

# Scottish Independence

## The Romantic Game

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### Introduction

The European Union has recently had to face increased assertions of national identity and regional autonomy in several member states. The 'identitarian' far right is on the rise in a number of countries and is strongly opposed to the idea of the European Union.<sup>1</sup> Growing authoritarian nationalism also pretends to be an answer to global capitalism (Bloom 2016: 50–51). Furthermore, certain regions within EU member states, such as Scotland or Catalonia, are also demanding greater autonomy ever more loudly. It is noticeable that, although both movements (i.e. identitarian politics associated with nation states, and movements for greater autonomy within a state) derive from the same root – nationalism (see Gellner 1998: 3–4, 61) – they can be (but are not always) quite different in their position towards the European Union and in their stance to immigration politics. In Scotland, for example, a rise in nationalism and calls for Scottish independence from the UK (effectively: from England) since the 1960s is evident in the fact that the Scottish National Party (SNP) has held power in the regional (devolved) government of Scotland since 2007. And yet, at least the present leadership of the SNP proclaims to have a rather social-democratic political position<sup>2</sup> and is opposed to a far-right anti-immigration

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1 This is, however, not really a new development in the EU, see Schlesinger (1994: 325) for a description of this phenomenon about 25 years ago.

2 See, for instance, the speech by the then newly elected SNP leader Nicola Sturgeon on 15 November 2014: 'But in the SNP, the people of Scotland will always know they have a party of true social democracy.' Cited in Sparrow (2014), 'SNP conference – Nicola Sturgeon's speech: Politics Live blog', *The Guardian*, 15 November 2014: <https://www.theguardian.com/politics/blog/live/2014/nov/15/snp-conference-nicola-sturgeons-speech-politics-live-blog> (accessed 8 March 2019). Historically, the SNP was a conservative party, and from 1934, when it was founded, and at least until 1937 some of its founders, for example Andrew Dewar Gibb, flirted with fascism, albeit rather coyly. See, e.g., Hanham (1969: 163–166).

agenda.<sup>3</sup> It also declares its adherence to a concept of 'civic nationalism' (Kiely et al. 2005: 150). Whatever that may be, it is ostensibly a rejection of a nineteenth and twentieth century-style traditional ethnic and homogeneous mono-cultural nationalism (Gellner 1998: 2–3, 72–73). Such 'traditional' nationalism sees itself as universal, which is incorrect as such, because cultural diversity where nationalism did not play a significant role has inevitably also existed. Furthermore, nationalisms in different nations are necessarily confrontational and in a state of rivalry (Gellner 1998: 6–8, 95). By contrast, the SNP leadership is supportive of membership of the European Union and the EU's anti-nationalist values. It reflects the mood of the Scottish people in this regard: in the EU referendum on 23 June 2016, Scotland voted in all its constituencies and with 62% overall for remaining in the European Union (overall turnout in Scotland: 67.2%).<sup>4</sup>

The following is a perhaps idiosyncratic discussion by a European about Scotland's drive for – and largely already achieved – autonomy within the UK, with an emphasis on the legal perspective. As it concerns the UK, the discussion cannot be divided from 'Brexit', the UK's impending departure from the EU. This chapter concerns the development of autonomy within a country that positioned itself *outside* Europe as a cultural space, and that would not have changed, even if the legal withdrawal from the EU according to Art. 50 TEU had not gone ahead or had been delayed further.

## Autonomies Inside and Outside the European Union: The English-Scottish United Kingdom and Brexit

In England, the majority of the English people do not consider themselves part of 'Europe'. British, especially English, people refer to themselves as 'British' in contrast to, and not as a subset of, an identity as 'European'. Furthermore, and possibly in reaction to mounting Scottish nationalism in the context of the 2014 independence referendum, many would also stress that they are 'English'. For them 'Europe' is 'the Continent'. The outcome of the EU referendum was therefore no great surprise; in fact, it was fairly astonishing that the result in favour of Brexit in England was rather weak (53.4%),<sup>5</sup> given the populist anti-immigration and xenophobic agitation, fuelled by the British tabloid press, which characterised the EU referendum campaign.

3 See, for instance, Carrell & Watt (2013), 'Nigel Farage and Alex Salmond clash over protesters', *The Guardian*, 17 May 2013.

4 BBC News: 'EU Referendum Results': [https://www.bbc.co.uk/news/politics/eu\\_referendum/results](https://www.bbc.co.uk/news/politics/eu_referendum/results) (accessed 8 March 2019).

5 See e.g. BBC website: 'EU Referendum Results':

The Scots generally feel, and usually are, more 'European', but are part of a union with a country that, by contrast, has a non-European orientation. Whether the kingdoms of England and Scotland will remain united, especially in the aftermath of a potentially disastrous 'no-deal Brexit', remains to be seen. Many Scots are sympathisers or supporters of a separatist nationalist movement that seeks Scottish independence but (generally, though not always) sees the future of an independent Scotland in the EU, that is, in a political and economic union of nation states that is designed to overcome nationalism. Thus, the Scottish nationalists largely adhere to a non-nationalist EU. In contrast, other, more traditional right-wing nationalists, such as in France, Germany, Austria or Italy share a similar level of disdain for the EU, but it is precisely this commonality of political perspective that prevents them from cooperating. The idea of 'nationalists of the world, unite!' is a contradiction in terms. This shows two important aspects of nationalism: national identity is not 'natural', but constructed and invented at will, and nationalism involves irreconcilable paradoxes.

