



Rahmatian, A. (2018) Brexit and Scotland: Centralism, federalism or independence? *European Review*, 26(4), pp. 616-647.  
(doi: [10.1017/S1062798718000054](https://doi.org/10.1017/S1062798718000054)).

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Deposited on: 29 January 2018

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# **Brexit and Scotland: Centralism, Federalism or Independence**

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## **Abstract:**

The public debate about the consequences of Brexit in Britain follows certain predictable lines of established academic concepts in British constitutional law. This arguably overlooks important constitutional complications of Brexit, including the position of Scotland in post-Brexit Britain. This article takes the unorthodox approach of focusing on legal and intellectual history rather than British constitutional law, because in this way one obtains a better understanding of the present British constitutional framework in the context of Europe. The discussion is from a continental European viewpoint and through the eyes of a private and commercial lawyer. The completely different understanding of Britain and Europe about the nature of a constitution and the structure of a state becomes more apparent with Britain's departure from the EU, which may also influence the future national cohesion of the UK itself, particularly the relationship between England and Scotland after Brexit.

## **1 Introduction**

The legal problems which the United Kingdom will have to deal with when leaving the European Union are usually discussed from the perspective of British lawyers, and confined to legal questions of the future trade relationship between the UK and the EU, the situation of EU citizens in the UK, the Irish border, the financial settlement with the EU following Brexit, the legal possibility of reversing the withdrawal under Art. 50 of the Treaty of the European Union, and so on. The academic voice of Europeans in the public Brexit debate in Britain is entirely absent, and the legal discussion on Brexit follows certain predictable lines of established academic concepts of British constitutional law. This arguably overlooks important constitutional complications of Brexit, particularly in relation to the position of Scotland in post-Brexit Britain. One obtains a better understanding of the present British constitutional framework in the context of Europe if one sees it from the position of legal and intellectual history.

Therefore this article takes an unorthodox approach. It is not about constitutional law as conventionally understood. It rather focuses on legal and intellectual history, comparative law and particularly property theory, and it looks at the British constitution and the challenges Brexit poses from the outside, that is, from

a continental European viewpoint and from the position of European intellectual and constitutional history. Furthermore, the perspective taken is primarily not that of a public lawyer, but of a private and commercial lawyer looking at constitutional issues. In a globalised world of transnational trade and international commercial law the traditional idea of the nation state which the disciplines of public law or constitutional law still adhere to becomes less and less important. Many phenomena of the modern legal world, also within the classical domain of public law, can nowadays only be explained with an analysis of the rules and institutions of commercial law, not traditional public law. In some respects the evolution has come full circle, because the private law or property law element in what we call public law or constitutional law today was central to the feudal system in historical times. And that leads seamlessly to the British constitution and its struggles with Brexit.

Brexit engages commercial lawyers and public lawyers alike. Whether or not the referendum of 23 June 2016 was an accidental slip into popular sovereignty against the age-old constitutional convention of parliamentary sovereignty<sup>1</sup> is unclear. In any event, the result of the slight majority of 52% of the British people in favour of Britain's departure from the European Union became 'the will of the people' and gospel for parliamentarians. The dictate of the majority already astonished Alexis de Tocqueville in his study of US democracy:<sup>2</sup> so the minority of 48% were apparently not the 'people', nor even the *majority* of the Scots and Irish in Northern Ireland who voted against Brexit,<sup>3</sup> and judges upholding parliamentary sovereignty in *R. (Miller) v. S of State for Exiting the EU*<sup>4</sup> were even the 'enemies of the people' for some.<sup>5</sup> At least at that stage 'the people' became a populist battle cry with fascist leanings.<sup>6</sup>

In any event, the UK never really understood the principal idea of the European Union which all EU measures and structures ultimately have to sustain:<sup>7</sup> never ever war between France and Germany and never ever war between Member States generally. Britain had little interest for that. EU membership really meant a pragmatic use of the common market which was considered as expedient.<sup>8</sup> In the UK, overregulation and excessive legal harmonisation were often regarded as objectionable because they may have impeded the free single (financial) market that the UK traditionally championed, or because they may have hurt nationalistic feelings. It was never a British concern that over-synchronization could damage the European project itself: for the more one pursues integration, harmonisation and unification of national laws across Europe, the more one imperils the framework of a union of European states. Further legal unification prompts a tendency of the EU Member States to move away from one another in conflict with the EU agenda, something I called elsewhere the 'Herderian paradox',<sup>9</sup> after Johann Gottfried Herder's idea of diverse cultural unity of humanity.<sup>10</sup> But the UK never had much

comprehension of such ideas. Furthermore, Britain is not a Euro or a Schengen country, so that these issues did not play a great role in the Brexit referendum.

The most important reason for the success of the Brexit supporters in the referendum was not the EU and its possible failings, but ‘immigration’, or more accurately, the whipping up of xenophobia and racism in the Brexit campaign. The government was quick to adopt this ‘immigration’ interpretation of the Brexit referendum result.<sup>11</sup> Other possible causes for its outcome, dissatisfaction with the central government in London, the establishment (although parts of that establishment instigated Brexit), or with austerity, have had no decisive importance in the Brexit debate before or after the referendum. In relation to the hostility towards foreigners Britain and many EU countries have become more similar than ever before, curiously at a point in time when Britain wants to leave the EU. An even more sinister aspect of this xenophobia is that it is only ostensibly directed against Europeans, while it may also affect everyone in Britain with a British passport who may not be considered as properly *English*, like ethnic minorities or Scots, Welsh and Irish. A statement from a businessman quoted in a newspaper report soon after the Brexit referendum in June 2016 is probably more representative than one wishes to acknowledge: ‘So what does he think of the Scots voting overwhelmingly to remain? “I hope we ditch them from the UK. I hope they do get another independence vote and we can get rid of them. And the Welsh. Then we can just be England. That’s what people wanted – England back.”’<sup>12</sup> Thus in this political climate, by no means discouraged by the present government, the Scots and the Welsh could find themselves being no longer considered a full part of Britain after Brexit, but inhabitants of a subordinated province.

After somewhat lurching initial Brexit negotiations, the European Council could conclude in December 2017 that in relation to the preliminary negotiation issues – EU citizens’ and British expats’ rights after Brexit, financial settlement on severance, Irish border after Brexit – sufficient progress has been made to move to the second and definitive phase of negotiations related to transition and the framework for the future relationship between the UK and the EU.<sup>13</sup> There is nevertheless a strange contradiction in the Brexit endeavour. The discussions of a trade treaty between the UK and the EU require co-operation to agree a ‘non-close co-operation’ treaty that stipulates the UK as a direct economic competitor to the EU in the future. It is a co-operation treaty not to co-operate – how that should come about is mysterious. In contrast, all conventional (free) trade agreements seek to align the parties’ wishes and to compromise, as any contract: to agree not to have future special relations appears like a negotiation for negotiation’s sake, and the EU should better prepare and provide for the realistic situation of a breakdown of the talks.<sup>14</sup> For the EU Brexit is primarily

about damage control,<sup>15</sup> and, rather than protracted negotiations with an uncertain outcome, a collapse of the talks can create decisive certainty that may limit more clearly the economic damage for the EU. There is however still the possibility of a complete stalemate, so that Brexit effectively does not happen or gets watered down because especially the British government may be overwhelmed by the gargantuan task ahead for its legal and administrative negotiating teams.<sup>16</sup> A small example from intellectual property law may illustrate that:<sup>17</sup>

After several failed attempts, the EU established a patent with unitary effect in 2012.<sup>18</sup> But this unitary patent package<sup>19</sup> is not comparable to the already existing EU-wide EU trade mark law<sup>20</sup> and the community designs law,<sup>21</sup> but a conglomerate of existing and newly created international law treaties which are not EU law. The substantive law on patentability remains the European Patent Convention (EPC) 1973,<sup>22</sup> a (non-EU law) treaty of which the UK most likely remains a member. The new EU patent court system is based on the Agreement on a Unified Patent (UPC Agreement) court, an intergovernmental treaty between EU Member States outside EU law.<sup>23</sup> This new EU patent system is created by allowing the voluntary transformation of EPC patents into patents with unitary effect or uniform protection in the participating EU Member States (Ref. 18, p. 936).<sup>24</sup> The unitary patent protection is however not autonomous but based on the Member States' national laws<sup>25</sup> and the EPC.<sup>26</sup> The EU-Regulation establishing the unitary patent protection through enhanced cooperation<sup>27</sup> is an EU-mantle which gives the non-EU instruments the effect of EU legislation.

The fact that much of the harmonised substantive patent law is technically not EU law may make it possible that the UK could retain some benefits of European patent law. However, the future Unified Patent Court will apply laws that are at least based on EU-Regulations. Therefore referrals to, and reviews by, the Court of Justice (CJEU) of the European Union will be possible and likely. But the UK government seeks to maintain that the UK will no longer be subject to the CJEU's jurisdiction after Brexit.<sup>28</sup> Furthermore, the implementation of the unified patent package presupposes EU membership,<sup>29</sup> even though the substantive patent law is in the EPC and the EU patent court structure is based on the UPC Agreement which are both not EU law. Contrary to the usual political line on Brexit, in December 2016 the UK government expressed the intention to ratify the UPC Agreement, despite its efforts to leave the EU.<sup>30</sup> The British negotiating team will struggle to find a solution to these inconsistencies.

But there is another neglected great problem which the Brexit negotiations highlight: there is a completely different understanding between Britain and Europe about the nature of a constitution and the structure of a state.<sup>31</sup> These, ultimately

irreconcilable, differences were not so relevant during Britain's EU membership but come to the fore with Britain's departure, and they may also influence the future national cohesion of the UK itself, particularly the relationship between England and Scotland after Brexit. That is what this article will discuss.

The article consists of two parts. The first part discusses the present unwritten British constitution, a feudal constitution of an *ancien régime*, and its ability to adapt to all kinds of political systems, though not necessarily democratic ones – a phenomenon that becomes more apparent under the tension of Brexit. The second part is devoted to the possible situation of Scotland in the UK after Brexit: it demonstrates that the current constitutional settlement of devolution for Scotland, effectively an inchoate or asymmetrical federal framework, is difficult to sustain in the ultimately feudal British constitutional system that is necessarily centralist. Within the EU that was less relevant, but after departure from the EU this will be a politically and legally important issue, and new constitutional arrangements for the future relationship between Scotland and Britain or for possible Scottish independence are suggested.

## **2 The Real British Constitution and the Situation after Departure from the European Union**

### ***a) An unwritten constitution of the Ancien Régime***

Here the position is maintained, perhaps controversially, that the United Kingdom does not only have an unwritten constitution (Ref. 1, p. 8-12),<sup>32</sup> but no constitution at all as a modern political and legal system would understand it. The British constitution is comprehensible to property lawyers and legal historians, but not to present-day constitutional lawyers, be they from the USA, Canada or Continental Europe – an aspect where European and American lawyers see entirely eye to eye. What is called the constitution in Britain is a feudal constitution of an *Ancien Régime*, that is, prior to the US American (1787) and French (1791) constitutions at the onset of the French revolution from 1789 onwards, which were, together with the short-lived Polish constitution of the 3<sup>rd</sup> May 1791,<sup>33</sup> the first constitutions in a modern sense. Normally, the term '*Ancien Régime*' is not used in British political and legal history. Unlike on the Continent, the English/British system was never swept away by a revolution, or at least modelled into a formal constitutional monarchy as in many European states in the nineteenth century. Because of the absence of a constitutional rupture in England or Britain since 1689 and 1707, respectively, the word '*ancien*' makes no sense, except from a continental European viewpoint.

