scotland until negotiations and/or the ratification process were concluded. Armstrong suggested this as a possible interim solution:

“[C]ore substantive aspects of the accession treaty could be agreed as having provisional effect pending formal ratification. This could be written into the treaty itself and include important aspects of EU law relating to the Single Market. While there is no direct precedent for this in the context of accession – Austria, Sweden and Finland had the continuing benefit of their EFTA membership of the EEA pending their formal EU accession – it is far from being an implausible legal strategy to avoid certain disruptions in Scotland- EU relations. Moreover, there is specific provision in Article 218 (5) TFEU for international agreements between the EU and third counties or international organisations to have provisional application pending the entry into force of the agreement. By analogy this might also apply in an accession context.’

Jean-Claude Piris, whom we have seen is strongly of the view that an Article 49 process would be needed to bring about accession, seemed also to consider that an interim arrangement would preserve Scotland’s position in relation to the EU:

‘the duty of the EU and of its Member States would be to try and reach a swift agreement with the new State, in order to avoid complex legal situations and negative economic effects, as well as disrupting the lives of many individuals. The delay between the date of the political decision on independence and its entry into force could be used in order to try and reach such an agreement, at least on provisional arrangements during a period of transition.’

42 Piris op. cit. p.6.
See also Graham Avery:

‘From a practical point of view, no Member State has a material interest in Scotland remaining outside the EU, even for a short time. This would deprive the EU of the benefits of Scotland's membership (budgetary contribution, fisheries resources, etc.). Scotland outside the EU, and not applying EU rules, would be a legal nightmare for: EU Member States, whose citizens and enterprises would lose their rights in Scotland. No Member State, particularly not the rest of the UK, would have an interest in creating such an anomaly.’

In the end these various positions were not tested. But the notion that Scotland would have been able to accede to membership of the Union and also that there would be little likelihood of any period of membership limbo both remain very pertinent points as we consider both that the independence issue is unlikely to go away completely, and that it may in fact be revived in the event of a referendum at UK level on EU membership.

III. Scotland after the Referendum: The Debate over UK membership of the EU

A Referendum on UK Membership: the ‘No vote’ scenario

In the event that a referendum on UK membership is held and a No vote results it would seem at first glance that everything will stay the same, but will it? One thing which may be relevant is a breakdown in the vote from region to region within the UK. If polls were to show that a majority of Scots voted No to exit from the European Union and that this was decisive to an overall result, given a majority vote within the rest of the UK to leaving the EU, this would surely stoke resentment particularly among pro-exit voters in England.

Of course an obvious response would be that the UK is one country and the result must be accepted at a pan-UK level. But the notion that this disjuncture between English and Scottish voting outcomes would simply have to be accepted by English people sharing the UK state may in fact be undermined by the Scottish referendum itself. A political argument could emerge that Scots have shown themselves no longer to be fully committed to the British project both by holding a referendum on independence and by the closeness of the result in that referendum. If Scots are indeed seen as semi-detached from the UK then the idea that they should exercise an effective veto on England’s EU membership will not, to say the least, sit very comfortably. We also know from recent attitudes data that those identifying as exclusively or primarily English not British are also much more likely to favour the independence from Europe movement. It seems very possible that English nationalist sentiment could well be intensified if people sense they are being forced to remain within the

43 Avery op. cit. p.2. See again the blog by David Edward op. cit. in which he discusses what he sees as the absurdity of the following situation: ‘Until the moment of separation, Scotland would remain an integral part of the EU; the Scottish people and all EU citizens living in Scotland would enjoy all the rights of citizenship and free movement; and the same would apply, correspondingly, to all other EU citizens and companies in their relations with Scotland. Then, at the midnight hour, all these relationships would come abruptly to an end.

The logical consequence in law would be that the acquis communautaire would no longer, as such, be part of the law of Scotland. Scotland would cease to be constrained in relation to the rates of VAT and corporation tax. Erasmus students studying in Scotland would become “foreign students” liable to pay full third country fees, as would students from England, Wales and Northern Ireland. Non-Scottish fishermen would be excluded from Scottish waters. And all the waters between Scotland and Norway would cease to be within the jurisdiction of the EU – an important security consideration quite apart from fishery rights.’

EU by a part of the UK that appears to be so disengaged from the British project. This sentiment may be further compounded by the fact the electorate on the Scottish independence referendum was restricted to those living in Scotland meaning there was no English voice or English determination of the future of England’s union with Scotland.