The paradoxes of nationalism are also evident in the Brexit debate. Brexit is indeed a peculiarly British, or rather English, problem and is really a matter for the British, with their pathological obsessions with Europe, to sort out.<sup>6</sup> Self-contradictory views are quite common. Even 'remainers', that is, those who oppose Brexit, are not free from nationalistic contradictions. The remainner position combines a nationalistic attitude that emphasises autonomy and uniqueness with a pro-European position. This is true in both England and Scotland individually, and in the UK as a whole. One can draw certain conclusions about developments inside the EU from the experiences around autonomy in a country that will soon be outside the EU.

## Unacknowledged Federalism Without a Written Constitution

Are Scottish devolution and the Scottish independence movement really models for the idea of autonomous regions in Europe? This question can be answered immediately with a resounding 'no'. The principal reason is that Scottish devolution is based on a unique constitutional framework that could not, and should not, be followed anywhere else. Any modern federal system with relatively autonomous regions, states, *Länder* or cantons requires a written constitution that sets out the competences of the federation vis-à-vis the separate federal states. Federalism can have a democratising effect by preventing excessive centralisation of political power, but this can only operate properly where there is a constitutional system that distributes powers and has a judicial review system, either through a specialised constitu-

<sup>6</sup> Fintan O'Toole, 'The paranoid fantasy behind Brexit', *The Guardian*, 16 November 2018.

tional court or (particularly in common law systems) through the ordinary courts assuming the role of a constitutional court.

Britain has no written constitution; that is undisputed. However, what may be controversial is my own interpretation after having lived and worked as a lawyer (mostly as an academic) in both England and mainly Scotland for some twenty years: the United Kingdom has no constitution at all as a modern political and legal system would understand it. What Britain has, is a feudal constitution in the spirit of an *ancien régime*, as in France before the French Revolution of 1789 and before the US Constitution (1787, in force since 1789). The term '*ancien régime*' is characteristically not used by British political scientists, lawyers or historians, because there has been no revolutionary rupture, for England since the Glorious Revolution of 1688-89, and, for Scotland, since the Act of Union of 1707, which formed the Kingdom of Great Britain. The current British system is thus '*ancien*' in substance, at least from a continental European viewpoint (Rahmatian 2018: 620).

The feudal system is part of everyday life in the UK, although ordinary people will often not be aware of it. Every instance of land ownership in England and Wales is technically a feudal tenure in law, whereby the Crown, at the apex of the feudal pyramid, is the only owner of the land, while the user and perceived owner of the individual plot of land or house is actually a vassal or feudal tenant (nowadays usually a tenant-in-chief with no intermediate superiors). Every conveyance of immoveable property in England and Wales today is officially a substitution of vassals – the seller is substituted by the buyer according to the Statute *Quia Emptores* of 1290, which is still in force. Scotland only abolished this system of feudal landholding in 2004. This legal, not only sociological, feudalism is ultimately still the framework of a state that does not have a written constitution (Rahmatian 2018: 620–621 on the legal technicalities): the feudal pyramid, based on landholding and property – mirrored in the ubiquitous and unabated power of the English class system today – is the skeleton of the structure of the British 'state'. It is also characteristic that the term British 'state' is unfamiliar (Loughlin 1999: 35); in Britain one refers rather to the 'Crown' or 'Government' or 'Parliament', as the case may be. Naturally the constitutional and administrative structure of the British 'state' also rests on the feudal system; it could not rest (in law) on a founding constitution, because there is none. The legislative, executive and judicial powers were and are rooted in the feudal structure. The Crown and the British Parliament in particular, including the highest court of the land until 2009, were historically, and still are, creatures of feudalism. The court of final appeal was formerly the House of Lords (technically 'The Appellate Committee of the House of Lords'), whereby the judges or Law Lords were also members of the House of Lords, the Upper House of Parliament. In 2009, a separate Supreme Court was established, which finally

achieved proper separation of powers.<sup>7</sup> This features a characteristic of (otherwise historical) feudal systems: the fusion of private law (land ownership) and public law (state institutions), which political theorists of the early modern period so carefully sought to distinguish by conferring sovereignty on the state, the prince, and later the people (public law), and by conferring property on the individual (private law).<sup>8</sup>

I said before that 'naturally' the British constitutional and administrative system rests on the feudal system, but there is almost no reflection on that fact among British public lawyers, and I cannot see much difference between English and Scottish lawyers in this regard. What I have presented is certainly a heretical account of British constitutional law. Legal historians would probably be more forgiving and would remember the statement of the distinguished legal historian Frederic Maitland that 'our whole constitutional law seems at times to be but an appendix to the law of real property' (Maitland 1909: 538).<sup>9</sup> But it would probably not be accepted by traditional British constitutional lawyers. Nevertheless, my understanding has been proven in the course of the Brexit negotiations.

The British system of an unwritten feudal constitution can be interpreted in such a way as if Britain had a modern democratic constitutional system. In this way, the old feudal *ancien régime* framework is laced with constitutional conventions that emulate a modern constitutional system of the type that emerged following the French Revolution, and as is found in every other EU member state, and as is the tacit assumption underlying the legal and constitutional framework of the EU itself. Recently, British politicians of both principal political parties, have, however, chosen to depart from that method of emulation and pursue a different path. This may be a specific form of English democracy, or it may turn out not to be even that. The feudal constitution itself has (again, naturally) no democratic safeguards enshrined within it (Rahmatian 2018: 624–626). Since the imitation of modern European constitutional democracies is no longer sought, British membership of the EU is incompatible also for this reason, and, for that reason alone, the Brexit negotiations were largely negotiations for their own sake.<sup>10</sup>

Developments in the Brexit process in early 2019 are but a symptom of this conceptual gap. The former British Prime Minister Theresa May could apparently not understand why EU leaders did not agree to a reopening of the negotiations of the withdrawal agreement,<sup>11</sup> after it had been voted down spectacularly in the British

7 Constitutional Reform Act 2005, s. 23, and SI 2009/1604: Supreme Court of the United Kingdom: The Constitutional Reform Act 2005 (Commencement No. 11) Order 2009, sch. 2.