It is a matter of common knowledge that in law all land in England and Wales belongs to the Crown and anyone who is inaccurately called an ‘owner’ of a plot of land is a tenant of the Crown, so that the old medieval feudal pyramid is technically still in place. While one normally is a tenant in chief who holds directly from the Crown, the mesne lords (intermediary vassals) have never been formally abolished and could theoretically appear in concrete conveyancing transactions, although that is rare today.<sup>34</sup> The feudal system was weakened early by the Statute *Quia Emptores* of 1290 which effectively allowed alienation of land by prohibiting subinfeudation and ordering the substitution of vassals (tenants) instead: the seller was substituted by the buyer. This is still the ultimate basis for every freehold conveyance in England and Wales today (ref. 34, p. 29).<sup>35</sup> Scotland never had a law comparable to the Statute *Quia Emptores*, and sales of land were technically realised by subinfeudation, whereby the seller became the superior for his buyer as vassal (feuar),<sup>36</sup> although from the eighteenth century onwards<sup>37</sup> these concepts were effectively hollowed out (Ref. 36, pp. 4-5, Ref. 37, p. 57).<sup>38</sup> In Scotland feudal tenure was formally abolished and converted to outright ownership in 2004.<sup>39</sup> One can see this situation as a historical leftover and a nice eccentricity, and usually it is reflected in conveyancing practices only. However, one should remain aware of the fact that in the concept of an unwritten constitution the skeleton is still this feudal pyramid based on landholding and property which props up the structure of the ‘state’. The great legal historian Frederic Maitland said for a good reason that ‘our whole constitutional law seems at times to be but an appendix to the law of real property.’<sup>40</sup> When these times are depends significantly on the political style and attitude of the government of the day; there are no boundaries a written constitution would provide.

‘Property’ or ‘real property’ should not be interpreted here from a narrow private law viewpoint of possession and use of land. Not only are a number of UK institutions of public law still rooted in feudalism, also the concept of sovereignty, especially as it is understood in the UK, derives ultimately from a (feudal) property concept. The Crown itself is the most obvious feudal constitutional institution. But there is also the question of crown land which is held by the monarch in different capacities: in a political capacity<sup>41</sup> (e.g. Windsor castle held by the monarch as body politic) or in a private capacity (e.g. Balmoral), and the separation of these two categories can be difficult (Ref. 35, pp. 113, 115). Here a characteristic of feudalism becomes apparent: a blurred boundary between state and private ownership of the monarch, between public and private property, and, finally, between sovereignty and property which seventeenth century legal scholars so carefully sought to separate from one another.<sup>42</sup> The feudal institution of the Duchy of Lancaster finances the monarch’s private expenditure as a sovereign, while the Duchy of Cornwall provides

an income for the Prince of Wales as heir apparent and Duke of Cornwall (Ref. 35, pp. 118, 119).<sup>43</sup> The statute abolishing the feudal system in Scotland expressly excepted the monarch's powers by virtue of the royal prerogative,<sup>44</sup> so that the specifically proprietary element of feudalism is repealed, while the constitutional element is preserved. The historical basis of the House of Lords and Parliament as a whole is still a medieval royal and feudal one<sup>45</sup> – it could not be otherwise, for there is no constitutional law that could have created it, unlike the Scottish Parliament, for example.<sup>46</sup>

While the Scottish Parliament is created by an Act of the British Parliament,<sup>47</sup> the power of the British Parliament to do so emanates from its parliamentary sovereignty, again a feudal concept, though rather in form of a reinterpretation of a remaining institution of the dying classical feudalism in the sixteenth century. The creator of the modern concept of sovereignty, Jean Bodin, was much influenced by the Roman law concept of *dominium* or property ownership when he developed the idea of sovereignty (Ref. 42, pp. 73-74).<sup>48</sup> Thomas Hobbes also saw the concept of property as the predecessor, and as a maker, of sovereignty.<sup>49</sup> It is a specifically Anglo-Saxon characteristic that property has been considered as having a central role in the definition of sovereignty, and, since Locke in particular, of liberty,<sup>50</sup> which introduced the possibility that sovereign powers could gradually shift from a monarch or a college of aristocrats to the people. Continental European thinkers were not prepared to follow that conception entirely. Rousseau would postulate the people as the sovereign, but property had no constitution-building role for him, rather the opposite:<sup>51</sup> property was a source of alienation<sup>52</sup> – an idea that inspired Hegel<sup>53</sup> and Marx whose profoundly influential alienation theory<sup>54</sup> took Hegel's alienation concept into the social and economic sphere.

It is the British Parliament, not the British people which has sovereignty (Ref. 1, p. 109).<sup>55</sup> There is no constitutional rule that stipulates the people as the sovereign (something that many modern constitutions would often state at the beginning)<sup>56</sup> which delegates its sovereignty to its parliament by electing it. The opponent of parliamentary sovereignty is the royal prerogative, anachronistic and unacceptable in a modern constitutional system, but alive and well in the British one, although increasingly repressed by Parliament over the centuries.<sup>57</sup> Parliamentary sovereignty cannot be bound by statutes and other legal acts.<sup>58</sup> For example, it was a choice of Parliament (Ref. 58, p. 39).<sup>59</sup> (or the government majority in Parliament) to consider itself bound by an advisory<sup>60</sup> referendum in 2016 which recommended Britain's exit from the European Union; and the succeeding Parliament after the elections in June 2017 also seems to honour the outcome of this referendum, although the traditional understanding of parliamentary sovereignty means that a new Parliament need not

feel, and cannot be, bound by a previous Parliament, according to the classical British definition of parliamentary sovereignty by Dicey (Ref. 58, pp. 39-40, 69-70).

***b) Changing constitutional reality behind unmodified positive law***

Legal institutions, whether of public law (e.g. Parliament and constitutional rules) or of private law (e.g. property and ownership) may change their social, economic or political functions behind a framework of positive law without necessitating the change of the positive law itself.<sup>61</sup> A constitutional system that largely relies on unwritten customary law and has never formally discarded feudalism but has reinterpreted and subverted it to accommodate capitalism while paying lip service to old formal structures, is a particularly good example of such a process. An international commercial lawyer will notice that there is a trend towards modern feudal structures through the increase of property protection treaties (like TRIPs for intellectual property), or through global investment (i.e. property or assets) protection by free trade agreements, sometimes combined with Investor-State Dispute Settlements (as in CETA) as private judicature outside the ordinary courts that are a central manifestation of state sovereignty (Ref. 42, pp. 59-60, 62). Furthermore, large and multinational private corporations, thus private property holding entities, are increasingly entrusted with responsibilities that were historically acts and powers of state sovereignty, such as the outsourcing of warfare by the USA or the foundation of the EU financial stability mechanism on a private company with unlimited immunity of its organs, and outside actual EU law (Ref. 42, pp. 64, 69-70). Private entities based on private property fulfil public obligations, but without the accountability and checks and balances a modern constitutional system would provide. It seems that corporate social responsibility measures seek to replicate the constitutional accountability in a democratic and parliamentary system. But that is impossible unless one discards the principles of a company as having separate legal personality,<sup>62</sup> limited liability of shareholders<sup>63</sup> and therefore separation of ownership from power and control, but also from responsibility.<sup>64</sup> It also appears to be that the British feudal constitutional framework from the '*Ancien Régime*' could adapt to such post-democratic phenomena more easily than modern constitutional systems.<sup>65</sup> After the detour via a liberal democracy, it could be a modernised homecoming to a kind of neo-feudalism with emphasis on the proprietary element of *beneficium* in the feudal relationship,<sup>66</sup> much in a Brexit-spirit of reverting to ancient British tradition.

British pragmatism, as well as the difficulty to invade the British isles and colonise them in the wake of such military intervention with more recent political ideas (as happened in Germany and Italy as a consequence of the Napoleonic wars),

may have helped preserving the British feudal constitutional framework. And something else was also crucial for its continued existence: its opaqueness and flexibility. One can read into the British system what one wants to and interpret it in a great number of ways without the need for a change of the legal *status quo*. Thus the system can be invoked for feudal absolutism as in the 17<sup>th</sup> century (where it originated from), or for a paternalistic conservative welfare state; it can be reconciled with a liberal and perhaps democratic *laissez faire* society, and it could also be customised to modern authoritarian forms of government. As long as the position of the crown and the feudal structure are not touched (the modern social adaptation is particularly the class system which defines itself considerably through property ownership), much greater political and social flexibility and scope for new design is possible than under a legal system with a written constitution.

It is telling that Britain is still never referred to as the ‘British state’ in common parlance (Ref. 45, p. 195),<sup>67</sup> thus, in law, as a creature of a written (modern) constitution,<sup>68</sup> but as the ‘Crown’, ‘Parliament’ or the ‘Government’. In this way, the late medieval-feudal notion of the king (who was at that time not ‘sovereign’ in the sense of the 17<sup>th</sup> century<sup>69</sup>) and/or of a college of physical people, as the embodiment of a state, lives on, in the sense of a *dominium regale et politicum*, consisting of the composite body politic of king and Parliament, to whom together as ‘king in parliament’ a notion of ‘sovereignty’ was ascribed (on this point and on the legal fiction of the king’s two bodies, see Ref. 43, pp. 2-5, 20, 225-227, 302, 314, 401). It becomes apparent that, in law (sociologists and political scientists may differ) the state, such as the US-American *state* or the French *state*, are the creatures of, and based on, their constitutions, and in these countries the state is very much present in everyday life, unlike in Britain. One can interpret this British phenomenon variously as a feature of the lingering medieval state in which only the parochial landlords or lords of the manor (ref. 35, p. 108)<sup>70</sup> and their jurisdiction were perceived by the local population, or as a sign of an authoritarian state in essence which has no particular welfarist ambitions and so does not encroach on people’s lives except correctively by punishment, or as a liberal state which is supposed to interfere as little as possible in human lives and in the economy. The ambiguous opacity of the British constitutional system permits such varieties of interpretation.

One can adapt the readings of the British constitution to modern society, or choose not to, or, most commonly, do both selectively. A good example of a ‘modern’ interpretation is the following statement from 1999 about the royal prerogative, this ancient residue in the constitutional system that became very relevant for Brexit:<sup>71</sup>

‘It might be assumed that the world orders of Jacobean England and the United Kingdom entering the twenty-first century are totally different. Divine right is not invoked to justify the

powers of the Crown and yet most of the powers of the Crown still exist to be exercised by the Crown as it sees fit. ...

We may find it difficult to establish what the royal prerogative meant in the past: we have to interpret the powers of the prerogative within the context of the political arrangements of the day. We know that the royal prerogative exists today, but how far do the old authorities from a bygone era serve as a useful guide to the present day powers of the Crown?

