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Neil Walker: Hijacking the Debate

Posted on February 18 2014

Let me lay my cards on the table. I remain inclined to vote 'no' in September's referendum. I put it no stronger than 'inclined' in part because I believe, in the spirit of democracy - even democracy referendum-style - that those of us who have not signed the party pledge should keep an open mind as long as possible. That, indeed, is one of the reasons why, 18 months ago, some of us set up the Scottish Constitutional Futures Forum and its accompanying blog. But my reservations are also partly because recent events have fuelled my anxiety about the climate in which the debate is taking place. They have made me wonder whether the case for independence is getting a fair crack of the whip on the international stage, and have caused me to ponder the implications of lending my vote to a position that remains so reliant upon negative rather than positive arguments.

I am not talking about the shenanigans over a Currency Union. It may be a minority position, but I believe both sides have been giving as good as they get on this question, and that neither comfortably occupies the moral high ground. There has always been something both opportunistic and wishful in the nationalist stance. Sterling, once derided as a busted flush, is reclaimed as a joint birthright. The Euro, once hailed as the bright new monetary dawn, is conveniently relegated to the status of a political lifestyle choice rather than faced up to as an obligation of EU membership that can, at most, be deferred.

The Unionist response may be no more elevated than this, but is surely ranks no lower. There is an arguable case, if a far from compelling one, that it would be in rUK's best interest to refuse the departing Scots a Currency Union. There are certainly risks either way, and rUK might well change tack in the cold light of a 'yes' vote. But Better Together is being no more narrowly strategic than the nationalists in arguing forcefully for the position that best suits its immediate interests. It is a position that could backfire - may already be backfiring - as it allows the nationalists to play the victim card, and to point out that, as the residual sovereign in the event of post-yes-vote negotiations, rUK enjoys the 'bully's' advantage of being able to make promises - or threats - that it can credibly deliver upon in self-fulfilment of its prophecies and prejudices. But in the final analysis, the Better Together position, like the nationalist one, is a democratically legitimate one. It is articulated by elected politicians of various parties in favour of a constituency - the UK - whose right to retain the decisive constitutional voice is the very issue at the heart of the referendum. And while nationalists may proclaim the inconsistency of Better Together's new position with its previous self-denying ordinance against pre-specification of the terms and conditions of independence, they must also acknowledge that the Unionist parties, by building a united front on sterling, have at least answered another widely aired doubt. For once they have demonstrated their ability to get their act together and find common voice when it really matters.

The issue of democratic credentials, however, brings me directly to the point of my comment: namely that other awkward union, the European Union, and the position of Jose Manuel Barroso, President of the European Commission, on the subject. Barroso has previously given strong indications of where he stands, so perhaps we should not be too surprised by his remarks on the BBC's flagship *Andrew Marr Show* last weekend. The novelty of his latest contribution may only have been one of emphasis, but the tone was nevertheless striking. Apparently the prospects of membership for an independent Scotland, never untroubled in his perspective, are now to be assessed as "extremely difficulty.... If not impossible."

These remarks have been well publicised. Predictably, they have been seized upon by Better Together as vindicating their long-standing scepticism about an independent Scotland's EU future, and as further evidence of the emptiness of nationalist promises. But why should anyone listen to Barroso on this topic? Does he have a legitimate political voice in the debate? Does he speak from a position of legal authority? Or, regardless of his political or legal standing, does he simply have a good insider argument, and one that we should heed? The answer, on all three counts, would seem to be 'no'. Why is this so, and why is it important to the integrity of the debate that the kind of intervention Barroso has sought fit to make should be challenged?

First, there is the question of legitimate political voice. Barroso is not an elected politician. One upon a time he was. Between 2002 and 2004 he was Prime Minister of Portugal. Since then he has done two stints and ten years as the unelected President of the European Commission. His position, which he will vacate this year, *does* depend upon that of two elected institutions - on the Council (made up of nationally elected politicians) which proposed him, and on the European Parliament which was required to approve, his appointment. Under new rules introduced by the recent Treaty of Lisbon, the appointment of his successor will be subject to an additional indirect democratic check - namely the requirement that his or her nomination by the European Council should 'take account' of the results of the latest European Parliamentary elections. In fact, the last European elections in 2009 already saw a move towards an overtly political style of appointment, with Barroso the chosen candidate of the European People's Party. But none of these developing procedures and practices

can make an elected politician out of an unelected public servant. Barroso has no popular mandate, and perhaps some sense of that lay behind his protestations to Andrew Marr, rendered not a jot more credible by their repetition, that his words did not constitute an attempt "to interfere" in a matter of internal Scottish and British politics.

But even if Barroso represents no electoral constituency, does he, as head of the Commission, nevertheless possess a clear legal authority, or even a duty, to step into the Scottish debate? The Commission certainly has an extensive legal remit. According to Article 17 of the Treaty on European Union, it "shall promote the general interest of the Union". Yet in so doing we should understand the Commission's role as servants of the Treaty framework rather than its master. Article 17 continues by specifying the Commission's role in ways that reflect and confirm its status as the EU's administrative college. Its responsibilities are largely downstream. They include the monitoring of the application of European law, the performance of various budgetary, management, executive and management functions, as well as the power to initiate (but not decide) legislation under the Treaties. In all of this the Commissioners, including the President, like civil servants everywhere, are charged to act independently of external influence.

None of this suggests any stand-alone authority for the Commission or its President on the high political question of new membership, except insofar as this is directly specified in the Treaties. But if we look at the relevant provisions - Article 49 on accession and Article 48 on the alternative route of general Treaty revision - the standing of the Commission is a distinctly modest one. As regards accession, its role is only one of consultation, with the key decision-making reserved to the European Parliament and the Council. As regards general Treaty revision, the Commission is one of a number of institutions that may make proposals, but here the decisive voice lies squarely with the national governments.