8 Montesquieu, *De l'esprit des lois*, book 26, chapter 15 (1995: 876).

9 'Real property' is the legal term in England for land, immoveable property, which is feudal.

10 I have always made that point in Rahmatian (2017): 'Brexit: Verhandeln um des Verhandelns Willen?' *Der Standard* (Austria), 24 August 2017.

11 Peter Foster, 'Theresa May leaves diplomats in "disbelief" after presenting EU leaders with unchanged Brexit demands', *The Telegraph*, 18 January 2019.

Parliament by 230 votes on 15 January 2019,<sup>12</sup> the worst defeat for any British government in at least 100 years, and then voted down again twice and decisively on 12 and 29 March 2019. The then Prime Minister's stance was the result of a notion of British exceptionalism combined with a complete misunderstanding of the principles of the EU that are based not on some feudal structure with ever-changing constitutional conventions but on a modern constitutional statutory framework which the constitutions of the member states in aggregate and the EU Treaty itself provide. The new UK Prime Minister since 24 July 2019, Boris Johnson, seems to carry this misunderstanding to a new extreme.

However, despite the string of reputation-harming performances in the course of the Brexit debacle, most British politicians still fantasise about the UK being the oldest and best functioning democracy in Europe, with the best legal system in the form of the Common Law. It would not cross their minds that the EU, although it limited British parliamentary sovereignty, acted as a kind of framework that helped the ancient British feudal constitutional system emulate a modern democratic state and ensured that the British constitution continued to be interpreted in the light of a modern liberal and pluralist parliamentary democracy (Rahmatian 2018: 626).

Where does that leave Scotland? Actually, nowhere, but that is partly also self-inflicted. As explained earlier, the British constitutional system is, in essence, still a feudal system. Such a system does not contain any concept of federalism, but provides effectively a centralist state structure. Although Jean Bodin<sup>13</sup> and later Thomas Hobbes<sup>14</sup> developed the modern idea of sovereignty as a clear departure from the late medieval feudal system,<sup>15</sup> they took over the inherent centralism in the feudal system in which any political and legal relation – including the personal element of feudalism, the *homagium*, as well as the proprietary element, the *beneficum* (Ganshof 1964: 72, 75, 106) – ultimately focused on a single vanishing point, the king. This was the case under the French feudal system (and France would become the classic example of a centralist state) and the English system, which imported essentially the (Norman) French feudal system, albeit in a more tightened way (Stenton 1979: 60-61, 64-65). It was only Johannes Althusius (1614) who proposed, against Bodin, the idea of federalism (Althusius 1965: 99). In modern British political and constitutional theory, Althusius is entirely unknown, and Bodin fares little better. Whether greater familiarity with these thinkers would make any change is doubtful, because the concept of federalism, considered rather as an American or German idea, is in any case still unpopular in the UK. Furthermore, for UK politicians and much of

<sup>12</sup> For a breakdown of results according to political parties and constituencies, see e.g. Antonio Voce and Séan Clarke, 'How did my MP vote on May's Brexit deal?', *The Guardian*, 15 January 2018.

<sup>13</sup> Bodin, *Six Books of the Commonwealth*, book 1, chapter 8 (1955: 25-36).

<sup>14</sup> Hobbes, *Leviathan*, chapters 18, 22, 26 (1985: 228-239, 274-288, 312-314).

<sup>15</sup> Bodin, *Six Books of the Commonwealth*, book 1, chapter 9 (1955: 37-38).

the English people, the idea of a 'federal Europe' or an 'ever-closer' European Union is almost horrific (Schlesinger 1994: 319) – something that contributed to the Brexit result.

Nonetheless, in 1999 the Scotland Act 1998 established the Scottish Parliament.<sup>16</sup> This Act introduced to the UK what is usually called 'asymmetrical devolution', and could more prosaically be termed 'unrecognised limping federalism'.<sup>17</sup> It is limping because there is no equivalent English Parliament; the British Parliament in Westminster covers English affairs, and there is little indication of a political will to change that. It is unrecognised because, rather than laying out a federal structure in a written constitution, these arrangements were rather grafted ad hoc onto the centralist unwritten constitution of the whole of the UK. The Scotland Act 1998 that devolved certain powers to Scotland, a federalisation in all but name, is, however, still an Act of the UK Parliament. According to classical British constitutional doctrine (the theory of parliamentary sovereignty), Parliament cannot bind subsequent Parliaments, which can thus amend or abolish any Act, including the Scotland Act, at will at any time and thereby eliminate the Scottish Parliament and end Scottish devolution. There are no higher-ranking constitutional norms. Recent legislation has nevertheless emphasised that, in this particular case, such a move would not be possible,<sup>18</sup> and the key constitutional decision of the Supreme Court in *Miller* confirmed that in 2017.<sup>19</sup> However, though that may be the law, politics may take a different view. The Scotland Act and Scottish devolution are based on a self-imposed limitation of parliamentary sovereignty by the Westminster Parliament in London. This self-limitation is the same legal construct that made Britain's EU membership and acceptance of supranational EU law possible, and exactly this is in the course of being dissolved. The cited case of *R. (Miller)* incidentally stresses the foundational centralism of the UK: it makes clear that neither the Scottish Parliament, nor the Welsh and Northern Irish Assemblies have a legal veto on the UK's withdrawal from the EU.<sup>20</sup> Whatever Scottish nationalists may want to believe, ultimately Scottish devolution can only exist as long as it secures the grace of the British Parliament in London. This is different from a proper written federal constitution, which all Parliaments, national and regional, would be subjected to.