However, there is no compelling constitutional reason to assume that this view has to be adopted again, in 2017,<sup>72</sup> particularly by the present government that wants to restore British (more precisely: English) values and traditions from perhaps the 1950s, or from Victorian times or even earlier – the recreation of a romanticised traditional Britain of the past is necessarily a pastiche of inconsistencies and anachronisms. But the royal prerogative is certainly a part of British constitutional tradition and fits well if one wants it to fit, and the ‘context of the political arrangements of the day’ undoubtedly permits a widening of the scope of the prerogative of the Crown.

Recently, the prime minister took the view that notification under article 50 of the Treaty of the European Union to start withdrawal from the EU is fully within the powers of government by virtue of the Crown’s prerogative powers to enter into and withdraw from treaties, so that Parliament need not be involved.<sup>73</sup> This opinion could only have puzzled European constitutional lawyers not familiar with the feudal root of the British constitutional system. Some, not all,<sup>74</sup> British constitutional lawyers considered the government’s position as legally acceptable, but found it politically unwise.<sup>75</sup> In *R. (Miller) v. S. of State for Exiting the European Union* the Supreme Court confirmed that the royal prerogative is residual and can be curtailed or abrogated by Parliamentary legislation. The European Communities Act 1972, having constitutional character, is a partial transfer of law-making powers by Parliament to EU legislature and requires that domestic law has to be consistent with EU law. A withdrawal from the EU constitutes a significant constitutional change, because the EU Treaties are a source of domestic law and legal rights; they do not only concern the international relations of the UK. Thus the royal prerogative to make and unmake treaties does not apply to the EU Treaties, so that ministers do not have the power to withdraw on the basis of the royal prerogative. An express power of withdrawal would have to have been created by the 1972 Act, but such a power does not exist. Therefore, the Supreme Court held, ministers require Parliament as the authority of primary legislation for giving notice under Art. 50.<sup>76</sup>

The Supreme Court, however, remarked that, although the prerogative powers have been described as a ‘relic of a past age’, ‘that description should not be understood as implying that the royal prerogative is either anomalous or anachronistic’.<sup>77</sup> From the viewpoint of a modern constitutional system it is probably both,<sup>78</sup> and the fact that private persons with the necessary financial means had to

bring an action to trigger a ruling of fundamental constitutional importance on the competence of state institutions only intensifies this impression – in written constitutions one would find such competence rules. *R. (Miller)* certainly added to the UK constitution, but this decision could have done that in another way, as there are no restrictions except through statutes and precedents the Court felt bound by; there is no higher order of legal (constitutional) rules (Ref. 68, p. 239-240). In twenty years' time, when another generation of lawyers may have grown up in a new spirit, decisions may be considerably different. The British constitutional system is very elastic.

It is not a new phenomenon that the ambiguous and opaque British constitution allows flexible and even contradicting interpretations of its nature. Montesquieu famously used in the eleventh book of his *De l'esprit des lois* (1748) an idealised interpretation of the British constitution to explain and justify the principle of the separation of powers and of checks and balances which are a cornerstone of every modern constitution:<sup>79</sup>

*'On the Constitution of England*

...

When the legislative and executive power are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. ...

It is not my business to examine whether the English actually enjoy this liberty, or not. Sufficient is for my purpose to observe, that it is established by their laws; and I inquire no further.'

The last comment indicates that Montesquieu was aware of constitutional realities. In fact, the British constitutional system has always had difficulties with the concept of the separation of powers;<sup>80</sup> perhaps one could say that this notion became finally embodied in the British constitution with the establishment of a Supreme Court as an authority entirely separate from the House of Lords in 2009.<sup>81</sup>

Sixty years after Montesquieu, another commentator understood the British constitution entirely differently. Adam Heinrich Müller, student of Gustav Hugo (founder of the German Historical School of Law), was a theorist of the state of the Romantic period, an opponent of the French revolution and an important representative of the conservative counter-Enlightenment. In 1809, he made the following observation about the British constitution in his *Elements of Statecraft* (*Elemente der Staatskunst*):<sup>82</sup>

'What Montesquieu attaches such great importance to, the mechanical separation of powers, the artificial limitation of sovereignty for the purpose of liberty, is, according to our experience, entirely impractical, a curiosity and antique. And this political quackery comes

much closer to Theophrastus Paracelsus's experiments to create humans in his chemical alembics and flasks than one may think. It is not true that in England such a separation of powers takes place: only bookish scholars and later the populace, following in their footsteps, have read this fatuous thought into the British constitution. Power is not separated; rather, the ancient opposites in civil society and their interdependencies, out of which all true and simple power then arises, are preserved in England, hallowed and affirmed by the time and by faithful persistence (*Beharren*) of the nation: that means 'British constitution', and that only deserves to be called constitution in every place and in all countries of the world.'

Müller may be a counter-Enlightenment figure, closer to Burke or perhaps de Maistre<sup>83</sup> than to Montesquieu or Rousseau, but his reference to Paracelsus's alchemy reveals that he was also a child of the Enlightenment, because it was only in the eighteenth century that alchemy became discredited as obscurantist charlatanism; in the seventeenth century even Robert Boyle and Isaac Newton were keen alchemists.<sup>84</sup> In any case, one could argue that parts of Müller's analysis are still valid. It also shows that what is called 'British constitution' is a malleable notion that is created by the beholder in the spirit of the time and, if the beholder is a politician, in accordance with his or her political ambitions, more than a written constitution would tolerate.

It is therefore obvious that democracy is as little enshrined in the British constitutional system as anything else.<sup>85</sup> The political and constitutional circumstances surrounding Brexit show that one is mistaken if one thinks that the present remnants of the feudal structure are only an amiable irrelevance, a charming distinguishing feature of Britain when compared to the European Continent, idiosyncratic and playing to the clichéd view Europeans have about the British as an eccentric people clinging to their bizarre traditions.<sup>86</sup> Idiosyncratic all that may be, charming it is certainly not. Apart from the fact that only those members of the class regarded as born to rule can allow themselves to indulge in eccentricities (a point Europeans frequently fail to realise), these eccentricities can usher in outright authoritarian and non-democratic measures which are perfectly compatible with the British constitutional system, since almost everything is compatible with this system, except, perhaps, radical forms of socialism.

It is a strange paradox that the EU, which effectively limited British parliamentary sovereignty,<sup>87</sup> acted as a kind of framework, or others would say, as a corset, that helped the ancient British constitutional system emulating a modern democratic state and ensured that the British constitution is continued to be interpreted in the light of a modern liberal and pluralist parliamentary democracy. This is puzzling in two ways: First, it is not a constitution that enacts – from a lawyer's perspective – the legal structures of a democratic system, but it is rather political consensus from time to time that moulds the British constitutional system from the '*Ancien Régime*' into a modern democracy. Secondly, the EU itself has a number of democratic deficits<sup>88</sup> and is not an impeccable role model for democracies.

Furthermore, governments in other European Member States, such as in Poland, seek to erode the rule of law in their country,<sup>89</sup> while maintaining EU membership. Here one may remember that the governing Law and Justice party in Poland and the governing Tory party in Britain formed together with other right-wing parties a separate club in the European Parliament in 2009,<sup>90</sup> which underlines their mutual political sympathies. The fact that the UK was a democracy when it joined the EU does not mean that it will remain a modern highly developed democracy after it has left it. In the absence of a formal constitution the common law is not an adequate safeguard either.

*c) The common law as the ultimate source of law*

In Britain the ultimate source of law, including for the courts, is not a constitution, but a mystical idea of the ‘common law’. This also applies to the courts deciding on constitutional matters, such as on the royal prerogative, although the source of the royal prerogative itself is not the common law (Ref. 71, p. 78). According to legal tradition the first source of law are Acts of Parliament, followed by decided cases (the common law in the regular sense); the decided cases are subordinate to Acts of Parliament, if any (Ref. 58, p. 62).<sup>91</sup> However, since historically at least Acts of Parliament have been considered as remedial (which is also reflected in the – inexact – canon of statutory interpretation, Ref. 91, pp. 11, 79-85, 157) and not as comprehensive, unlike in a codified system,<sup>92</sup> courts not only apply, but also align, extend and interpretatively rework the statute in question, so that the common law is necessarily a major part of living statutory law. Acts of Parliament flow from parliamentary sovereignty, but where parliamentary sovereignty emanates from is unclear: it is again the courts in their decisions which find, or ascertain, the extent of that sovereignty,<sup>93</sup> for example where there is a conflict with the royal prerogative. So we are back to a constitutional and general customary law, the ‘common law’ as the mystical source of all law. And this ‘common law’ as an ideal seems to have a special fascination for many, like the conservative philosopher Roger Scruton:<sup>94</sup>

‘I was absolutely bowled over by the English law. I had no idea of its historical depth and the fact that it captured in beautiful concepts a vision of what it is to be at home for a thousand years in a single place which is what our country has experienced. And the common law is a wonderful expression of this because it is a law which has never been imposed from above, it has grown from the decisions of the courts, grown from concrete cases in which real human conflicts of all kinds have been resolved by impartial judges ... without there necessarily being a statute ... And this way of reasoning from the particular case to the principle, rather than from the abstract structure of the constitution down to the particular case, is, in my view, not just intellectually, but also morally, completely superior to the other way of doing it. ... And it’s at the root of a deep ... structural antagonism between Common law countries and these Roman law countries, Civilian, as they are called, such as the French and the German.’

This romantic view is at odds with the history of English law, but rather common and representative, also among English lawyers. The statement stresses at least three points:

First, English law is supposedly the law for self-proclaimed English people, not for people having arrived from elsewhere during the centuries, such as non-white people, but also Europeans. Apparently, English law is not compatible with Scots law either which has a Civilian origin to some extent, so that Scottish people and English law would be a problematic match, too. Behind this statement stands the feudal idea that an individual's personal status determines the law that applies to him, such as different marriage laws or laws of succession for the nobility, the common people, foreigners, Jews and so forth, as was the case well into the nineteenth century in Europe. However, despite that historical reality, some comparative lawyers conjure up the idea of a more or less uniform concept of a Roman law-based *ius commune Europaeum* that apparently existed in Europe in the sixteenth century already. In this way they try to justify attempts at a Europe-wide unification of private law today,<sup>95</sup> an endeavour that initiates the 'Herderian paradox' explained above. Several specialists in German legal history have shown that the approach of these '*ius commune seekers*' is historically incorrect because there was rather a patchwork of different laws applying simultaneously according to class and status, feudal tenure, origin, religion, territory and so forth.<sup>96</sup> One may be reminded that the Austrian Civil Code, promulgated in 1811 and still in force with many amendments, is entitled 'General Civil Code' (*Allgemeines Bürgerliches Gesetzbuch*),<sup>97</sup> and 'general' emphasised the then new fact<sup>98</sup> that the civil code was supposed to apply to all classes of society.<sup>99</sup> So in theory one could bring a civil law action for damages even against the Emperor, although that most likely never happened.

The idea of English law for the English (British) and some other law for the others was reflected in the usual situation in much of the British Empire. For instance, in India under British colonial rule that was often the legal reality, in form of a divergent application of the law (usually imported English law) to the British and to the Indians.<sup>100</sup> In Africa under British colonial rule the British authorities frequently used and shaped local customary laws for, and supposedly from, the indigenous population. These laws were exploited in the context of the 'indirect rule' to serve the interests of the colonial powers, while the British were subjected to their own law.<sup>101</sup> The existing constitutional framework does not expressly stand against a special regime in a post-Brexit Britain for the Scots, Welsh and Irish or any other group one may seek to define.