If the Commission does not command a central legal role in these matters, should we not nonetheless be prepared to listen carefully to the views of its President simply as an expert in Union-craft - as someone who has the knowledge and experience gained from a decade of independently "promoting the general interest of the Union"? Absolutely. Of course we should! The snag here is that the President has chosen to say nothing worth saying - nothing that would draw upon a considered sense of that general interest, but instead restricts himself to well-worn prognostications about what others might do in pursuit of their *particular* interests. He trades on the symbolic authority of his position to do nothing more than profound than recall that the reception of an independent Scotland into the European Union, whether through the Article 49 route that he envisages, or through the relatively "seamless" Article 48 route that the nationalists argue for, would require the approval of all 28 existing member states; and then to advise that this is an arithmetically formidable threshold, especially given the reservations of certain member states about independence movements in their own backyards - a caution that, as Barroso proceeds to remind us, has led Spain, concerned with Catalanian and Basque claims, even to refuse to permit a precedent as distant as the recognition of Kosovo as an independent Balkan state.

What is glaringly absent from the debate, both in the knowing buck-passing of Barroso's intervention and in the broader silence of the EU's main movers and players on the Scottish question, is the articulation of any kind of public philosophy that would provide good reasons, rather than simply motivations of base political self-interest, why an independent Scotland should or should not be welcomed with open arms. How, precisely, is the EU, still resolved by common commitment of the member states in the preamble to the Treaty on European Union "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity", to justify the exclusion of an independent Scotland? Why should a country of 5 million citizens, who have also been EU citizens for 40 years and who have expressed no desire to leave the European Union, be treated less generously than the 110 million new EU citizens - over 20% of the EU's total population - who have joined from Central and Eastern Europe since 2004? Why should Scottish citizens instead be placed in the same category of Kosovo, or any other potential candidate from beyond the Union's distant borders?

The point in posing these rhetorical questions is *not* to suggest that the propositions they contain will simply collapse under the weight of their own absurdity. For there may well be a principled case to make against automatic and accelerated membership of an independent Scotland. We find the embryo of such a case, for example, in the [analysis of Joseph Weiler](#), the current President of the European University Institute in Florence. He has argued, with special reference to the Catalan case, that just as national minorities in existing member states who presently enjoy extensive forms of individual and collective freedom have no automatic right to secede as a matter of general international law, so, too, the European Union in its accession policy should not be expected to indulge the independence claims of these unoppressed sub-state nations. To the contrary, the very ethos of integration, reconciliation and continental solidarity that has fed the European project from its post-War beginnings, according to Weiler, should lead the European Union to take a dim view of any separatist impulse that seems to betray these very founding virtues. From this perspective, therefore, far from having a stronger claim than those external candidates who have benefited from the post-Cold War Enlargement, those nations already comfortably nested in the EU's Western European heartland of multi-level governance should be promised no safe European haven if they insist on the path to independence.

I happen to disagree with both the specific thrust and the wider implications of the Weiler thesis. To begin with, and most narrowly, even if Weiler's reasoning is applicable to the situation of Catalonia, where no constitutionally permissible route to referendum and independence is presently countenanced at the level of the wider Spanish state, the Scottish case is quite different. Here, the Edinburgh Agreement reflects the preparedness of the UK's flexible constitution to accommodate the prospect of independence. So for the EU to set its face against Scottish independence would be to dismiss the significance of the member state's own recognition of the legitimacy of secession. Secondly, and more broadly, whether we are dealing with the Scottish or the Catalan case or that of any other national minority, surely more store than Weiler allows should be set by an aspiring nation's own sense of what is the constitutionally adequate vindication of its desire for collective autonomy. If nothing short of independence is deemed adequate from the perspective of the constituency in question as an affirmation of shared political identity, it is difficult to see why such a subjective aspiration should be dismissed in favour of a supposedly objective standard of adequate individual and collective freedom. Thirdly, even if a special case for the EU as an entity possessing and pursuing a unique historical mission to make internal secession both unnecessary and unacceptable can be advanced, it seems unduly dogmatic to use this to justify a rigid policy against continued membership of new internal states. There are, after all, other and rival views of the deeper purpose of the European Union. The priority given in the Preamble to the TEU to the principle of subsidiarity has already been mentioned, and this surely reflects an alternative and more independence-friendly perspective. In the face of these competing narratives, should the public policy of the EU on accession not remain more agnostic?

Whether or not my arguments convince, they surely serve to demonstrate that the EU's accession policy is and always has been intimately linked to the deep purposes of the world's first supranational polity, and to ongoing debate, inevitably controversial, over what precisely these deep purposes demand. It is, therefore, a matter that requires reasoned public argument and justification of the sort that Weiler attempts rather than a mere weighing of the strategic 'private' preferences of national parties. Yet all we get from Barroso is the latter. Not only is this less than we might expect from someone committed to the general interests of the Union, but it also allows the prejudices of national parties to be entered to the calculation without the embarrassment of a first person airing.

In a nutshell: if any of the key players on the EU stage is opposed to Scottish membership then they should either show the courage of their convictions through a discourse of public justification linked to the interests of the Union as a whole or, failing that, they should at least be prepared to declare their intentions to act out of national self-interest. Barroso's intervention allows a significant oppositional note to be struck without either of these tests of public candour being met. The danger increases that our independence debate become hijacked to poorly specified and undefended external considerations. That surely is bad news for anyone interested in the referendum as a means to the long-term, widely accepted resolution of our national conversation.

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