Many Scots may cherish their devolution, but what Scotland has done with its devolved status has so far been unimpressive. The legislative competence of the

16 Scotland Act 1998, s. 1.

17 Scottish nationalists often see devolution as a defective compromise, see e.g. Maxwell (2013: 38–39).

18 Scotland Act 1998, s. 63A.

19 *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] HRLR 2, para. 149.

20 *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] HRLR 2, para. 150.

Scottish Parliament is actually rather wide,<sup>21</sup> but a look at the titles of the fifteen Acts of the Scottish Parliament passed in 2018 may give an idea of the problems that seem primarily to concern the Scottish legislature: they do not strike one as having a particularly nation-building quality, but are typical of a regional assembly.<sup>22</sup> It is true that the Scottish Parliament has no competence to legislate on Brexit-related matters,<sup>23</sup> but it is astonishing that the SNP, which has formed the Scottish Government since 2007 and has Scottish independence as its declared political aim, has so far not made any serious attempts at preparing for a possible independent Scotland outside the existing legislative constraints. That could include establishing independent informal foreign relations with smaller EU member states (and learning foreign policy from them), or developing greater economic autonomy, for example, by encouraging IT and other high-skills service industries to settle in Scotland, and so forth. An unsympathetic analysis may regard the idea of Scottish independence as a case of romantic political irrationalism or a strategic political dream, and it is not clear whether it is intended that the dream should ever genuinely be fulfilled. Scotland undoubtedly has a separate national identity, expressed by – or made up by – a range of cultural features: education, language (Scots and Gaelic), a different legal system partially based on the historical continental European *ius commune* deriving from Roman Law (White et al. 2013: 21), a cultural outlook generally more directed to Europe, but at the same time influenced

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21 Scotland Act 1998, ss. 29-30, and on retained EU law after Brexit, see s. 30A.

22 Prescription (Scotland) Act 2018 (asp 15), Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 (asp 14), Housing (Amendment) (Scotland) Act 2018 (asp 13), Islands (Scotland) Act 2018 (asp 12), Land and Buildings Transaction Tax (Relief from Additional Amount) (Scotland) Act 2018 (asp 11), Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (asp 10), Social Security (Scotland) Act 2018 (asp 9), Forestry and Land Management (Scotland) Act 2018 (asp 8), Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018 (asp 7), Budget (Scotland) Act 2018 (asp 6), Domestic Abuse (Scotland) Act 2018 (asp 5), Gender Representation on Public Boards (Scotland) Act 2018 (asp 4), Wild Animals in Travelling Circuses (Scotland) Act 2018 (asp 3), Writers to the Signet Dependents' Annuity Fund Amendment (Scotland) 2018 (asp 2), Edinburgh Bakers' Widows' Fund Act 2018 (asp 1).

23 See the Supreme Court Decision The UK Withdrawal From The European Union (Legal Continuity) (Scotland) Bill - A Reference by the Attorney General and the Advocate General for Scotland (Scotland), [2018] UKSC 64, para. 52: '... An enactment of the Scottish Parliament which prevented ... subordinate legislation from having legal effect, unless the Scottish Ministers gave their consent, would render the effect of laws made by the UK Parliament conditional on the consent of the Scottish Ministers. It would therefore limit the power of the UK Parliament to make laws for Scotland ... The imposition of such a condition on the UK Parliament's law-making power would be inconsistent with the continued recognition, by section 28(7) of the Scotland Act, of its unqualified legislative power.' This subordinate legislation would particularly be legislation following the withdrawal of the UK from the EU.

by Presbyterianism as a distinctive variant of Protestantism.<sup>24</sup> However, it appears that blaming the central government in London and insisting on autonomy when it suits the Scots is politically easier<sup>25</sup> than a well-planned, reasonable (and perhaps non-nationalistic) and systematic preparation for full political independence. That may even apply after Brexit: Scottish allegiance to the UK may prevail over allegiance to the EU.

## Parallels between the 2014 Scottish Independence Debate and the UK Brexit Debate of 2016

The 2014 Scottish independence referendum also revealed a contradictory attitude. It was never quite clear whether the governing SNP was doing more than indulging in a romantic fantasy. The main disturbing feature of this referendum campaign was not so much the possibility of independence of Scotland from the UK, but rather the complete and naïve unpreparedness of the Scottish Government for this step, shrouded in self-centred nationalistic rhetoric.<sup>26</sup> First, and, for a lawyer, fundamentally important, there was neither a draft constitution for the envisaged new independent state nor even any advanced preparations (Rahmatian 2018: 630).<sup>27</sup> It was claimed that nothing would change much for Scotland after independence, especially not as far as the economy is concerned.<sup>28</sup> It was said that after independence, Scotland would retain the (English) pound as its currency.<sup>29</sup> Scotland, being in the EU via the UK, would remain in the EU as an independent country as well. The last claim should be remembered by Scots who now (rightly) accuse the UK Government of incompetence in legal matters during the Brexit negotiations. The position of the Scottish SNP Government about EU membership of Scotland after

24 On the tense relationship between the Presbyterian communities and the Roman Catholicism of the Irish immigrants in the nineteenth and early twentieth centuries, see, e.g. Hanham (1969: 19–20).