Another issue is the moving constitutional landscape of the UK itself following a No vote in the independence referendum. The Better Together campaign in Scotland towards the end of the process promised extensive constitutional change and this has led to the establishment of the Smith Commission.45 This body was created by the UK Government and given the task of convening cross-party talks to produce, by November 30, 2014 recommendations for further devolution of powers to the Scottish Parliament. The remit of this body is to focus only upon more powers that might be ceded to the Scottish Parliament. However, one question is whether giving significantly more powers, particularly tax powers, to the Scottish Parliament might have implications for Scotland’s relationship to Europe. It is indeed likely that Scotland will acquire far more fiscal responsibility, making it possibly the most fiscally devolved territory within Europe. If so, this will involve the Scottish Government in setting its own economic policies, and to this end it is likely that it will seek input to Brussels decision-making and also to bilateral trade relations with EU states and regions.

This may be a particular issue if Scotland is left to generate its own wealth through new fiscal autonomy. In other words, if tax revenue falls and the Barnett formula is no longer there to top up any shortfall. This would put pressure on Scotland to maximise trade development, use of capital investment, infrastructure investment, etc. to advance Scotland’s interests. Indeed such a proposal has already been made; only one month after the referendum the SNP was already calling for direct representation for Scotland within the EU.46 In its submission to the Smith Commission the Scottish Government also states: ‘Scotland should be able to act directly in the European Union on fisheries, marine environment and food and drink exports, given their importance within the Scottish economy and the distinctive policy positions in Scotland. In areas such as fisheries, where Scotland has the predominant interest within the UK, Scotland should have the lead role at Council, where appropriate.’

In addition to seeking representation within the European Union, further fiscal devolution may well see the devolved institutions of Scotland linking Scotland directly to state and private European partners where possible, building direct relationships with public bodies and with corporations in attempts to attract trade and investment. The lure of specific tax policies may be used in this way. Now that there has been a No vote and the reality is that devolution is here to stay for a generation at least, will Scottish institutions do better in developing a regional presence, accessing the informal networks within European decision-making than other regions do? There are regions in Europe that are much better networked than sub-state territories in the UK and it may be that stronger efforts will be made to learn from these. This may be particularly the case in light of the devolution of more powers.

Such efforts at ‘paradiplomacy’ could well face opposition not only within the UK which will not be keen to see radically different tax regimes across the state, but also because of the institutional disposition of the EU itself. There will be specific issues about state aid which will need to be analysed carefully, but beyond this there is the bigger picture within which regions in Europe struggle for meaningful representation. The reality for sub-state territories

45 https://www.smith-commission.scot/
within Europe is that states are the only serious actors at the political level, at least at the level of formal representation. All sorts of imaginative scenarios in constitutional design are possible within states as a way of managing plural territorial identities, but this reality has not been replicated at the EU level where the Committees of the Regions initiative has not offered much to sub-state territories. This no doubt lies behind the Scottish Government’s new goal of better representation within Europe, but the reality is that hopes for such a change are slim. The European order has not yet caught up with the development and emergence of regional powers in what has been termed a ‘post-independence’ era. Regional territories are emerging as “dynamic, networked, territorial configurations embedded in their referential nation-states and driven by a wide range of diverse, transformative promotional policies.” Without a coherent infrastructure to recognise the formation of regional powers nation-states, the EU and the regional powers themselves face uncertainty.

The European Union works on the basis of the Union on one hand, with its own state-like aspirations, and Member States on the other, with no real scope for regions to play a meaningful role in European deliberations. This arguably goes against one of the founding principles of the EU project, the principle of subsidiarity – i.e. that decisions be made as close to the citizen as possible. Whilst the EU may well be committed to the principle of subsidiarity at a regional level through consultation with the Committee of the Regions, the infrastructure for supporting regional mechanisms remains weak. In addition to this, the reaction to the very idea of such a region leaving its existing state to become an independent Member State was met with something approaching open hostility. We see this in the attitude of senior EU actors to the prospect of Scottish independence. We cited above the intervention by European Commission President Jose Manuel Barroso reiterating a strongly statist position in arguing that Scotland would find negotiating entry to the EU to be difficult. The hostility which the Scottish independence movement faced shows that in many quarters no account is taken of the very reality of national pluralism within states. This is an ironic conclusion to draw given that the EU itself embodies national pluralism and has been fashioned upon the need to manage this institutionally and constitutionally. In many ways the EU establishment, for all the talk among academics about constitutional pluralism, remains quite old-fashioned on the issue of state powers and territorial integrity. The world remains a binary one of states and international institutions.