Secondly, Scruton considers English law as intellectually and morally superior to Civilian legal systems, which seeks to separate Britain clearly from European influence, also in relation to legal and constitutional theories. And thirdly, his statement emphasises that a modern constitution as an ‘abstract structure’ (and as the ultimate source of law) is irreconcilable with the common law.

Indeed, there is not much appetite to enact a British written constitution (Ref. 1, p. 230, Ref. 55, p. 541), and although Brexit may highlight shortcomings of the present constitutional system, the forces that brought about Brexit are also forces which have little time for ‘French’ or continental European abstractions with which modern constitutions are associated. This makes a modern written British constitution even less likely, apart from the big problem of political consensus about its content. Theoretically it is not too difficult to draft a constitution: it is more a question of legal craftsmanship than ingenuity, similar to a trained composer being asked to write a fugue. But in Britain there is presumably not the necessary know-how for creating a modern constitution. There is even little research and teaching of comparative constitutional law, which also explains the usually limited understanding of the next theme, federalism.

### **3 Federalism and the Position of Scotland in Post-Brexit Britain**

#### ***a) The unacknowledged federalism in the UK***

Scotland is placed in the UK in form of an unrecognised limping federalism, or asymmetrical devolution as it is usually called (Ref. 1, p. 93),<sup>102</sup> under the Scotland Act 1998 which contains, in particular, the establishment of the Scottish Parliament and its legislative competence in relation to the British Parliament and government.<sup>103</sup> The term ‘federalism’ is unpopular in the UK,<sup>104</sup> not only because it may remind too much of the ‘enemy’ in culture, the USA, and the former enemy in war, Germany, but also because a true federal system is incompatible with the British feudal constitutional framework outlined before: a federal system would not allow the concept of overriding parliamentary sovereignty of the central parliament but would require central and state parliaments being subordinate to the federal constitution (Ref. 1, p. 112). A federal system requires being laid down in a written constitution in the modern sense, partly because of the technicalities of competences of state and federal authorities, between reserved and devolved matters,<sup>105</sup> and partly because of the fact that federalism plays a role in providing checks and balances that underlines the constitutional framework of the whole state, not only the region in question. The British form of ‘limping’ federalism established a Scottish Parliament, but no English

Parliament, since England is not a federal entity. This leads to interesting constitutional entanglements, for instance, when the British Parliament (with Scottish MPs) has to act as the English Parliament in effect (Ref. 1, pp. 98-99: ‘West Lothian Question’). Often it has been said that an English federal state would not make sense, since it is infinitely bigger than Scotland, Wales or Northern Ireland (Ref. 1, pp. 93, 99-100), and indeed, a consequent federalism would probably have to divide England into four regions or so (London being one of them) with state parliaments in each region<sup>106</sup> – a purely academic suggestion.

What is not appreciated satisfactorily, also among British constitutional scholars, is the fact that an ultimately feudal constitutional system that is still the design and framework of the state can only be a system of centralism.<sup>107</sup> Where historically the princes and later the regions had too much power which went towards independent sovereignty, then the state fell apart, as in Germany, finally after the Peace of Westphalia in 1648;<sup>108</sup> where this regional power was curbed, the state preserved itself as a centralised entity, as in France under Louis XIII and Louis XIV.<sup>109</sup> Thus Britain could afford the luxury to establish this partial and incomplete system of federalism for Scotland because it has been a member of the EU where the position of being a sovereign nation state is less relevant: a Member State is embedded in a supranational legal and political framework. Once Britain is on its own after Brexit, the assertion of its national unity and integrity will become much more significant, and the present devolution arrangement under the Scotland Act may well suffer. There are already some indications in this respect. The British Government considers powers that will revert from the EU after Brexit as powers exclusively reserved to the UK Parliament, not as powers that could (partly) go to the devolved Scottish Parliament.<sup>110</sup> In *R. (Miller) v. S. of State for Exiting the European Union* the Supreme Court decided that the Scottish Parliament (and the Welsh and Northern Ireland Assemblies) do not have a legal veto on the UK’s withdrawal from the EU.<sup>111</sup> The Government’s and the Supreme Court’s positions are entirely in line with British constitutional law.

Unpopular as this may be with some Scots, the Scotland Act that introduced devolution is the product of parliamentary sovereignty from the British Parliament in Westminster, and this Act, as well as the Scottish Parliament through it, are sustained by this parliamentary sovereignty and based on an Act of the *British* Parliament (Ref. 1, p. 112, Ref. 105, p. 428, Ref. 102, p. 218).<sup>112</sup> According to the orthodox theory of parliamentary sovereignty there is no higher rank of statutes, hence future parliaments cannot be bound by this Act.<sup>113</sup> They may choose to abolish it instead (and the Scottish MP will always be in the minority in Westminster). The recently introduced s. 63A of the Scotland Act 1998 stands against this interpretation,<sup>114</sup> and in *R. (Miller)*

the Supreme Court affirmed the British Parliament's self-limitation of its parliamentary sovereignty in s. 63A.<sup>115</sup> But this legal construct is effectively the same that reconciled the UK parliamentary sovereignty with EU membership of the UK,<sup>116</sup> and such an argument presumably carries much less weight with a British government (or Parliament) that prepares for Brexit.

***b) Constitutional Solutions: Federalism – Centralism – Independence***

The cleanest solution after Brexit would be a written federal constitution as the ultimate source of law which creates and empowers a national parliament and regional parliaments separately and determines their legislative competencies, with a recourse to a (separate) constitutional court in cases of conflicts of competence. In this way the Scottish Parliament and Government would be established by, and based on, the constitution, not on the parliamentary sovereignty of the British Parliament. Where the authority to enact such a constitution shall come from, is an interesting point, but goes beyond this discussion (Ref. 1, p. 229).<sup>117</sup>

However, the clean solution of establishing a federal state of the UK with a written constitution is the most unlikely option in the present political situation. Another possibility is Scotland blending into British centralism as a North British region – not an entirely unacceptable approach because it avoids possible political turmoil and civil unrest as well as fast economic decline in the region. The most realistic scenario is muddling along with the present constitutional arrangement post-Brexit as long as possible, but the situation is unlikely to be entirely stable for very long and may not survive into the next generation.

The most ambitious solution is Scottish independence. For this option, however, the Scottish independence referendum of 2014 has shown that the way in which the ruling Scottish National Party (SNP) approaches the matter of independence is perhaps the safest route to absolute failure. Those who lived through the campaign for Scottish independence before the referendum on 18 September 2014 will remember that the SNP as campaign leader had only foggy ideas about the constitutional basis of the new Scottish state they aimed at. The White Book the Scottish government issued as ‘a guide to an independent Scotland’<sup>118</sup> had very little to say about a Scottish constitution after independence beyond broad ideas about enactment and content, such as ‘[t]he process by which Scotland adopts a written constitution is as important as its content.’<sup>119</sup> It was not more than an initial discussion paper; nothing was suitable for enactment and enforcement in case of independence.

The most obvious reason for the reticence of the SNP government in relation to a Scottish constitution is that, again, there does not seem to be sufficient

appreciation for the concept of a constitution in a modern sense: Scots were also socialised under the traditional feudal British constitution that can, and currently does, assume democratic forms. But, as said, it cannot cope with, and is not associated with, modern federal structures.<sup>120</sup> So the idea of preparing and passing a regional state constitution for Scotland in any event, irrespective of whether and when independence will follow at a later date has apparently not crossed the minds of Scottish politicians. In fact, in federal states like Germany or Austria their states or *Länder* obviously have separate state constitutions. However, state law must not contradict the national laws or the constitution of the federation (*Bund*).<sup>121</sup> For Scotland the enactment of a Scottish constitution can be more challenging because it is more difficult to ascertain if and when the Scottish constitution conflicts with the unwritten British constitution. It is also hard to establish a competence to pass such a constitution, because under the Scotland Act 1998 constitutional issues are a reserved matter.<sup>122</sup>

Nevertheless, it would be advisable to explore ways to enact a regional constitution in Scotland which could serve, at least in the interim, as a national constitution in the case of later independence. Some existing constitutional examples, and even some solutions in history could provide some inspiration, such as the Compromise (*Ausgleich*) between Austria and Hungary. That Compromise created a real union (not a federation<sup>123</sup>) between Austria and Hungary and established the Austro-Hungarian Empire in 1867.<sup>124</sup> Whether or not there will be a further Scottish independence referendum – which may also be advisory as the Brexit referendum and the independence referendum of 2014 were<sup>125</sup> – there could be a constitutional crisis, especially if a referendum held were to result in favour of independence. This would not be a good time to cobble together a constitutional framework for a possible new state, and the general lack of expertise in drafting matters would only exacerbate that situation. Furthermore, a referendum question, such as, ‘Should Scotland be an independent country?’,<sup>126</sup> only makes sense to a lawyer if there is a (draft) constitution in place which would create this independent country, otherwise ‘Scotland’ remains an irrational romantic notion.

In cases of state secession, constitutional crises and even the breach of the national constitution are the norm, unless an existing constitution has a procedure for the secession of a region.<sup>127</sup> Such rules do not exist under the British constitution. For example, the Declaration of Independence of the USA in 1776 did not comply with British constitutional law – still a valid argument, given the constitutional continuity of Britain since 1707 and of England since 1689. Something comparable to the civilised ‘Edinburgh Agreement’ (Ref. 55, p. 544)<sup>128</sup> between the British and Scottish governments in 2012 to resolve the question of competence of the Scottish Parliament

in relation to the referendum is less likely to come about in the future, also because there is a much higher chance of success of a further independence referendum than was envisaged back in 2012 when the matter was clearly underestimated. So a crisis similar to that presently in Catalonia<sup>129</sup> is a possibility.

A disquieting point in the absence of any constitutional debate in the Scottish referendum in 2014 was the fact that in a new Scottish state the SNP government may have tried to rule on the basis of the royal prerogative for a time, since the Crown was supposed to be retained,<sup>130</sup> and the royal prerogative is obviously not dependent on a constitutional framework. This government power would theoretically have been unfettered, because the safeguards (court decisions etc.) of the old British constitutional systems restricting this prerogative powers would presumably no longer have applied. Leaving aside the question of whether a new state in the twenty-first century should start as a monarchy, initially even without a constitution, there is also the puzzling problem what would have happened to the other political parties in the Scottish Parliament who were, and still are, opposed to independence. An SNP one-party state is clearly not an option.

There were other awkward features of the 2014 independence referendum. The SNP maintained that a separation of Scotland from the rest-UK would lead to a kind of continuation of Scotland's membership in the EU because Scotland is already a member of the EU,<sup>131</sup> blatantly in contradiction with established principles of state secession in public international law.<sup>132</sup> The EU also made unequivocally clear that Scotland as a new state would have to apply for EU membership,<sup>133</sup> a position that remains the same today. Although the EU might, in the long run, water down the importance of states, it paradoxically relies entirely on states for establishing membership (in line with public international law), and the recent experience with Catalonia underlines that.<sup>134</sup> For an independent Scotland, however, the political circumstances for joining the EU *after* Brexit might be more favourable than in 2014.