25 In the words of one Scottish Nationalist: 'Scotland's subordinate political status' frustrates 'Scottish initiative' in relation to its own welfare and economic policy, see Maxwell (2013: 55). When this was published, the Scottish Parliament had existed for over twelve years.

26 Rahmatian (2014) 'Schottland: Das hässliche Gesicht des Nationalismus', *Die Zeit Online*, 16 September 2014.

27 It is telling that nobody, apart from myself, raised this point as an essential issue, which shows that Scots lawyers are also totally socialised in the deficient concept of the unwritten constitution of the UK.

28 Salmond (2014): 'St. George's Day Speech: Full Text', *New Statesman*, 23 April 2014.

29 For example, S. Carrel, 'It's Scotland's pound and we're keeping it, says Alex Salmond: First minister indicates independent Scotland would use sterling even if formal sterling zone was rejected by UK government', *The Guardian*, 7 August 2014. On the – rather grotesque – effects of such a decision (if approved by England, which seemed very unlikely), see Rahmatian (2012: 337).

independence was not only unquestionably wrong under international law and the rules on state secession (Crawford 2007: 383; Rahmatian 2012: 336), the EU itself also pointed out several times that this view is incorrect, and an independent Scotland would have to reapply for EU membership.<sup>30</sup> The Scottish SNP Government, now very EU-friendly, then rejected out of hand statements made by the EU that other member states could block Scotland's accession to the EU.<sup>31</sup> Since there are many conspicuous parallels between the lofty and disingenuous declarations made during the Scottish independence referendum in 2014 and in the Brexit process from 2016 onwards, one can conjecture that the current pandemonium around Brexit gives a good indication as to how the Scottish independence process would have been if the referendum result in 2014 had been in favour of independence (Rahmatian 2018: 633). However, maybe the Scottish Government did not quite want to win it anyway, just as the proponents of Brexit within the ruling Conservative Party in the UK did not quite want to win the Brexit referendum, either, but only sought political gain in a personal gamble.<sup>32</sup>

In Brexit Britain, Scotland is now probably one of the calmer parts of the country, but that should not make one forget the period of the run-up to the Scottish independence referendum. There was a highly nationalistic atmosphere at that time, no trace of the purported civic nationalism. Furthermore, an inclusive identity-creating nationalism is in any case a contradiction in terms: the making of identity (expressed in an independent Scottish state) always involves inclusion and exclusion, a distinction between 'them' and 'us' (Schlesinger 1994: 321). Accordingly, the whole country was rather engulfed in the usual traditional, hostile and toxic nationalism, and a few elements showed obvious parallels to fascism,<sup>33</sup> though the Scottish Government did not associate itself with these dark forces. This nationalism was then primarily directed at the English – for no justifiable reason – but, if the referendum result had been in favour of independence, it could have turned

<sup>30</sup> For example, European Parliament, Parliamentary Questions, Subject: Status of the United Kingdom if Scotland leaves, 29 October 2012, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2012-009862&language=EN> (accessed 8 March 2019). See also: *Letter of the then EU Commission President José Manuel Barroso to Lord Tugendhat, House of Lords*, 10 December 2012.

<sup>31</sup> Jim Pickard and Mure Dickie, 'EU Commission president says Scotland membership not automatic', *Financial Times*, 16 February 2014.

<sup>32</sup> Hinsliff, (2016): 'A pyrrhic victory? Boris Johnson wakes up to the costs of Brexit', *The Guardian*, 24 June 2016.

<sup>33</sup> On historical interchanges between Scottish Nationalists and the Nazis in the 1930s and 40s, see Bowd (2013: 138–181). However, even during that time, only a small number of Scots associated themselves with fascism. An outline of the current weird curiosities of Scottish Nationalism is contained in Bowd (2013: 265–267).

quickly against Europeans and other perceived non-Scottish elements as well.<sup>34</sup> This demonstrates again that kindred nationalists – here English and Scottish nationalists – may merge in a nuclear fusion, with the emission of deadly energy as a result, but are unable to work together constructively.

## Against the Mainstream of the EU Integration Agenda: Regionalisation as a Non-Nationalistic Approach

Scottish devolution in the UK, which has now left the EU, is not a convincing model for the development of autonomous regions within the EU, but perhaps rather an example of how not to do it. A negative example of this kind can also give guidance points. Furthermore, the Brexit process has unintentionally strengthened the position of the EU as the better political and economic entity for Europe in principle: not even the most brilliantly devised EU-advertising campaign could have made a better case for the EU than has the chaotic British Brexit disaster. The most pallid and uncreative EU-apparatchik in Brussels need only point to the UK after Brexit as a possible alternative to the EU and will have won the argument at once. In this regard, Europeans can be grateful to the British.

However, if the EU wants to survive in the coming decades, it cannot rely on an unexpected boost accidentally provided by the inabilities of a parting member. Rather it is necessary for the EU to adopt a more flexible approach to the process of political and economic integration. Sometimes further integration is expedient, sometimes not, and even a certain reversal must be possible if necessary. The constitutional body of the EU must allow these adaptabilities. In the same way as the ribs must be flexible to allow the body to breathe in and out, otherwise it cannot live, the constitutional and political framework of the EU must allow the EU to breathe as an entity, otherwise it cannot live. Nobody wants to destroy the ribcage, but a static ribcage is a statue, not a living being. A sclerotic EU is a dying EU, a danger that we face now.

