Scottish Independence and the European Union

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Abstract

This article discusses what will happen to Scotland regarding its European Union membership if it becomes a State, independent from the United Kingdom, after the proposed referendum on this issue in 2014. The full secession of a nation from within an EU member state is an unprecedented EU event and it is unclear whether, upon independence, Scotland will automatically become an EU member state in its own right, or if it will find itself alone, outside the EU.

The opinions of Scottish nationalists (that its EU membership will be automatic) are in sharp contrast to related academic commentary and the message emerging direct from the EU institutions (that it would no longer be part of the EU and would have to apply for EU membership). Here, what Scotland stands to gain as a fully independent EU member state, is compared with its current situation of being a, sometimes marginalised, devolved region of the UK. The implications of Scottish independence upon the rest of the UK are also considered, as are the Acts of Union that currently bind Scotland and England together. The process of Scottish accession to the EU is discussed, as are any barriers to accession Scotland may face. Wider concerns from Europe about sub-state nationalism are considered and there is some discussion of this as being a sign of the increased evolution towards a stronger European Union. Any accession by Scotland to the EU as an independent state is argued not to be straightforward.

Keywords: Scotland, United Kingdom, Referendum, Independence, Devolution, Act of Union, European Union.

Introduction

In February 2012 it was announced that the United Kingdom government had reached an agreement with the devolved Scottish Parliament, that a referendum would be held to decide the question of Scottish independence (BBC News 2012a). If the Scottish people choose independence, this will mean the nation will become completely free to determine its own future as an independent state.

Not only would Scotland become completely responsible for itself regarding national matters, it would also obtain an international personality. The aim of this essay is to establish what would happen to Scotland upon independence regarding its membership of the European Union. What
Scotland stands to gain, the opinion held by Scottish nationalists and the view from Europe and previous academic research on the matter will be discussed and evaluated.

It is unclear exactly what would happen to Scotland, and indeed the rest of the UK, regarding EU membership upon Scottish independence. Currently as a part of the UK, Scotland enjoys the ‘peace, prosperity and stability’ that EU membership brings (Fontaine 2006, 5). Any event that could affect Scotland’s relationship with the EU needs to be assessed to allow Scottish voters to make an informed decision about what full independence would really mean for them. Although the issue of Scotland’s EU membership directly affects both Scotland and the UK, it also has an impact upon other aspiring nations within the EU that seek independence. This is particularly relevant as, in EU terms, the full secession of a nation from its union with an EU member state, is an unprecedented event. Importantly, it is uncertain if a new nation within the EU would automatically become a new EU member, or would find itself outside of the EU, having to reapply for membership.

The current situation
Since 1979 there has been gradual progress made towards Scottish independence. By 1998 the Scotland Act enacted devolution; this was decided by a referendum where a large majority of Scots voted in favour of the creation of a devolved Scottish Parliament. Practically devolution means that Scotland has increased powers to govern itself, however certain greater legislative powers remain with the UK Parliament. Key devolved areas where Scotland legislates for itself are: health, education, tourism, law and home affairs, police, local government, environment and agriculture.

Under devolution the UK Parliament retains the right to legislate on reserved matters. Significantly, these may be perceived to be the greater powers of: defence, foreign policy, constitutional matters, trade, immigration, social security, data protection and employment. Upon independence, all of these reserved powers would be gained by Scotland giving them the highest level of autonomy.

Although Scotland already has a certain level of enhanced autonomy within the UK, in the form of devolution, there remains some dissatisfaction amongst some Scots with the current situation. Even on devolved Scottish matters Westminster can ultimately still legislate with the agreement of the Scottish Parliament by the use of a Legislative Consent Motion (or Sewell motion). These motions are used more frequently than one would think and add to the feeling of disenfranchisement felt by Scottish nationalists (Batey & Page 2002, 502). This manifests itself in the growth in power of the Scottish Nationalist Party (SNP), whose aim is full independence. The SNP hold a large majority of
the seats in the Scottish Parliament and it is thought therefore that as nationalist support is strong, full independence is a strong possibility.