The economic problems as a result of leaving the EU are for others to discuss. Nevertheless, both Scotland and England seeking to substitute the abandoned EU relationship with free trade agreements worldwide will not only have the difficulty of numerous lengthy and protracted trade negotiations. They will also have to deal with the fact that they will be associated with the British Empire, and their possible future trading partners will not have forgotten their sufferings under British colonial rule, particularly India (Ref. 100, pp. 238-265, 281-286, 331-357, 432-441), the seemingly most interesting trade candidate at the moment. It is mainly the region of what is today the European Union which Britain has not affronted, at least not after the Congress of Vienna of 1815.

In the independence campaign the SNP government also suggested a currency union with England ('the sterling zone') after Scottish independence<sup>135</sup> which would have had the curious effect that an independent state would have had its central bank in exactly the state it wanted to leave. Therefore, England would necessarily have been in charge of Scotland's banking sector and Scottish economic policies, but without Scottish MPs being represented in the Westminster Parliament who could exercise any influence (Ref. 132, p. 337).

The Scottish separatists' EU argument and the 'sterling zone' suggestion are both very reminiscent of the attempted 'have the cake and eat it' strategy of British Brexit supporters now:<sup>136</sup> no EU membership but all financial and customs benefits of the single market.

The Scottish independence campaign was also characterised by a divisive nationalistic them-and-us attitude, predominately directed against the English (for no acceptable reason), but it would only have been a question of time when Europeans and minorities would have been affected as well, especially if there had been independence. For example, in the Israeli press some Scottish Jews asked the question how 'Scottish' they would have to be in an independent Scotland.<sup>137</sup> The Brexit referendum and its aftermath echo this nationalistic and xenophobe divisiveness. One cannot help thinking that the confusion around Brexit today gives a good indication of the situation then if Scots had voted for independence in the referendum in 2014, which also suggests how level-headed and statesmanlike the Scottish government really was at the time.

### **c) *Relinquishing Scottish legal nationalism***

A final point concerns the future of Scots law, whatever the position of Scotland will be: a state in a further developed British constitutional federation or an independent country. In either case Scotland will retain its separate legal system, as preserved in the Act of Union in 1706.<sup>138</sup> The rising Scottish legal nationalism from the 1960s onwards, mostly among Scottish legal academics, far less so among practitioners, wanted to safeguard Scots law against the perceived intrusions of English law and to determine a dissimilarity of Scots law as a partly Roman-law based mixed system between civil and common law in contrast to the unadulterated common law of England.<sup>139</sup> This mission ought to be abandoned for several reasons.

There are many flaws in the approach of Scottish legal nationalism, starting with the crude application of the concept of a mixed legal system and the problem that some areas of Scots private law are not really mixed because they are essentially

common law (contract, delict) or Roman law-based civil law (property). Furthermore, the nationalistic battle in academic gazettes does not really inform legal practice but may hamper the advancement of legal scholarship with its emphasis on obscure subjects only appreciated by a handful of specialists. One example from Scots commercial law is the claim by Scottish legal nationalists that the transfer of ownership under the Sale of Goods Act 1979, as an apparently ‘English’ common law statute,<sup>140</sup> is *causal*.<sup>141</sup> This purportedly imposes an alien conception on the old Scots common law under which the transfer of ownership is supposedly *abstract*, like under the German Civil Code (BGB), that is, detached from the validity of an underlying contract (e.g. sale) directed at passing ownership – in contrast to the causal transfer. Apart from the fact that the abstract conveyance in Scots common law is beyond doubt for immovable property only,<sup>142</sup> it was the successful lobbying of pragmatic Scottish merchants which brought the extension of the English Sale of Goods Act 1893 (as it then was) to Scotland.<sup>143</sup> Incidentally, the conveyance according to the Austrian General Civil Code or ABGB – clearly a civil law system – is also causal,<sup>144</sup> but many Scottish legal nationalists do not really arrive at a deep understanding of civil law systems.<sup>145</sup> If there is any evident legacy of Scottish legal nationalism, then it is the segregation of non-Scottish legal scholars from their Scottish colleagues who are apparently the only ones with a true appreciation of Scots law.<sup>146</sup>

The scientific value of the Scottish legal nationalist approach is doubtful, but I have discussed that elsewhere<sup>147</sup> and need not go into any detail here. This is increasingly a past debate anyway. If Scotland becomes independent, Scots law is just the law of a new state (if recognised by the international community) and the impassioned discourse about the separation from English law becomes redundant. If Scotland stays in the UK, any protectionist antiquarian hair-splitting by specialists, like the example of the abstract conveyance above, also ought to be discarded. Otherwise Scotland will not be able to establish itself as a small jurisdiction with laws which are recognised as a modern separate body of law in the UK and in the world. Scottish legal academics have a responsibility not to frustrate the development of Scots law with *recherché* themes as a battleground for out-dated nationalistic polemics couched in legal scholarship.

#### **4 Conclusion**

These discussions should not give the impression that a written constitution, either for Britain and Scotland, or for Scotland only, is a panacea. If there is no sufficient political will to perform and maintain a modern liberal democracy, one can easily

wreck a written constitution, irrespective of its technical-juristic quality. The Weimar constitution is an obvious example: it was never formally repealed by the Nazis, who saw no need to do so,<sup>148</sup> which prompted Ernst Fraenkel to develop his famous analysis of the national-socialist state as a ‘dual state’ comprising the (liberal constitutional) ‘normative state’ and the ‘prerogative state’ (*Maßnahmenstaat*) of the national-socialist party.<sup>149</sup>

Some of Fraenkel’s analysis may also be useful for the understanding of the British constitution and its anachronism of prerogative powers. Locke saw the prerogative powers as part of the executive (Ref. 50, pp. 373, 375, Ref. 58, p. 64), and the present British government does that as well. It was already Thomas Jefferson who regarded them as a separate force beside the executive and preferably proscribed (Ref. 149, p. 67). The Founders of the USA and the Framers of the US constitution experienced the British prerogative powers in Colonial America, and when devising the principles of constitutional control they may have had in mind persons like the current US president to curtail individual powers.<sup>150</sup> Britain has no equivalent, except a modern benevolent interpretation of a malleable constitutional framework consisting of changeable customary law, some statutes and case law. The British constitutional system can be adapted easily to political developments that would now be considered as a retrograde step. In the EU Britain emulated modern democracies; whether it will do that outside the EU remains to be seen.

Political theory and political history have shown in many examples that it is a fatal error to believe in the benevolence of the executive in a state. The ‘way of reasoning from the particular case to the principle, rather than from the abstract structure of the constitution down to the particular case’ is not ‘completely superior’ (Roger Scruton) but dangerous. At least for the purpose of the law, man is not good by nature, and a (written) constitution should restrict, control and correct with precision the powers of the political actors. The Brexit negotiations are not only about conflicts over EU citizens’ rights, the future economic relations and the financial settlement between the UK and the EU, but indirectly also about a divergence between a constitution and political players of an *ancien régime* in the UK and modern constitutional systems in the other EU Member States. Even the steady increase of the powers of the European Parliament<sup>151</sup> retraces, belatedly, the development of the constitutions and widening parliamentary powers against the ruler and the executive in continental European states over the last 200 years.

Scotland, whether or not it stays in the UK, would benefit from giving itself a constitution, to ascertain what the legal framework of the country is and on which basis Scots law ultimately rests. This formal legalistic approach of a law-governed state (*‘Rechtsstaat’*), perhaps even beyond the principle of the rule of law,<sup>152</sup> also has,

within limits, a Scottish precursor. The judge, jurist and philosopher Lord Kames (Henry Home, 1696-1782), a principal representative of the Scottish Enlightenment, said in 1745, well after Locke, but just before Montesquieu's *Spirit of the Laws* and before Rousseau's *Second Discourse* and *Social Contract*:<sup>153</sup>

‘... no man is bound to obey the king’s commands, unless delivered *in a certain form prescribed by law*. ... The laws are superior to the king, and these he must be judged by. And supposing an absolute government in the strictest sense, where the king’s will is law, yet there is always one law above him, which is that of self-preservation.’

If Scotland does choose to become independent, that should be a longer process, well-organised also in relation to the Scottish economic position, pragmatic with a cross-party consensus, and constitutional. Particularly perilous would be any emotional chauvinistic nationalism, whether outright or masked as ‘civic nationalism’. If Scotland managed its possible secession as a rational, legalistic progression where it establishes itself as a new state without nationalism at its inception, that would be a modern successful example of progress in the history of civilisation.

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### **Acknowledgement**

This article is based on the Inaugural Lecture as Professor of Commercial Law at the University of Glasgow Law School, Scotland, United Kingdom, on 3 November 2017.

### **About the Author**

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<sup>1</sup> V. Bogdanor (2009) *The New British Constitution*, (Oxford and Portland, OR: Hart Publishing), p. 173.

<sup>2</sup> A. de Tocqueville (1969) *Democracy in America*, (ed.) J. P. Mayer, New York: Doubleday, vol. 1, chapter 7, pp. 246, 254-255. For a historical discussion in relation to constitutions in Europe before 1848, see L. Lacche, Luigi (2013), Granted Constitutions. The Theory of Octroi and Constitutional Experiments in Europe in the Aftermath of the French Revolution, *European Constitutional Law Review*, **9**(2), pp. 285-314, at pp. 297-298.

<sup>3</sup> Scotland 62% remain, Northern Ireland 55.8% remain, England 46.6% remain, Wales 47.5% remain. See BBC EU referendum results, available at:

[http://www.bbc.co.uk/news/politics/eu\\_referendum/results](http://www.bbc.co.uk/news/politics/eu_referendum/results) (accessed 17 Jan 2018).

<sup>4</sup> *R. (on the application of Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768, para. 92.

<sup>5</sup> That was the headline of the Daily Mail on 4 November 2016, written by the political editor James Slack, online version: <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> (accessed 17 Jan. 2018) after the High Court judgment of *R. (on the application of Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) was handed down.

<sup>6</sup> Compare, for example, the statement of the ‘Imperial Judicial Leader’ Hans Frank in Nazi Germany in 1936, that the judge’s duty is ‘not to give effect to a legal order above the people’s community (*Volksgemeinschaft*) or to enforce general ideas and values but to preserve the concrete folkish (*völkische*) communal order ...’, extract in W. Hofer (1982) *Der Nationalsozialismus. Dokumente 1933-1945* (Frankfurt am Main: Fischer Taschenbuch Verlag), p. 101.

<sup>7</sup> Whether certain EU measures after the financial crisis, such as the Treaty on Stability, Coordination and Governance, TSCG (Fiscal Compact) (an intergovernmental treaty under international law between twenty-five EU Member States), further the principal European idea is debatable.

<sup>8</sup> The Bloomberg speech by the then Prime Minister David Cameron of 23 Jan. 2013, says that as well: ‘For us, the European Union is a means to an end – prosperity, stability, the anchor of freedom and democracy both within Europe and beyond her shores – not an end in itself.’, available at:

<https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> (accessed 17 Jan. 2018).

<sup>9</sup> A. Rahmatian (2016) European copyright inside or outside the European Union: pluralism of copyright laws and the “Herderian paradox”, *International Review of Intellectual Property and Competition Law*, **47**(8), pp. 912-940, at pp. 919-921.