Paradoxically, this lack of representation for regions may well be stoking the kind of secessionism which the EU dislikes. During the referendum campaign the Scottish nationalists were able to argue that the only way to achieve meaningful representation in the EU for Scotland was through independence. In the end it was difficult to develop this argument too much because the Yes campaign remained on the back foot since it had to defend its claim that EU membership would be straightforward and the terms of entry would be favourable. In other words, the Yes campaign found it hard to move the debate on to

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49 ibid
50 ibid
51 See for example the consultative rights the Committee of the Regions has under the Lisbon Treaty and the ability to bring judicial action in relation to consultative rights under Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01
discussing the advantages of independent membership. But this is an argument that continues to be made not only in Scotland but also currently in the Catalan independence debate.

What if the UK votes to leave the EU?

The second scenario is a referendum outcome where a majority of UK voters vote to leave the EU but voting data shows that a majority of Scots voted to remain. This would potentially re-open the entire constitutional debate in Scotland. It would be argued that many would not have voted against independence in 2014 if it had been known that the UK was destined to leave the EU a few years later. Such an argument is made more plausible by the way in which the Scottish Government made EU membership such a central plank of its campaign for a newly independent Scotland.

It is widely expected that the independence referendum has settled the issue for the foreseeable future. But EU exit by the UK could cause this to be re-opened. Faced with the prospect of EU exit, Scottish nationalists would no doubt see this as a mandate to ask Scots separately to choose the UK or the EU in a new Scottish referendum. And perhaps many who would not describe themselves as nationalists would take the view that this was indeed legitimate. For some the issue would simply be one of choice. The Scottish people should be allowed to decide on independence again before the country exits the EU; for others it may be an issue of substantive choice, with some who did not vote Yes in the 2014 referendum deciding that they would prefer to live in an independent Scotland within the EU than a United Kingdom outside of the common market.

And what of the EU itself? Let’s not forget that a vote to leave the EU by the UK need not be the end of the matter. There is after all Art 50 TEU. By this provision the withdrawal of a State from the EU requires negotiation of the terms of this act, and withdrawal will take effect only on the date agreed or two years after notification. This period of negotiations could well lead to a new agreement on UK membership, or could provide an opportunity for the Scottish government to open negotiations on succeeding to UK membership, with a referendum planned on this.

Conclusion

This is a highly volatile period. The UK has passed through one of the most dramatic constitutional events in centuries when the threat of the break-up of the country seemed very real indeed. The Scottish referendum outcome of 55% to 45% was in the end quite close, and the polls towards the end suggesting that the result was too close to call in the final two weeks of campaigning. The UK is still taking stock of this result. However, at the same time it is rushing into further constitutional change, on a path that will devolve extensive tax powers to Scotland.

This is the unsettled backdrop to the possibility of a referendum on membership of the EU. The Conservative Party is now in earnest in seeking to achieve a repatriation of significant powers from Brussels. And to this end we need to await the outcome of the May elections in 2015. There are indeed many ifs and buts, and the prospect of the UK actually withdrawing from the EU remains highly unlikely. Still, the very debate highlights that across the UK attitudes towards the EU are diverging. There was in fact similar levels of Euroscepticism in Scotland and England until recently, but the independence debate in Scotland has coincided with a divergence and a more positive attitude to Europe within Scotland at the same time as the rise of UKIP denotes a growing scepticism towards the EU within England, particularly
over the issue of immigration. This could have significant implications for internal UK relations in the longer term regardless of the outcome of any in/out referendum.

The Scottish referendum campaign is significant because it opened up the debate about how an independent Scotland would be able to join the EU. Most commentators came to the conclusion that this would be achievable, the only real disagreement being over how long this would take and the terms of entry. In the event of a vote by the UK people to leave the EU the question of Scottish independence will no doubt be re-opened, particularly if there is evidence that a majority in Scotland voted to remain in Europe. In this sense the Scottish referendum will have taken on more significance and the pressure to repeat the exercise will be strong.

Even without such a scenario we are now living in a period of increased devolution and there is already an attempt by the Scottish Government to secure more powers with which Scotland can become a more active player within Europe. This could in turn lead to tensions both within the EU itself and within the UK. The future is unclear but what is certain is that the issue of Europe and the UK’s position within it is set to remain a central feature of territorial politics within the UK itself.
Scotland and the EU: Transition not Rupture

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I agree with Sionaidh that the accession of an independent Scotland to the European Union is not in any serious doubt. I develop this point in a paper written with Katie Boyle here. In this blog I argue that although accession will no doubt take time, there is unlikely to be any period within which Scotland is effectively cast out of the EU. More speculatively I would like to ask whether there might in fact a duty on the part of the EU to negotiate Scotland’s membership, and whether the Seccession Reference to the Supreme Court of Canada may provide an interesting analogy supportive of this argument.