It has been argued that, within the EU, Scottish matters are not always satisfactorily represented by the UK. Where, however, Scotland is able to legislate for itself to fulfil EU obligations, it does so very efficiently. It seems Scotland is committed to the EU, but also constrained by the will of Westminster (Ross 2009, 247-248).

Today, Scotland’s First Minister, Alex Salmond, is the leader of the Scottish Nationalist Party; Salmond has a reputation as a canny politician. He realises that for Scotland to be viable as a nation, both internationally, and to his own electorate, independence for Scotland can only succeed if Scotland is to be a full member of the European Union – it is one of the greatest selling points of the independence issue. Salmond’s mantra for independence is that Scotland should be ‘a full independent member of the European Union’, aspiring for a place ‘at the top table’ (SNP 2006). There is no doubt that membership of the powerful international organisation that is the EU would be affirmation of Scotland’s viability as an independent nation and a real coup for nationalists.

What does Scotland stand to gain?
There is debate whether Scotland would have any greater influence in the EU as a smaller independent state or as a, sometimes marginalised, region of a larger member state (Walker 2000, 403-404). To determine if Scotland stands to gain any real benefit from EU membership as an independent state, each of the decision-making institutions of the EU will be considered starting with the most powerful.

The European Council is mostly comprised of the Heads of State or Government of each EU Member State. This is generally the member states’ Prime Minister or President. Although it holds no direct legislative function, the role of the European Council is to set the political agenda for key EU issues. The UK (and therefore Scotland) is currently represented at the European Council by Prime Minister David Cameron. As an autonomous Member State, Scotland’s chosen leader (First Minister Alex Salmond?) would become empowered to meet with other EU leaders on an equal level and have greater influence over the political direction of the EU, including the power to veto key EU decisions.

Member States are also obliged to nominate a Commissioner to sit in the European Commission for a period of at least five years. The European Commission initiates the lion’s-share of new EU
legislative proposals, for consideration and adoption by the Council (see below) acting with the European Parliament. Currently Baroness Catherine Ashton acts as the UK’s Commissioner and has a huge responsibility as the High Representative of the Union for Foreign Affairs and Security Policy. Although EU Commissioners are in a powerful position, they are obliged to withhold any national bias, indeed their sole function is to serve the EU as a whole not their individual national interests. This obligation to send a Commissioner to Brussels may not give an aspiring nation such as Scotland any more real power, but it would certainly be a further signifier that they were a credible nation, having achieved a place ‘at the top table’ of one of the European Union’s powerhouses, the European Commission.

The Council of the European Union (also known as the Council of Ministers) is distinct from the higher European Council, and is generally referred to simply as ‘Council’. The Council is made up of Government Ministers from each Member State, each of whom is expected to represent their national interests in the policy making processes. Who that Minister is, will depend on the policy matter being considered; so, in theory, when an environmental issue is to be decided, a minister for the environment from each member state will meet as the Council: for agriculture, the ministers of agriculture, and so forth. The Council therefore gives the democratically elected governments of Member States direct, focused involvement with the decision making process at EU level. This is very relevant for Scottish nationalists as the government ministers of an independent Scotland (with full Member State status) would gain direct input into the shaping of EU legislation to reflect distinct Scottish interests.

The European Parliament (EP) is comprised of members who are directly elected by the citizens of each Member State. In most cases legislative proposals (which are usually proposed by the European Commission) are passed as law by the Council acting jointly with the EP. This means that the elected Members of the European Parliament (MEPs) play a key role in shaping the content of EU law. Currently, as a part of the UK, Scotland is already proportionally represented by 6 MEPs (from the UK’s 72) in the European Parliament. Although Scotland is already represented there, it seems autonomous nations of the same geographical size and population do have more seats in the EP. Denmark, for example, is closest to Scotland in this respect, yet Denmark currently has 13 seats in the EP. The maximum number of MEPs in the EP is currently limited to 754, but this is due for review in 2014 (the same year as the independence referendum). Any adjustment in Scotland’s favour would be bound by this upper limit, but it is likely that there will be some rebalancing by the proportional reduction of UK MEPs due to the UK decreasing in size upon Scotland’s secession.
The Committee of the Regions is an EU Advisory Body, comprised of elected representatives from regional and local government, with the aim of bringing EU decision-making closer to the citizen. The Commission and the Council must consult the Committee regarding proposed legislation that may affect the Regions. Today, Scotland is represented in the Committee of the Regions by four members. From a UK perspective, this disproportionately represents Scotland in the Committee, with one-sixth of the UK’s total representation yet representing just one-tenth of its population.