<sup>10</sup> J. G. Herder (1989) *Ideen zur Philosophie der Geschichte der Menschheit*, (ed.) Martin Bollacher (Frankfurt am Main: Deutscher Klassiker Verlag), pp. 253, 298, 369-370. For Herder’s ‘Unity in difference’, see I. Berlin (2000) Herder and the Enlightenment, in: Isaiah Berlin, Henry Hardy (ed), *Three Critics of the Enlightenment: Vico, Hamann, Herder* (London: Pimlico), pp. 168–242, at p. 177.

<sup>11</sup> See e.g. the Prime Minister Theresa May in her keynote speech at the Conservative Party conference 2016: available at:

<http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html> (accessed 17 Jan. 2018): ‘But if you believe you’re a citizen of the world, you’re a citizen of nowhere. You don’t understand what the very word ‘citizenship’ means.’ Her statement was much more subdued at the

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Conservative Party Conference 2017: ‘If you are a citizen of the EU who has made their life in this country ... we value the contribution you make to the life of our country. You are welcome here. And I urge the negotiating teams to reach agreement on this quickly because we want you to stay.’ (see <https://blogs.spectator.co.uk/2017/10/theresa-mays-conservative-conference-speech-full-text/>, accessed 17 Jan. 2018), but actually she leaves the result to the negotiators who can be blamed if an agreement cannot be reached.

<sup>12</sup> Maxine Frith, ‘I hope we ditch the Scots from the UK. And the Welsh. Then we can just be England. That’s what people want – England back’, *The Sunday Herald*, 26 June 2016.

<sup>13</sup> European Council (Art. 50) meeting, 15 Dec. 2017, EUCO XT 20011/17, following Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union, 8 Dec. 2017.

<sup>14</sup> This is what I suggested in Andreas Rahmatian, ‘Brexit: Verhandeln um des Verhandeln Willen?’, *Der Standard (Austria)*, 24 Aug. 2017.

<sup>15</sup> Statement by the President of the European Council, Donald Tusk, 26 September 2017, EU press release 533/17: ‘as I have always said, in fact Brexit is only about damage control’.

<sup>16</sup> As the former permanent representative of the UK to the EU, Sir Ivan Rogers, said in his resignation letter of 3 Jan. 2017: ‘Serious multilateral negotiating experience is in short supply in Whitehall, and that is not the case in the Commission or in the Council.’, available at: <http://www.bbc.co.uk/news/uk-politics-38503504> (accessed 17 Jan. 2018).

<sup>17</sup> For the following passage see R. Arnold, L. A. F. Bently, E. Derclaye, G. B. Dinwoodie (2017) *The Legal Consequences of Brexit Through the Lens of IP Law*, *University of Cambridge Faculty of Law Research Paper No. 21/2017*, Available at SSRN: <https://ssrn.com/abstract=2917219>, p. 5. A. Rahmatian (2017) Brief speculations about changes to IP law in the UK after Brexit, *Journal of Intellectual Property Law and Practice*, **12(6)**, pp. 510-515, at pp. 512-513.

<sup>18</sup> For the history of this project, see J. Pila (2013) The European Patent: An old and vexing problem, *International and Comparative Law Quarterly*, **62**, pp. 917-940.

<sup>19</sup> Regulation 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection; Regulation 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements; Agreement on a Unified Patent Court (UPC Agreement) OJ C 175 (20/06/2013).

<sup>20</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification), OJ L 154.

<sup>21</sup> Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs, OJ EC No L 3.

<sup>22</sup> See Regulation 1257/2012, Recitals 5 and 6, and Arts. 1 (2), 2 (b) and (c), 3 (1).

<sup>23</sup> UPC Agreement, Recital, paras. 3, 4 and 14.

<sup>24</sup> Regulation 1257/2012, Art. 3 (2).

<sup>25</sup> Regulation 1257/2012, Arts. 5 (3) and 7 (1): unitary patent and nature of patent protection granted are defined by national law.

<sup>26</sup> K. Kaesling (2013), The European patent with unitary effect – a unitary patent protection for a unitary market?, *UCL Journal of Law and Jurisprudence*, **2(1)**, pp. 87-111, at pp. 92, 110.

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<sup>27</sup> Regulation 1257/2012, Recitals 3, 5.

<sup>28</sup> European Union (Withdrawal) Bill, s. 6.

<sup>29</sup> Regulation 1257/2012, Arts. 3 (2), and 7 (1).

<sup>30</sup> On 14 December 2016, the UK's deputy permanent representative to the EU signed the Protocol on Privileges and Immunities of the Unified Patent Court, see Council of the EU website:

<http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2016047> (accessed 17 Jan. 2018).

<sup>31</sup> Jennifer Rankin, Lisa O'Carroll, Jessica Elgot, 'UK's approach to Brexit is "nostalgic and unrealistic", says EU negotiator', *The Guardian*, 31 August 2017.

<sup>32</sup> Recently also *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 40: 'The United Kingdom does not have a constitution in the sense of a single coherent code of fundamental law which prevails over all other sources of law. Our constitutional arrangements have developed over time in a pragmatic as much as in a principled way, through a combination of statutes, events, conventions, academic writings and judicial decisions.'

<sup>33</sup> N. Davies (1981) *God's Playground. A History of Poland*, Vol. 1 (Oxford: Clarendon Press), pp. 534-535). An English translation of the Polish Constitution of 3 May 1791 under:

[https://en.wikisource.org/wiki/Constitution\\_of\\_May\\_3,\\_1791](https://en.wikisource.org/wiki/Constitution_of_May_3,_1791) (accessed 17 Jan. 2018). The Polish constitution of 3<sup>rd</sup> May was still committed to the idea of estates and a state religion (arts. 1-4), but contained clearly the concept of separation of powers (arts. 5, 7-8).

<sup>34</sup> Ch. Harpum, S. Bridge, M. Dixon (Megarry and Wade) (2008) *The Law of Real Property*, 7<sup>th</sup> ed. (London: Thomson/Sweet and Maxwell), pp. 29-30.

<sup>35</sup> A. W. B. Simpson (1986) *A History of the Land Law* (Oxford: Oxford University Press), pp. 22, 54; J. Bray (2009) Feudal Law: The Case for Reform, in: Martin Dixon (ed.), *Modern Studies in Property Law*. Vol. 5 (Oxford and Portland, Oregon: Hart Publishing), pp. 99-121, at p. 102.

<sup>36</sup> K. G. C. Reid (2003) *The Abolition of Feudal Tenure in Scotland* (London: Lexis-Nexis), p. 2.

<sup>37</sup> Tenures Abolition Act 1746, Heritable Jurisdictions (Scotland) Act 1746. Gretton in K. G. C. Reid (and contributors) (1996) *The Law of Property in Scotland* (Edinburgh: Butterworth), pp. 56-57.

<sup>38</sup> Nonetheless, G. Gretton said in 1996 that only in one country feudalism survived in any real sense, and that was in Scotland.

<sup>39</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000, ss. 1, 2 (1). Reid, Ref. 36, p. 8.

<sup>40</sup> F. W. Maitland (1909) *The Constitutional History of England* (Cambridge: Cambridge University Press), p. 538.

<sup>41</sup> And any sale of Crown land is subject to the prohibition of the Crown Lands Act 1702, s. 5 (in England and Wales). In Scotland dealings with land by the Crown is allowed, Abolition of Feudal Tenure etc. (Scotland) Act 2000, s. 59.

<sup>42</sup> H. Grotius (2005) *The Right of War and Peace (De Juri Belli ac Pacis)*, book 2, Richard Tuck (ed.) (Indianapolis: Liberty Fund), book 2, chapter 3, sections IV.1, pp. 456-457. Modern legal doctrine still adheres to the strict separation between property and sovereignty, e.g. G. Jellinek (1960) *Allgemeine Staatslehre*, 3<sup>rd</sup> ed. (Bad Homburg: Hermann Gentner Verlag), pp. 398-399: power over a territory by a state is

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not *dominium* (property) but *imperium* (sovereignty). See also A. Rahmatian (2017) Indirect Sovereignty Through Property Rights, *Notre Dame Journal of International and Comparative Law*, 7(2), pp. 58-90 at p. 77.

<sup>43</sup> On the legal refinement of the doctrine of the king's two bodies in relation to the Duchy of Lancaster, see E. Kantorowicz (1997) *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton, NJ: Princeton University Press), pp. 403-406.

<sup>44</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000, s. 58 (1), (2).

<sup>45</sup> M. Loughlin (2010) *Foundations of Public Law* (Oxford: Oxford University Press), pp. 246-247; A. F. Pollard (1926) *The Evolution of Parliament*, 2nd ed. (London: Longmans, Green and Co.), pp. 51-52, 62. For a short account, see Lord Longford (F. Pakenham) (1999) *A History of the House of Lords* (Stroud: Sutton), pp. 27-30, 35-39.

<sup>46</sup> Scotland Act 1998, s. 1(1). On the fact that the Scottish Parliament is sustained by, and dependent on, the parliamentary sovereignty of the British Parliament, see below under 3.

<sup>47</sup> Scotland Act 1998, s. 1 (1).

<sup>48</sup> J. Bodin (1955) *Six Books of the Commonwealth*, M. J. Tooley (tr. and ed.) (Oxford: Basil Blackwell), book 1, chapter 8, pp. 25-27.

<sup>49</sup> T. Hobbes (2012) *On the Citizen (De Cive)*, Richard Tuck and Michael Silverthorne (ed. and trans.) (Cambridge: Cambridge University Press), chapter 6, section 15, p. 85; T. Hobbes (2008) *The Elements of Law Natural and Politic (Human Nature, De Corpore Politico)*, J. C. A. Gaskin (ed.) (Oxford: Oxford University Press), part II, 'De Corpore Politico', chapter 24, sect. 2, p. 137.

<sup>50</sup> J. Locke (2013) *Two Treatises of Government*, 2<sup>nd</sup> ed., Peter Laslett (ed.) (Cambridge: Cambridge University Press), ch. 7, § 87, ch. 8, § 119, pp. 323, 347.

<sup>51</sup> J.-J. Rousseau, Jean-Jacques (2011) *The Discourses and other Early Political Writings*, Victor Gourevitch (ed.) (Cambridge: Cambridge University Press), *Second Discourse*, part II, pp. 161, 169.

<sup>52</sup> J.-J. Rousseau (1968) *The Social Contract*, Maurice Cranston (ed. and trans.) (London: Penguin Books), ch. I, 4, 9, pp. 54, 66.

<sup>53</sup> G. W. F. Hegel (1986) *Grundlinien der Philosophie des Rechts (Werke 7)* (Frankfurt am Main: Suhrkamp Verlag), § 41, § 46, § 65-68, § 73, pp. 102, 107-108, 140-146, 156.

<sup>54</sup> K. Marx (2004) *Ökonomisch-philosophische Manuskripte (1844)*, in: I. Fetscher (ed.), *Karl Marx, Friedrich Engels, Studienausgabe*, vol. 2 (Berlin: Aufbau Verlag), pp. 77-90.

<sup>55</sup> See also N. Walker (2014) Our Constitutional Unsettlement, *Public Law*, pp. 529-548, at pp. 530-536, discussing the weakening of absolute parliamentary sovereignty. Compare Hobbes, Ref. 49, chapter 9, section 10, p. 112. On the difference between sovereignty of the state (and parliamentary sovereignty is an application of that notion) and popular sovereignty, see H. Heller (1971) Souveränität, in: H. Heller, *Gesammelte Schriften*, vol. 2 (Leiden: A. W. Sijthoff), pp. 31-202, at pp. 92-99.