To begin, I am not as sure as Sionaidh that Article 48 would be the route to membership adopted by the EU. I believe Article 48 does offer a plausible mechanism to secure Scotland’s membership, but given that Scotland will become a new Member State and given that the case law of CJEU establishes that specific articles have preference over general ones, it seems that Article 49 offers the more obvious process. Of course politics may take over here so we simply don’t know for now.

In either event detailed negotiations of the terms of membership will be required and a potentially lengthy process of ratification of a new accession treaty (if Art 49 is used) could well ensue. That said, Scotland’s position is in no way analogous to that of accession countries joining from the outside. We see this when we turn to another and perhaps more important question: what if the entire accession process is not concluded by the date of Scottish independence, proposed by the Scottish Government to take place in March 2016? In this event would Scotland, in declaring independence, find itself cut off from the rights and obligations that come with membership of the European Union, albeit temporarily? This is a huge question in the current referendum debate.

For a number of reasons such a radical break in Scotland’s relationship with the EU seems very unlikely. Scotland is already embedded within the EU and is of no little economic, strategic and territiorial importance to the Union; it is integrated into its institutions, its territory is subject to EU law, and residents of Scotland from across Europe enjoy the rights of EU citizenship within Scotland. For these reasons it seems very likely that the EU will endeavour to ensure that the jurisdiction of EU law and the rights and responsibilities of citizenship continue to apply to Scotland in any intervening period between independence and full EU membership, rather than deal with the administrative upheaval and potential legal minefield which the removal of Scotland from the writ of EU law would bring.

This is also a time of uncertainty for the European Union in light of the economic crisis and the conflict in Ukraine. Why when faced with these more significant concerns would the EU not seek to avoid the practical problems which would result from the loss of jurisdiction in Scotland, the concomitant impact on rights of citizens etc.? And such a scenario is surely entirely avoidable. A more likely prospect is an interim arrangement which would secure the continuing effect of EU law in relation to Scotland, but would delay formal membership by Scotland until negotiations and the ratification process are each concluded.
Another argument (made at greater length [here]) is that the salience of the concept of citizenship to the EU, the Union’s commitment to democracy and the growing emphasis on the protection of citizens’ rights, together suggest that there is in fact a prima facie duty on EU institutions and Member States to negotiate Scottish accession to the EU in the event of a Yes vote. This argument is based upon the EU’s own treaty commitments (for example, the principles of sincere cooperation, full mutual respect and solidarity found in Art 4 TEU), but can also be developed by analogy with the Reference re Secession of Quebec.

In this case the Supreme Court of Canada found within the Canadian constitution an obligation on Quebec’s ‘partners in confederation’ to negotiate Quebec’s secession. The situation regarding Scotland and Europe is of course different in a number of respects. The EU is not a state like Canada and does not have a history of some 130 years of confederation. However, on the other hand, the Canadian Supreme Court based the duty to negotiate upon the principle of democracy which is not expressly mentioned in the Canadian constitution, but which the Court took to be an implicit and unwritten principle of the constitution. By contrast, Article 2 TEU makes explicit reference to the principle of democracy. Based primarily upon this principle, the Canadian court decided that ‘a clear expression of self-determination by the people of Québec’ imposed duties on the rest of Canada to negotiate. By analogy, a Yes vote in the referendum can reasonably be seen as the expression of the will of the people of Scotland not only to be an independent state but to be part of the EU. A commitment to EU membership is part of the Scottish Government’s proposal for independence; it is contained in the White Paper, ‘Scotland’s Future’ for example. It can be argued strongly that voters are aware that to vote Yes to independence is also to vote for Scotland becoming an independent member of the EU. And since we are discussing a territory which is part of the EU and which wishes to remain part of the EU, it would seem easier to assert an obligation on partners in a union to negotiate the continued membership of a component part, where the principle of democracy, along with citizenship, are express constitutional commitments, than an obligation to negotiate its secession where the constitution is silent on both secession and democracy as it was in Canada.

None of this is to say that there will not be a number of important and possibly contentious issues to be dealt with in the negotiations. Scotland’s relationship to monetary union, the status of existing UK opt outs and the budget rebate all present potential sites of dispute. Indeed, should the terms of admission be very unfavourable there may well emerge a debate within Scotland as to whether membership of the EU is even desirable; the UK’s own EU trajectory will be relevant to such a debate. In short, Scotland will almost certainly not get all that it wants in seeking to join the EU. But this is very different from any suggestion that it will somehow be cut adrift entirely from the European project.