That said, the Committee’s role is only advisory, it delivers an Opinion and the Commission and Council must consider its Opinions, but they are not bound by them. The Committee can issue Opinions without being consulted, but again these are merely advisory and not binding. In effect, the Committee contributes to legislative proposals, but in some circles is described as a ‘mere talking shop’ for EU policies. That said, its Opinions are used to gauge the response to proposed legislation throughout the EU, by the Institutions that hold the real power: the European Parliament, the Commission and Council. Scotland’s disproportionate (UK) representation in the Committee therefore, seems mostly to give the illusion of a more equal representation for them in Europe by way of appeasement from Westminster to Holyrood. However, as an independent EU Member State, Scotland could expect more; using Denmark as the benchmark, it would be entitled to more than double its current representation, with nine Representatives.

Scotland’s commitment would also extend to sending a judge to the European Court of Justice; although, as with Commissioners, judges are independent of national ties, having allegiance to the EU only. This gain would again be symbolically significant for Scotland within the EU. Over time Scotland would also become increasingly involved in the other EU institutions such as the Court of Auditors, the European Economic and Social Committee, the European Central bank and the European Investment Bank.

To summarise, it is clear that the gains Scotland stand to make, as an independent EU Member State are significant. Representation at the European Council would ensure Scotland has a voice at the highest level. The appointment of a Scottish Commissioner would signify increased responsibility and credibility, as would the requirement to send a judge to the European Court of Justice. Scottish ministers in the Council of Ministers would be well placed to represent Scottish interests in EU law making. The number of Scottish MEPs is also likely to increase, perhaps even double to reflect the representation of other similar sized states. Scotland would increase its representation in the
Committee of Regions. It clearly stands to become a more influential player in EU – and hence global – affairs.

Interestingly for nationalists, these gains for Scotland of increased and effective EU representation would also represent a shift in the balance of power against the remainder of the UK. The UK would stand to lose a proportional amount of its EU representation in return. Scottish independence would mean the loss of seats (possibly 13 if Scotland is treated like Denmark) in the European Parliament for the remainder of the UK. The UK would also stand to lose representation in the Committee of Regions and, perhaps more significantly, its voting influence in the Council will be reduced (as the qualified majority voting rules would need to be adjusted in Scotland’s favour).

At home there may also be further political implications for Scottish independence. For instance, it would be in the interests of the UK Conservative party if Scotland were to go it alone, as the only real political competition for the Conservatives is the Labour party. If Scotland were to become independent, a large proportion of the Labour party would be removed from the UK political arena. This would be advantageous to the Conservatives at the next general election because of the 59 MPs representing Scottish constituencies in the House of Commons, 41 of them are members of the Scottish Labour Party, compared to only 1 Conservative. The loss of 41 Labour constituencies before the next election of 2015 would undoubtedly be in the Conservatives favour. It may be no coincidence that the Scottish referendum is to be held the year before.

**What will happen?**

Scottish nationalist lawyers claim that Scottish independence would result in the dissolution of the Acts of Union 1707. The Acts of Union enacted the Treaty of Union. This Treaty joined the Scottish and English Parliaments to form the Parliament of Great Britain, just as the monarchies of the two nations had been joined together in 1603. This formalised the political partnership between Scotland and England. The nationalist lawyers claim the end of this Union would result in the dissolution of the United Kingdom itself. They assert that this in turn would negate England, Wales and Northern Ireland’s EU status. They say that this is because the EU Treaties bind the UK as a whole, and not the individual nations that it is comprised of (Happold 2000, 16-19). This still remains the main argument of the nationalists today. However, this overlooks the fact that the Acts of Union between Scotland and England created Great Britain, not the UK. The UK is currently described as the United Kingdom of Great Britain and Northern Ireland, and is the sovereign state of which Great Britain is a part. If Scotland chooses to leave the Union, Great Britain may cease to exist, but a
‘United Kingdom of England, Wales and Northern Ireland’ (perhaps) would remain. Previous evidence that the UK would continue to exist upon secession of a Union nation exists in the case of Ireland. In 1922 the Irish Free State left its Union with the UK, and the UK continued to exist. Scottish nationalists continue to clutch at straws claiming that as the Acts contain the term ‘for ever after’, they hold an entrenched constitutional status. Ultimately though, supremacy on UK issues lies with the UK Parliament, which cannot be bound by its successor, and was not, when in 1922 it cast aside the Union with Ireland Act 1800.