<sup>56</sup> E.g. US Constitution, Preamble; German Basic Law (Grundgesetz), Preamble and Art. 20; French Constitution 1958, Art. 3; Austrian Constitution of 1920/1929, Art. 1.

<sup>57</sup> The Supreme Court's narrative on this matter is in *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 41: '... over the centuries, those prerogative powers, collectively known as the Royal prerogative, were progressively reduced as Parliamentary democracy and the rule of law developed. By the end of the 20th century, the great majority of what

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had previously been prerogative powers, at least in relation to domestic matters, had become vested in the three principal organs of the state, the legislature (the two Houses of Parliament), the executive (ministers and the government more generally) and the judiciary (the judges).<sup>7</sup>

<sup>58</sup> A. V. Dicey (1985) *Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> ed. (Basingstoke and London: Macmillan), pp. 41-42. See also *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 43, with reference to the classical definition by A. W. Dicey.

<sup>59</sup> More precisely ‘The Crown in Parliament’, as discussed by Dicey.

<sup>60</sup> The European Union Referendum Act 2015 is silent about the legal effect of the referendum.

<sup>61</sup> K. Renner (1949) *The Institutions of Private Law and their Social Functions* (London: Routledge and Kegan Paul), pp. 75-77, 252-254, 257, who developed this idea in relation to property, but this idea is also relevant to constitutional institutions. See also O. Kahn-Freund (1949) Introduction, and Notes, in K. Renner, *The Institutions of Private Law and their Social Functions* (London: Routledge and Kegan Paul), pp. 5, 96-97, 263.

<sup>62</sup> O. Kahn-Freund (1944) Some Reflections on Company Law Reform, *Modern Law Review*, 7, pp. 54-66, at pp. 55, 58-59, who criticizes the rule of separate legal personality because of its effects.

<sup>63</sup> P. Davies, and S. Worthington (2012) *Principles of Modern Company Law* (Gower & Davies), 9<sup>th</sup> ed. (London: Sweet & Maxwell), p. 207.

<sup>64</sup> A. A. Berle and G. C. Means (1933) *The Modern Corporation and Private Property* (New York: The Macmillan Company), pp. 278-279, 281, 285.

<sup>65</sup> See, for example, the challenges of the EU fiscal stability measures as unconstitutional under the German constitution before the German Constitutional Court, discussion in Rahmatian, Ref. 42, p. 70, with further references.

<sup>66</sup> F. L. Ganshof (1964) *Feudalism*, 3<sup>rd</sup> ed., trans. Ph. Grierson (London: Longman), p. 106: fief (*beneficium*) – as opposed to the personal element in feudalism, vassalage (homage and fealty).

<sup>67</sup> See also discussion by M. Loughlin (1999) The State, the Crown and the Law, in: Maurice Sunkin and Sebastian Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press), p. 35. Modern British constitutional theory is obviously more advanced and sophisticated.

<sup>68</sup> H. Kelsen (1992) *Reine Rechtslehre* (Wien: Österreichische Staatsdruckerei), pp. 283-284, 289.

<sup>69</sup> E.g. B. de Jouvenel (1993) *On Power. The Natural History of Its Growth*, trans. J. F. Huntington, orig. fr. Du Pouvoir. Histoire Naturelle de sa Croissance (Indianapolis: Liberty Fund), pp. 31-33.

<sup>70</sup> The manor denoted a jurisdictional or economic entity and played a role in feudal society although it was not part of the feudal pyramid.

<sup>71</sup> S. Payne (1999) The Royal Prerogative, in: M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (Oxford: Oxford University Press), pp. 77-110, at pp. 77, 78.

<sup>72</sup> It has, however, been adopted by the UK Supreme Court in 2017, see *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, paras. 41-43.

<sup>73</sup> *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2. The government’s position is set out in para.

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34. The matter became a constitutional formality, because the European Union (Notification of Withdrawal) Act 2017 went through Parliament unopposed, saying in s. 1 that the Prime Minister may notify under Art. 50 (2) the UK's intention to withdraw from the EU, which is the same result as initially sought by the government, but now only with agreement by Parliament.

<sup>74</sup> E.g. Barber, Hickman and King, Pulling the Article 50 'Trigger': Parliament's Indispensable Role, *U.K. Const. L. Blog* (27 Jun 2016) (available at <https://ukconstitutionalaw.org/>) (accessed 17 Jan. 2018).

<sup>75</sup> Prof. A. McHarg and Prof. A. Tomkins in Peter Nicholson, Brexit: a full menu, *Journal of the Law Society of Scotland*, 18 July 2016, pp. 12-15.

<sup>76</sup> *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, paras. 47-48, 67-68, 81, 86-88, 93, 101.

<sup>77</sup> *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 49.

<sup>78</sup> A. Tomkins (2005) *Our Republican Constitution* (Oxford and Portland, Oregon: Hart Publishing), p. 132, is in favour of the abolition of all prerogative powers of the Crown by Parliament.

<sup>79</sup> Ch. de Montesquieu (1977) *The Spirit of Laws*, ed. D. W. Carrithers (Berkeley: University of California Press), Book 11, chapter 6, pp. 202, 213.

<sup>80</sup> The English Parliament itself embodied the executive (King-in-Parliament) and had a judicial role as a high court of justice, see Loughlin, Ref. 45, pp. 247-251. The Supreme Court in *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 41, sets out the British constitutional system in a modern way with a clear separation of powers – an example of the versatility of the British constitution which allows for a wide variety of interpretations.

<sup>81</sup> As enacted by the Constitutional Reform Act 2005, s. 23.

<sup>82</sup> A. H. Müller (2006) *Die Elemente der Staatskunst*, vol. 1 (Hildesheim, Zürich, New York: Georg Olms Verlag) (facsimile reprint of the 1809 edition), pp. XVIII-XIX (own translation).

<sup>83</sup> A big difference is that Müller was a representative of the Romantic period, while de Maistre detested Romanticism and adhered to ideals of classicism, see I. Berlin (1991) Joseph de Maistre and the Origins of Fascism, in *The Crooked Timber of Humanity*, H. Hardy (ed.) (London: Fontana Press), pp. 91-174, at p. 93.

<sup>84</sup> L. M. Principe (2013) *The Secrets of Alchemy* (Chicago and London: The University of Chicago Press), pp. 83, 89, 116, 160, 168-169.

<sup>85</sup> See J. Goldsworthy (2002) *The Sovereignty of Parliament. History and Philosophy* (Oxford: Clarendon Press), pp. 247, 254, discussing the relevance of an official consensus on principles such as democracy, justice and the rule of law on the validity and the enforcement of statutes passed by Parliament. The opinion of UK constitutional lawyers is that democracy is a fundamental principle of the UK constitution, e.g. M. Elliott (2015) The Principle of Parliamentary Sovereignty in Legal, Constitutional, and Political Perspective, in J. Jowell, D. Oliver, C. O'Conneide (eds), *The Changing Constitution*, 8<sup>th</sup> ed. (Oxford: Oxford University Press), pp. 38-66, at p. 43. This view is naïve.

<sup>86</sup> The traditional ceremony of the Queen's speech in Parliament would be a good example.

<sup>87</sup> P. Craig, G. De Búrca (2015) *EU Law: Text, Cases, and Materials*, 6<sup>th</sup> ed. (Oxford: Oxford University Press), pp. 119-123.

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<sup>88</sup> A. Follesdal, S. Hix (2006) Why there is a democratic deficit in the EU, *Journal of Common Market Studies*, **44**(3), pp. 533–562, at pp. 534-537.

<sup>89</sup> E.g. Gabriela Baczynska, Lidia Kelly, Poland could be stripped of EU voting rights after abolishing judiciary's independence, *The Independent*, 20 July 2017.

<sup>90</sup> The European Conservatives and Reformists Group, see e.g. <http://ecrgroup.eu/> and <http://news.bbc.co.uk/1/hi/world/europe/4665818.stm> (22 June 2009) (both visited 17 Jan. 2018).

<sup>91</sup> See also F. A. R. Bennion (2009) *Understanding Common Law Legislation. Drafting and Interpretation* (Oxford: Oxford University Press), pp. 7, 15.

<sup>92</sup> A. Rahmatian (2004) Codification of Private Law in Scotland: Observations by a Civil Lawyer, 8 *Edinburgh Law Review*, pp. 28-56, at p. 52.

<sup>93</sup> Loughlin (Ref. 45, p. 271) discusses the view that parliamentary sovereignty is a creature of the common law and its detailed contents and limits are ascertained by the courts.

<sup>94</sup> Sir Roger Scruton, in a BBC Radio 4 interview with Patrick Wright in the broadcast 'The English Fix', 14 September 2017 (own transcription, minutes 7:41-9:18), <http://www.bbc.co.uk/programmes/b0939wgl> (accessed 17 Jan. 2018).

<sup>95</sup> E.g. H. Coing (1973) Roman Law as *Ius Commune* on the Continent, *Law Quarterly Review*, **89**, pp. 505-517, at p. 515; H. Coing (1985) *Europäisches Privatrecht*, Vol. I (München: C. H. Beck), p. 7; R. Zimmermann (1996), Savigny's Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science, *Law Quarterly Review*, **112**, pp. 576-605, at pp. 581, 588-589, 591, 596-598, 602.

<sup>96</sup> E.g. P. Caroni (1994) Der Schiffbruch der Geschichtlichkeit. Anmerkungen zum Neo-Pandektismus (Diskussion), *Zeitschrift für Neuere Rechtsgeschichte*, **16**, pp. 85-100, at pp. 90, 98; W. Brauner (1997) *Europäisches Privatrecht: Historische Wirklichkeit oder zeitbedingter Wunsch an die Geschichte?* (Roma: Centro di studi e ricerche di diritto comparato e straniero: Saggi, Conferenze e Seminari, vol. 23), pp. 1-22, at pp. 4-7, 8-9, 19. On that discussion, see also A. Rahmatian (2007) Friedrich Carl v. Savigny's *Beruf* and *Volksgeistlehre*, *The Journal of Legal History*, **28**, pp. 1-29, at pp. 19-20.

<sup>97</sup> Brief introduction in English in Rahmatian (Ref. 92, p. 32-33) with further references.

<sup>98</sup> W. Ogris (1975) *Die Rechtsentwicklung in Österreich 1848-1918* (Wien: Verlag der Österreichischen Akademie der Wissenschaften), p. 57; Th. Mayer-Maly (1980) Zeiller, as ABGB und wir, in: W. Selb and H. Hofmeister (eds), *Forschungsband Franz von Zeiller (1751-1828)* (Wien, Graz, Köln: Hermann Böhlaus Nachfolger), pp. 1-13, at p. 10; K. Zweigert and H. Kötz (1998) *Introduction to Comparative Law*, 3<sup>rd</sup> ed., Tony Weir (trans.) (Oxford: Clarendon Press), pp. 158-160. See W. Wagner (1980) Die Privatisierung des Lehnrechts, in: W. Selb and H. Hofmeister (eds), *Forschungsband Franz von Zeiller (1751-1828)* (Wien, Graz, Köln: Hermann Böhlaus Nachfolger), pp. 226-247, at pp. 238, 240, on the removal of feudal law from general private law in the ABGB. See also § 1 of the General Civil Code (ABGB).