For that reason, legal and economic integration in the EU must happen in phases that are, at least in principle, partly reversible. This is a good basis for increased regionalisation in Europe, and that, in turn, allows for a better recognition of autonomous regions within the EU. Pressure for further legal and economic integration still underpins the official agenda of the EU administration, but this could actually

<sup>34</sup> An insight is provided by the views of Jews in Scotland at the time: 'For now they [the Scottish nationalists] are restricting themselves to propaganda and signposts in Gaelic that no one really needs. But as a Jew who has relatively short roots in Scotland, and with friends and family in England and Israel, as much as I feel Scottish on the outside, I fear that one day people will start asking: "How Scottish are you?"', quoted in Pfeffer (2012): 'Jews on Scottish independence: More faintheart than Braveheart', *Haaretz*, 26 October 2012.

lead to the destruction of the fundamental European idea: the prevention of war between France and Germany and between EU member states generally. This is the essence of the EU, and the four freedoms are supposed to contribute to the realisation of this ideal (an aspect that is rarely understood in the UK, hence the Brexit calamity). The more one pursues legal and economic integration and unification across Europe, the more one impedes and endangers the fabric and framework of a union of European states. Further legal unification prompts a tendency of the EU member states to move away from one another. Further (imposed) unity causes further diversity, and, at the same time, a certain level of diversity effects and strengthens unity. This process appears somewhat dialectical, but is actually an ultimately unresolvable paradox, a phenomenon that I have called the 'Herderian paradox', after Johann Gottfried Herder (1744-1803). It applies in relation to already harmonised areas of the law in the EU, such as copyright, and to areas where there is more national diversity, as in the case of European private law (Rahmatian 2016: 919-920) or regulatory rules for the economy. The unity through, and within, diversity is then indeed what Herder saw as the overarching humanist culture that unites mankind, not only in Europe. Unity is actually created and made possible through diversity. Herder does not advocate a value relativism, but a co-existence of different values in different cultures (Berlin 1991: 84).

For Herder, there is a distinctive 'national character' ('Nationalcharakter') of peoples (Herder *Ideen*, II, 9, iv, 1989: 369-370), which he explained in his philosophy of history, particularly in his *Ideen zur Philosophie der Geschichte der Menschheit* ('Ideen on the Philosophy of the History of Mankind') (1784-1791) (see also Rahmatian 2016: 915-917). Herder's 'national character' is the outcome of a mystical combination of history and tradition, education and civilisation, but also of nature and climate.<sup>35</sup> However, despite the dissimilarity of peoples in their seemingly irreconcilable plurality there is still a 'general spirit of Europe' ('Allgemeingeist Europas'), which will gradually extinguish the national characters (Herder *Ideen*, IV, 16, vi, 1989: 705-706). Herder even once uses the term 'European Republic' (*Europäische Republik*) (Herder *Ideen*, IV, 16, 1989: 678). But, contrary to Herder's view, a 'national character' does not derive from nature, culture and tradition, language, education and art. National character is rather deliberately created, a social construct of politics, economics and the media, and frequently consciously fabricated for political ends. It is also often given some irrational mystical spiritual force, which allows it to avoid rational critique.

Humans create the various national characters by behaving as if they were real. In this way the national character can become an important political factor. Britain is a case in point: it is, also culturally, not really a part of Europe, because it chooses not to be, particularly England. However, that may change, and it has indeed been

<sup>35</sup> Herder *Ideen*, II, 7, iii (1989: 268-270); II, 7, v (1989: 280-281); II, 8 (1989: 298-299).

different in the past. A ‘national character’, as with individual identities, ought not to be a concept that is fixed and imposed from above (‘them’ and ‘us’ as a self-definition against ‘them’); for example, a Jew may not be concerned much about his or her Jewishness, but the anti-Semites will be, and that forces him or her into a certain role. The identity of people and peoples should rather be an ever-changing performative act of the self and can therefore only work in democratic systems which allow free discourse and exchange in a stable political space as a prerequisite. This is an aspect of the Herderian paradox of the European ‘unity in diversity’ of different nations with their different ‘characters’. The nations may seek to define and reassess their (imagined and created) identities as they see fit in an ongoing debate.

This concept can also be a model for the regionalisation of Europe in the European Union in a way that does not depend on ethnicities and languages; it is therefore not nationalism in the traditional sense of the past two centuries. Under such a design, nation states would provide the constitutional and legal framework of the regions, particularly in relation to constitutional and social security rights, which would also have to be transportable across the EU. The idea of autonomous regions as a separate concept would gradually dissolve in an all-encompassing regionalisation of Europe.

Nationalists in autonomous regions in Scotland and Catalonia, for example, unconsciously apply this idea already. When nationalist movements appear more EU-friendly than the central states in which they are situated, they invoke the EU (when it suits them) as a political counterbalance to the central government to preserve or even extend their autonomy. In this way they appeal to the idea of a Europe of the regions. However, their position also contains the seeds of demise of a Europe of the regions, because that idea is in contrast to their nationalist endeavours to create traditional independent nation states. If such endeavours are successful, and the new state subsequently becomes a new member of the EU, it may well turn into a quite EU-critical member, because the EU will then be seen as interfering in the new nation state. It should not be forgotten that the principal objective of separatists and nationalists is obtaining unfettered power over the region they claim independence for. This could be seen in the Scottish independence referendum in 2014: the SNP planned to keep the British monarchy for an independent Scotland (Scottish Government 2013: 21, 45, 340), had no constitution in place for the possible new state, and all political parties in the Scottish Parliament except the SNP and the small Scottish Green Party were against independence. (How could a constitutional convention be formed for passing a Scottish constitution under these circumstances?) The result could have been a one-party state in form of an absolute monarchy, at least for an interim period. Political theorists should know that any assumptions about an innate benevolence in human nature are entirely out

of place in politics, hence the absolute requirement for checks and balances in a constitutional system.