Happold goes on to argue that upon independence Scotland would secede from EU membership as it had from the rest of the UK. The remaining ‘rump’ (ninety per cent of the population and wealth, the majority of the landmass, the Head of State and main seat of Government) would be the continuer State and remain in the EU as the UK (Happold 2000, 27-28). Happold’s analysis was recently supported by a Parliamentary Research Paper, which upheld his reasoning (Thorpe & Thompson 2011, 2.5). This Research Paper also made reference to a European Parliamentary Question asked on similar lines by a Welsh MEP in 2004 regarding the hypothetical secession from the UK of Wales, and EU membership. The answer of the European Commission was direct and clear:

When a part of the territory of a member state ceases to be a part of that state, i.e. because that territory becomes an independent state, the treaties no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the treaties would, from the day of its independence, not apply anymore on its territory (Prodi 2004).

The statement goes on to refer to Article 49 TEU, which outlines the process of application to the EU for aspiring member states. This stance has recently been affirmed by comments from the President of the European Commission, José Manuel Barroso, in an interview given with the BBC (12 September 2012). Although Barroso wisely declined to ‘speculate ... about possible secessions’, when questioned further, Barroso clarified that:

A new State, if it wants to join the European Union, has to apply to become a Member, like any (other) State (BBC News 2012b).
More positively for Scotland he went on to say: ‘In fact, I see no country leaving and I see many countries wanting to join’ (ibid).

It seems clear, therefore, that there is a place for Scotland within the EU, but a newly independent Scotland would have to apply for membership. This position was clarified in more detail by Commission spokesman Oliver Bailly, at a news conference in Strasbourg. Bailly confirmed the stance of the Commission: a) there is a process under international law to allow the secession of new independent nations; and b) there is a process under EU law for accession to the EU where a new Treaty is formed and agreed (BBC News 2012c). These two points mean that Scotland’s independence must be legal (agreed bilaterally), and Scotland would have to apply to the EU and have their accession ratified by the existing EU member states. Scotland would not become an EU Member State until a new Treaty declaring such, and ratified by all other Member States, was in place. Despite these clear indications, Salmond and the SNP still appear to be in denial about the inevitability of Scotland having to apply for EU membership upon independence. After Barosso’s comments, Salmond’s office released this statement:

An independent Scotland will remain an integral part of the EU, and nothing in (Mr Barroso’s) answer suggests otherwise, despite the desperation of the anti-independence parties to say so. As many experts have confirmed, Scotland is part of the territory of the European Union and the people of Scotland are citizens of the EU. There is no provision for either of these circumstances to change upon independence (Newsnet 2012).

Ultimately, the aims of the European Union are inclusive, but applying for EU membership is not straightforward and applicant States are stringently vetted. Article 49 of the Treaty on European Union declares that applicant States must satisfy the values of Article 2 TEU: respect for dignity, freedom, democracy, equality, the rule of law and human rights. They also must address their application to the Council of the European Union, who must come to a unanimous vote and consult the Commission. They must also receive a majority vote from the European Parliament. Not only that, but the European Council can stipulate further criteria on a case-by-case basis. Any accession must be ratified by all member states in accordance with their constitutional requirements, at the very least, this usually means the agreement of each national Parliament.

