WORKING
PAPERS

Independence Referendums: Who Should Vote and
Who Should be Offered Citizenship?

edited by Ruvi Ziegler, Jo Shaw and Rainer Bauböck

Types of membership, types of processes and types of politics

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Ruvi Ziegler makes an important as well as interesting point in his kick-off contribution. By reflecting on the actual membership of the 'single issue demos' which will decide the future of Scotland on the 18th of September 2014, on the one hand, and the putative, and rather sketchy at this point, membership of an independent Scottish commonwealth, on the other, he notices the incongruence between the two. He has fully grasped the historical and political context, which Bernard Ryan also eloquently outlines, but he is convinced that the franchise in the Scottish independence referendum should not have reflected the criteria deployed for political participation in local government elections (Section 2 of the Representation on the People Act 1983). Instead, it should have followed other criteria since 'independence referendums share the fundamental and long-term characteristics of national elections, and their significance is enhanced by their capacity, from both a national and international law perspective, to alter the legal landscape for individual citizens' (kick-off contribution).

Why congruence?

Ruvi Ziegler furnishes two arguments in favour of congruence. The first is that the principle that 'all affected interests should be considered' is not complied with since individuals who will be deemed to be '*ab initio*' citizens should Scotland become independent are excluded from casting their vote on the 18th of September 2014. The second argument is that the under-inclusive character of the present arrangement undermines the legitimacy of the referendum – an argument that Dimitrios Kyritsis does not share. Ziegler notices the paradox that the ad-hoc referendum demos excludes persons who will be eligible for citizenship on day one of independence while the proposed citizenry of a future state will exclude those persons who are eligible to participate in the constitutive political act of establishing the new state. This leads him to argue that 'the determination of the franchise for the Scottish independence referendum was ill-conceived' (kick-off contribution).

Ziegler's reasoning is both plausible and insightful. It is plausible because we are confronted with a paradox. It is also insightful because, notwithstanding the special role of political contexts and historical processes, it is conceivable that political scientists and lawyers can develop clear and normatively justified criteria for franchise in independence referendums. Having said this, however, Ziegler's argument also rests on two presumptions which may not be universally shared. I will call these i) the time-continuum; and ii) the desirability of monism presumptions.

The time-continuum presumption projects a linear temporal line among the independence referendum, day one of independence and everyday political life post-independence. By so doing, it underscores the different political acts, processes, stages and politics that are involved in the transition of a political unit from regional self-determination to state formation to polity functioning and state maintenance. It thus subsumes multiplicity into an overarching monism; one type of political process, one type of politics, and one type of membership and electoral participation.

Types of process, types of politics and types of policy

Neither historical manifestations of a political unit's secession nor imaginative constructions of state formations in contractarian political theory, such as, for example, the Hobbesian formation of a sovereign state, conflate the constitutive act of the formation of a state with law and policy making by,

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and within, the (new) state. The former is a state-generative act or an act of constitutive politics since it emplaces a political structure. Following the establishment of a state, a different political process, which could be either inclusive or elitist in character, normally commences with a view to designing a complex array of policies and their generative structures. Foreign policy and external action, distributive policies, regulative policies and constituent policies will be enacted thereby shaping the state's functioning and maintenance. Defining who will be a citizen, or will be worthy to become citizen, is a constituent policy. And it is normally politics (and ideology) which will determine the scope of policies, including the scope of constituent policies, such as the citizenship policy of the new state. In other words, there is no continuum between 'the constitutive' and 'the constituent' and there is a lot of writing, a lot of re-writing and a lot of creativity in institutional design and policy formulation and implementation post-independence.

All this is to say that 'framers', that is, those who will vote in the independence referendum, do not have to be identical with 'the deciders' in an independent Scotland. Similarly, having chosen the residence-based option for franchise on the 18th of September 2014, there existed no obligation on the part of the Scottish Government to outline the scope and content of future policies in detail in a document. The legitimacy of the referendum would not have been undermined if Scotland's Future: Your Guide to an Independent Scotland, which was published by the Scottish Government in November 2013, contained no explicit, or very ambiguous, references to the content of the citizenship law of the newly independent state. Nor do any putative claims for inclusion into the body of citizens by qualifying Commonwealth citizens and EU citizens resident in Scotland derive their normative force and political weight from the fact that these persons will take part in the independence referendum. Such claims would have to be premised on the normative force of democratic considerations which make residence and participation in the socio-economic life generative of the entitlement to participate fully in the political sphere and to authorise the laws which govern one's affairs. Their right to vote in the referendum stems from the above premise and could thus be a supplementary ground in favour for their inclusion into the permanent Scottish demos following independence.

In the light of the foregoing discussion, the different political processes and politics involved in polity transitions must be put in proportion and perspective. True, a discussion of who should be part of the people of Scotland is rather premature at this point for the reasons that both Rainer Bauböck and Bernard Ryan outline in their contributions, but if predictions or a critical examination of what has been suggested thus far can be made at an institutional level, then one has to recognise the possibility of more than one pattern or policy option as well as the possibility that what might be chosen in the eighteen-month period that will follow a 'yes' outcome on the 18th of September 2014 might contain significant variations from what was proposed in November 2013. This is how politics works and almost any generalisation concerning policy design often proves to be inapplicable to most of the cases of concrete policy formulation.

This is not to say that academics and policy practitioners should not engage with questions concerning the (rightful) membership of the Scottish demos and provide advice about the content of the future Scottish citizenship law and policy. Rather, one needs to recognise that any such intellectual endeavour will be unavoidably normative in the same way that any really good citizenship theory is unavoidably normative. And while scholars are mainly interested in neat designs and are attracted to settled patterns and the elimination of framework ambiguities, real politics is messy, complex and unpredictable. The making of a real law is almost never a linear path from point A to B, but an act of producing a mosaic where multiple models and different patterns are brought together in a single design. And the Scottish citizenship law mosaic remains yet to be configured.

Different membership criteria for different demoi?

The different political moments involved in the Scottish independence story, the different political processes and types of politics unavoidably yield different types of 'we, the people' for the purposes of state formation and state functioning or maintenance following formation. While congruence between the membership criteria of the referendum demos, on the one hand, and the Scottish demos is not necessary since the connection between the types of demoi is a loose one, it is still desirable and important to reflect on the existing criteria of membership, characterise policy choices as good or bad and, generally speaking, to consider important questions about political membership, inclusion and democracy. This is precisely what Ziegler has invited us to do. If we value consensual and inclusive political processes and open and democratic politics, the choice of policies (of a citizenship policy in this case) becomes more limited. I fully agree with Ziegler that in formulating policies, governing elites need to: a) be inclusive; b) be as consistent as possible; and c) give a political voice to all those who have made Scotland the hub of their lives and will be subject to Scotland's jurisdiction on day one of independence – thereby according priority to democratic, as opposed to ethnocentric, considerations. Congruence between the different demoi would thus be normatively desirable; the Scottish citizenship law and policy should mirror the residence-based approach of the Scottish referendum franchise.