At the moment, the EU-friendliness of the Scottish nationalists is also a vehicle for distinguishing the Scots from the English (Ichijo 2004: 86). A central problem when nationalists are confronted with defining their nationalism in positive terms is: What does characterise Scottishness? The nationalists' positive attitude towards the EU is also a strategic tool for achieving Scottish independence, since separating from the UK but staying in, or rapidly joining, the EU is seen as a means of obtaining great political change, but risking little economic disruption (Ichijo 2004: 91-92). The experience of the position of the EU during the Scottish independence referendum in 2014 should have prompted Scottish nationalists to abandon this fantasy: in relation to existing members the EU may tend towards a diminution of the importance of the nation state, but in relation to aspiring members, it applies faithfully the classical rules of international law on the definition and secession of states, and on membership of international organisations.

## Conclusion

It has been shown that the discourse in the Scottish independence referendum in 2014 shared many elements of irrationality with the Brexit referendum two years later. Both are symptoms of generally irrational, populist and romantic nationalisms, whether against the central state or the EU, but in each case in relation to something bigger against whom the little plucky underdog tries to assert his self-determination, without a clear notion as to what actually should be determined. A consensus can quickly be found in the form of hatred towards refugees, xenophobia and racism, which then become the wretched areas of agreement. In this context, a particular national character is also often established or unearthed. While this national character does not have the sublime cultural features Herder wanted to see, politics would be ill-advised to deny the existence of such national characters, which are there because too many people(s) believe they exist. Nationalism nevertheless remains an objectionable and dangerously destructive force. It does not become better if it is renamed 'civic nationalism' or 'patriotism', and Arthur Schopenhauer's snarky comments about nationalism (*Nationalstolz*) (Schopenhauer, 1976: 66)<sup>36</sup> are as valid today as they were in the nineteenth century. (One should also remember François Mitterrand's words in 1995: '*Le nationalisme, c'est la*

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36 And also his important observation: 'Incidentally, individuality prevails by far over nationality, and with a given person the former deserves a thousand times more consideration than the latter.'

guerre!)<sup>37</sup> However, nationalism will not disappear if it is suppressed or disavowed in the constitutional framework of the EU and its policies on integration.

At the same time, cultural differences should not be deformed or destroyed by way of centralisation and unification. The major political challenge of the twenty-first century will be the reconciliation of cultural differences in a greater unity (and not only confined to Europe), based on mutual respect and appreciation. This paradox cannot, and should not, be resolved, but it may subdue nationalist forces. The idea of a European unity of cultures in their diversity did not emerge only with early German Romanticism. Gotthold Ephraim Lessing, the greatest writer of the late German Enlightenment, demonstrated it in a beautiful way in his play *Minna von Barnhelm* (Act 4, Scene 2, Lessing 1853: 221):

‘Riccaut de la Marlinière: [...] – Mademoiselle parle français? Mais sans doute; telle que je la vois! – La demande était bien impolie; vous me pardonnerez, Mademoiselle. –Das Fräulein (*Minna von Barnhelm*): Mein Herr –Riccaut: Nit? Sie sprek nit Französisch, Ihro Gnad? - Das Fräulein: Mein Herr, in Frankreich würde ich es zu sprechen suchen. Aber warum hier? Ich höre ja, daß Sie mich verstehen, mein Herr. Und ich, mein Herr, werde Sie gewiß auch verstehen; sprechen Sie, wie es Ihnen beliebt.’

## References

Althusius, Johannes (1965): *The Politics of Johannes Althusius*, Carney, Frederick Smith (ed.), London: Eyre & Spottiswoode.

BBC News (2016): “EU Referendum Results” ([https://www.bbc.co.uk/news/politics/eu\\_referendum/results](https://www.bbc.co.uk/news/politics/eu_referendum/results))

Berlin, Isaiah (1991): “Alleged Relativism in Eighteenth-Century European Thought.” In: Hardy, Henry (eds.), *The Crooked Timber of Humanity*, London: Fontana Press, pp. 70–90.

Bloom, Peter (2016): “Authoritarian Capitalism in the Age of Globalization”, Cheltenham: Edward Elgar.

Bodin, Jean (1955): “Six Books of the Commonwealth”. Tooley, Michael. J. (ed.), Oxford: Basil Blackwell.

Bowd, Gavin (2013): *Fascist Scotland. Caledonia and the Far Right*, Edinburgh: Birlinn.

<sup>37</sup> Mitterrand, ‘Le nationalisme, c'est la guerre!’ (INA, Institut François Mitterrand): <https://fresques.ina.fr/mitterrand/fiche-media/Mitter00129/le-nationalisme-c-est-la-guerre.html> (accessed 27 January 2019).

Carroll, Severin/Watt, Nicholas (2013): "Nigel Farage and Alex Salmond clash over protesters" In: The Guardian, 17 May 2013 (<https://www.theguardian.com/politics/2013/may/17/nigel-farage-alex-salmond-clash-protesters>).

Carrel, Severin (2014): "It's Scotland's pound and we're keeping it, says Alex Salmond: First minister indicates independent Scotland would use sterling even if formal sterling zone was rejected by UK government" In: The Guardian, 7 August 2014

Crawford, James R. (2007): *The Creation of States in International Law*, Oxford: Clarendon Press.