Although Scottish law already fulfils the EU Treaty provisions of freedom, democracy, equality etc. the three Copenhagen Criteria of accession would also have to be satisfied. The first two criteria are
already fulfilled: Scotland already has a Parliament, and a legal system that incorporates the *aquis communautaire* of EU law. Also Scotland has a functioning market economy (oil, fishing, whisky, tourism). The problem lies in the third criterion; the need to adhere to the aims of economic and monetary union. The unstable state of the Eurozone economy at present makes a move away from sterling to the euro unattractive (McDonell 2011). This explains the SNP’s indecisiveness to commit on the issue. It may though be hard to force the adoption of the euro upon Scotland. The EU Member States which joined in the fifth enlargement, and for whom euro adoption is compulsory, seem to be looking for ways out of their obligation to join the single currency. If any of these countries manage to negotiate an ‘opt-out’ it may be easier for Scotland to do likewise.

As the decision to admit a new member state must be unanimous there is the chance of veto to any possible accession to the EU. The threat of veto for Scotland’s accession could come from Spain, itself a country of autonomous devolved states with strong independence movements - specifically in the region of Catalonia. Arthur Mas the Catalonian Premier seems to think Scottish independence will cause Spain some ‘apprehension’ and Whitehall seem to be promoting this view. However, Spanish foreign minister, José Manuel Garcia-Margallo, is reported as saying Spain would not block Scotland’s accession, distinguishing the situation from that in Kosovo, which Spain refuses to recognise due to its unilateral secession from Serbia (Murray 2012). Whilst it is unclear whether this is just political posturing, Catalanian news has been following the Scottish independence issue closely. Spain is not the only country within Europe with regional independence issues. Belgium itself is split into three distinct autonomous regions: Flanders, Wallonia and Brussels. Although Belgium may be viewed as a ‘microcosm’ of how Europe should be, in so far as it is the hub of the EU and itself a federal state, it has tensions of its own to deal with (Cendrowicz 2010). These tensions could manifest themselves in a reluctance to endorse Scottish independence.

If Scotland’s accession to the EU were ratified, the joining process could be expedited, as the time period for accession varies on an individual basis. Quick accession has been demonstrated with less stable applicants in the past. For instance, in 1981 Greece’s accession was rushed through despite concerns over their political regimes and economic stability, with the aim of deterring an authoritarian regime from derailing democracy. Yet, considering the current global economic problems, with the focus being on Greece, Scotland may find its finances are scrutinised more stringently. Any acceptance under the Copenhagen Criteria of economic and monetary union would certainly require agreement to the new ‘fiscal compact’.
**Conclusion**

If Scotland became independent, it would not ‘automatically’ accede to the EU they would have to leave the UK by agreement, go through the existing application process as set out in Article 49 TEU, and negotiate favourable terms regarding the single currency. The two most contentious issues for Scotland are the adoption of the euro and the possibility of an ‘anti-independence’ veto. A veto could come from closer to home. The possibility of a reduction of its EU power, the upheaval of independence and economic disruption, could prompt a threat of veto to Scottish accession from the remainder of the UK itself. After all, David Cameron has already demonstrated he is not afraid to use his vote controversially to protect ‘UK interests’ (BBC News 2011). It is thought for certain, that an independent Scotland upon secession from the UK would have to apply for membership to the EU, it would not be automatic. This has been confirmed by the President of the Commission, Barroso, by a Commission spokesman, Bailly, and by the 2004 EP Question to the European Commission.

It is submitted that the reason why all this is happening is, as Tierney discusses: that sub-state nations such as Scotland are increasingly finding themselves dissatisfied with their out-of-date constitutional arrangements (Tierney 2005, 170-171). This implies that the Act of Union no longer satisfies Scotland in today’s globalised society. Although this Act of Union did once satisfy the needs of nations that shared a common dependency and interests, and was an example of an early form of federal treaty, five hundred years on it is no longer fit for purpose. It is suggested here that Scotland’s bid for independence and the gradual disintegration of the Union of Great Britain (devolution through to potential independence) reflects the increasing importance and relevance of the European Union in today’s globalised world. There is safety in numbers; previously marginalised nation States are now signalling that the EU is a place where they can belong. This evolution towards the EU being comprised of several smaller independent states as opposed to larger ones works in favour for the continuation and strength of the EU. This is as the balance of power found concentrated in larger Member States, such as the UK or Spain, upon sub-state independence will become redistributed more evenly. This in turn will increase the reliance of the Member States on the EU and ensure its future effectiveness and survival.

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