European Parliament (2012): Parliamentary Questions, Subject: Status of the United Kingdom if Scotland leaves, 08 March 2019, (<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2012-009862&language=EN>).

Foster, Peter (2019): "Theresa May leaves diplomats in "disbelief" after presenting EU leaders with unchanged Brexit demands" In: The Telegraph, 18 January 2019.

Ganshof, Francois (1964): *Feudalism*, 3rd. Ed., Grierson, Philip (ed.). London: Longman.

Gellner, Ernest (1998): *Nationalism*, London: Phoenix.

Hanham, Harold John (1969): *Scottish Nationalism*, London: Faber and Faber.

Herder, Johann Gottfried (1989): *Ideen zur Philosophie der Geschichte der Menschheit*, Bollacher, Martin (eds.), Frankfurt: Deutscher Klassiker Verlag.

Hinsliff, Gaby (2016): "A pyrrhic victory? Boris Johnson wakes up to the costs of Brexit" In: The Guardian, 24 June 2016.

Hobbes, Thomas (1985): *Leviathan*, Macpherson, Crawford (ed.), London: Penguin.

Ichijo, Atsuko (2004): *Scottish Nationalism and the Idea of Europe: Concepts of Europe and the Nation*, Abingdon (Oxon): Routledge.

Kiely, Richard/Bechhofer, Frank/McCrone, David (2005): "Birth, Blood and Belonging: Identity Claims in Post-Devolution Scotland." In: *The Sociological Review* 53/1, pp. 150–171.

Lessing, Gotthold Ephraim (1853): "G. E. Lessing's gesammelte Werke. Neue Rechtmäßige Ausgabe, Zweiter Band". Leipzig: G. J. Göschen'sche Verlagshandlung.

Loughlin, Martin (2003): "The State, the Crown and the Law" In: Sunkin, Maurice. (eds.), *The Nature of the Crown : A Legal and Political Analysis*, Oxford: Oxford University Press, pp. 33–76.

Maitland, Frederic W. (1909): "The Constitutional History of England". Cambridge: Cambridge University Press.

Maxwell, Stephen (2013): *Arguing for Independence: Evidence, Risk and the Wicked Issues*, Edinburgh: Luath Press.

Mitterrand, Francois (1995): "Le nationalisme, c'est la guerre!", INA, Institut François Mitterrand, January 27, 2019 (<https://fresques.ina.fr/mitterrand/fiche-media/Mitter00129/le-nationalisme-c-est-la-guerre.html>).

Montesquieu, Charles de Secondat (1995): *De l'Esprit Des Lois*, Versini, Laurent (ed.), Paris: Gallimard.

O'Toole, Fintan (2018): "The paranoid fantasy behind Brexit" In: The Guardian, 16 November 2018 (<https://www.theguardian.com/politics/2018/nov/16/brexit-paranoid-fantasy-fintan-otoole>).

Pfeffer, Anshel (2012): "Jews on Scottish independence: More faintheart than Braveheart" In: Haarez, 26 October 2012.

Pickard, Jim/Dickie, Mure (2014): "EU Commission president says Scotland membership not automatic" In: Financial Times, 16 February 2014.

Rahmatian, Andreas (2012): "The English Pound in an Independent Scotland." In: Journal of International Banking Law and Regulation 27/9, pp. 336–339.

Rahmatian, Andreas (2014): "Schottland: Das hässliche Gesicht des Nationalismus" In: Die Zeit Online, 16 September 2014.

Rahmatian, Andreas (2016): "European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the 'Herderian Paradox.'" In: IIC - International Review of Intellectual Property and Competition Law 47/8, pp. 912–940.

Rahmatian, Andreas (2017): "Brexit: Verhandeln um des Verhandelns Willen?" In: Der Standard (Austria), 24 August 2017.

Rahmatian, Andreas (2018): "Brexit and Scotland: Centralism, Federalism or Independence?" In: European Review 26/4, pp. 616–647.

Salmond, Alex (2014): "St. George's Day Speech: Full Text" In: New Statesman, 23 April 2014.

Schlesinger, Philip (1994): "Europeanness: A new cultural battlefield?" In: Hutchinson, John/Smith, Anthony D. (eds.), Nationalism, Oxford; New York: Oxford University Press , pp. 316–325.

Schopenhauer, Arthur (1976): Aphorismen zur Lebensweisheit, Frankfurt am Main: Insel Verlag.

Scottish Government (2013): "Scotland's Future: Your Guide to an Independent Scotland, Edinburgh". Edinburgh: The Scottish Government.

Scotland Act 1998, c. 46. (<http://www.legislation.gov.uk/ukpga/1998/46/notes/contents>)

Sparrow, Andrew (2019): "SNP Conference – Nicola Sturgeon's Speech: Politics Live Blog" In: The Guardian, 15 April 2019 (<https://www.theguardian.com/politics/blog/live/2014/nov/15/snp-conference-nicola-sturgeons-speech-politics-live-blog>).

Stenton, Doris Mary (1979): English Society in the Early Middle Ages, Harmondsworth: Penguin Books.

Supreme Court of the United Kingdom (2005): The Constitutional Reform Act 2005 (Commencement No. 11), Order 2009, SI 2009/1604.

Voce, Antonio, Antonia/Clarke, Seán (2018): "How did my MP vote on May's Brexit deal?" In: The Guardian, 15 January 2018.

Withe, Robin/Willock, Ian/McQueen, Hector (2013): The Scottish Legal System 5th Edition, Haywards Heath: Bloomsbury Professional.