<sup>99</sup> The application of the special rules on the *fideicommissum* (§ 618 ABGB) – most important for the nobility – became restricted during the nineteenth century, but these rules were repealed only in 1938. The feudal system itself was abolished in Austria-Hungary in 1867, see Ogris (Ref. 98, pp. 64-65).

<sup>100</sup> E.g. J. E. Wilson (2016) *India Conquered: Britain's Raj and the Chaos of Empire* (London: Simon and Schuster), pp. 310, 313-314. Even Indian judges administering

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the law alongside their British colleagues felt that and were not really equal partners, *ibid.*, at p. 315.

<sup>101</sup> M. Chanock (1998) *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia* (Portsmouth, NH: Heinemann), pp. 46, 55, 71, 75, 77-78. More cautiously H. F. Morris (1972) *The Framework of Indirect Rule in East Africa*, in: H. F. Morris and J. S. Read, *Indirect Rule and the Search for Justice* (Oxford: Clarendon Press), pp. 3-40, pp. 8, 24; J. S. Read (1972) *Customary Law under Colonial Rule*, in: H. F. Morris and J. S. Read, *Indirect Rule and the Search for Justice* (Oxford: Clarendon Press), pp. 169-170, 175, 183, 207, 212.

<sup>102</sup> See also A. Tomkins (2014) *Scotland's Choice, Britain's Future*, *Law Quarterly Review*, **130**, pp. 215-234, at p. 219. Or the term 'asymmetrical quasi-federalism' is used, see R. Rawlings (2015) *A Coalition Government in Westminster*, in: J. Jowell, D. Oliver, C. O'Connell (eds), *The Changing Constitution*, 8<sup>th</sup> ed. (Oxford: Oxford University Press), pp. 194-221, p. 218.

<sup>103</sup> Scotland Act 1998, ss. 1, 28-29. According to Ch. Himsworth, Ch. O'Neill (2009) *Scotland's Constitution: Law and Practice* (Haywards Heath: Bloomsbury Professional), p. 14), 'that Act can quite reasonably be described as a constitution for Scotland'. Contrary view in *Imperial Tobacco Ltd. v. Lord Advocate* [2012] CSIH 9, para. 71.

<sup>104</sup> See, however, the discussion by J. St. Mill on federal systems in the nineteenth century, J. St. Mill (1998) *Considerations on Representative Government*, in: J. S. Mill, *On Liberty and Other Essays*, J. Gray (ed.) (Oxford: Oxford University Press), ch. 17, pp. 203-467, at p. 437.

<sup>105</sup> That is the terminology of the Scotland Act 1998, see s. 29(2). See also N. Aroney (2014) *Reserved Matters, Legislative Purpose and the Referendum on Scottish Independence*, *Public Law*, pp. 422-445, at p. 423-424.

<sup>106</sup> For example: Northern Region – parliament in Manchester, Midlands – parliament in Birmingham, and so on.

<sup>107</sup> On the conflict of regional legislative powers with parliamentary sovereignty, see e.g. A. Tomkins (1999) *Of Constitutional Spectres*, *Public Law*, pp. 525-540, at p. 534; Tomkins, Ref. 102, pp. 218, 220. See also Walker, Ref. 55, p. 544: 'absence of a formal federal system'; Aroney, Ref. 105, p. 428: 'the United Kingdom is certainly not a modern federal state'.

<sup>108</sup> D. Willoweit (2009) *Deutsche Verfassungsgeschichte*, 6<sup>th</sup> ed. (München: C. H. Beck), p. 148.

<sup>109</sup> See H. Mitteis (1953) *Der Staat des Hohen Mittelalters*, 4<sup>th</sup> ed. (Weimar: Hermann Böhlaus Nachfolger), pp. 67, 256-257, 341, in relation to a possible origin of this evolution in feudal law. Modern scholarship has, however, qualified and partly rejected the (ahistorical) interpretation by older scholars, such as Mitteis, of possible different features of the French and the German feudal system in view of the later development of the nation state, see St. Patzold (2012) *Das Lehnswesen* (München: C. H. Beck), pp. 96-102. Brief discussion also in A. Rahmatian (2015) *Lord Kames: Legal and Social Theorist* (Edinburgh: Edinburgh University Press), pp. 198-199, 260.

<sup>110</sup> European Union (Withdrawal) Bill (HC Bill 5), s. 11 (1) (a) and (b). See J. Hunt (2017) *Devolution*, in: M. Dougan (ed.), *The UK after Brexit: Legal and Policy Changes* (Cambridge-Antwerp-Portland: Intersentia), pp. 35-52, at pp. 47-48.

<sup>111</sup> *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 150.

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<sup>112</sup> That is also the concept of the Scotland Act 1998, s. 28(7): ‘This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.’ See also the White Paper *Scotland’s Parliament* in 1997, Cm 3658, para. 42.

<sup>113</sup> Dicey, Ref. 58, p. 65, said about certain Acts, such as the Act of Union with Scotland of 1706, that they were ‘intended to give to certain portions of them more than the ordinary effect of statutes’, but showed that the British Parliament made amendments to the Act of Union and similar Acts subsequently, so this intention has no legal effect.

<sup>114</sup> Scotland Act 1998, s. 63A (1) The Scottish Parliament and the Scottish Government are a permanent part of the United Kingdom’s constitutional arrangements. ... (3) ... it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum.

<sup>115</sup> *R. (on the application of Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] HRLR 2, para. 149.

<sup>116</sup> *R. v. Secretary of State for Transport, ex parte Factortame Ltd. (No. 2)* [1991] 1 AC 603. See e.g. Craig and De Búrca, Ref. 87, pp. 116-119.

See also Tomkins, Ref. 102, p. 216, on the Claim of Right of the Scottish Constitutional Convention in 1989 as an attempt to establish ‘constituent power’.

<sup>118</sup> *Scotland’s Future: Your Guide to an independent Scotland*, Scottish Government, November 2013.

<sup>119</sup> *Scotland’s Future: Your Guide to an independent Scotland*, p. 351. Other important passages are at pp. 22, 338, 351-370.

<sup>120</sup> A small inclination towards federalism is the insertion of ss. (8) to s. 28 of the Scotland Act 1998 by the Scotland Act 2016 (Sewel convention): ‘But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’ However, criteria like ‘recognised’, ‘not normally’ and just ‘consent’ are still unacceptable to a modern federal constitutional system.

<sup>121</sup> For Germany, see German Basic Law 1949, Art. 31. For Austria (in relation to the state constitutions), see Constitution of 1920/1929, Art. 99 (1).

<sup>122</sup> Scotland Act 1998, s. 30, Schedule 5. This was also a reason why the Government enabled the Scottish Parliament to pass the Scottish Independence Referendum Act 2013 to ensure the legal basis of the referendum by having the Queen approving (with prior approval of both Houses of Parliament) an Order in Council: The Scotland Act 1998 (Modification of Schedule 5) Order 2013, 12 February 2013. See also Aroney, Ref. 105, pp. 423, 426.

<sup>123</sup> Under the Compromise, the ‘dual monarchy’ consisted of the emperor/king (Francis-Joseph I, until 1916, Emperor of Austria and King of Hungary), and the common ministers of foreign affairs, defence, and a common finance ministry solely for the army, navy and diplomatic expenditures.

<sup>124</sup> E. C. Hellbling, (1974) *Österreichische Verfassungs- und Verwaltungsgeschichte*, 2<sup>nd</sup> ed. (Wien-New York: Springer Verlag), pp. 396-398; E. Zöllner (1990) *Geschichte Österreichs*, 8<sup>th</sup> ed. (Wien-München: Verlag für Geschichte und Politik-R. Oldenbourg Verlag), pp. 411-413. A more contemporaneous analysis of the Austro-Hungarian Compromise by K. Renner (published under the name Rudolf Springer) (1906) *Grundlagen und Entwicklungsziele der Österreichisch-Ungarischen Monarchie* (Wien and Leipzig: Franz Deuticke), pp. 43-47.

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<sup>125</sup> The Scottish Independence Referendum Act 2013 is silent as to the effects of the referendum. See also Tomkins, Ref. 102, p. 223, on the Draft Referendum Bill consultation paper.

<sup>126</sup> That was the question in the 2014 independence referendum, see Scottish Independence Referendum Act 2013, s. 1 (2).

<sup>127</sup> For example, the Spanish Constitution, as its Art. 155 shows, has no such a procedure, which became apparent in the Catalonia crisis in autumn 2017. The Canadian Supreme Court decided in the case of *Quebec Secession Reference* [1998] 2 SCR 217, that such a process to secede must be constitutionally provided.

<sup>128</sup> See also A. McHarg, ‘The Referendum: Memorandum of Agreement and Draft Section 30 Order’, 16 Oct. 2012; Ch. Bell, ‘The Legal Status of the “Edinburgh Agreement”’, 5 Nov. 2012, both at Scottish Constitutional Futures Forum, <http://www.scottishconstitutional-futures.org/> (visited 17 Jan. 2018).

<sup>129</sup> Alasdair Fotheringham, ‘Catalonia suspends declaration of independence from Spain’, *The Independent*, 10 Oct. 2017.

<sup>130</sup> *Scotland’s Future: Your Guide to an independent Scotland*, Scottish Government, November 2013, pp. 22, 45.

<sup>131</sup> *Scotland’s Future: Your Guide to an independent Scotland*, pp. 13, 53, 219.

<sup>132</sup> M. N. Shaw (2008) *International Law*, 6<sup>th</sup> ed. (Cambridge: Cambridge University Press), pp. 207, 444, 960, 974; J. R. Crawford (2007) *The Creation of States in International Law* (Oxford: Oxford University Press), p. 383. Specifically with regard to Scotland, A. Rahmatian (2012) The English Pound in an Independent Scotland, *Journal of International Banking Law and Regulation*, **27(9)**, pp. 336-339, at p. 336; Tomkins, Ref. 102, p. 231: An independent Scotland, if recognised by the international community, would be a new state, having seceded from the rest of the UK as the continuing state.

<sup>133</sup> E.g. European Parliament, Parliamentary Questions, Subject: Status of the United Kingdom if Scotland leaves, 29 Oct. 2012, available at:

<http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2012-009862&language=EN> (accessed 17 Jan. 2018). Letter of the then EU Commission President José Manuel Barroso to Lord Tugendhat, House of Lords, 10 Dec. 2012.

<sup>134</sup> European Commission Statement 17/3626, 2 Oct. 2017: An independent Catalonia would be outside the EU.

<sup>135</sup> E.g. Severin 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; John Swinney, SNP Finance Secretary, in Eddie Barnes, *The Scotsman*, February 2, 2012. Swinney also ruled out joining the euro for the foreseeable future.

<sup>136</sup> About Brexit: S. Coates, “‘Have Cake and Eat it’ – Aide Reveals Brexit Tactic”, *The Times*, 29 November 2016. About the Scottish independence referendum: Editorial, ‘Scotland cannot have it both ways: Independence involves harder choices than SNP admits’, *Financial Times*, 26 November 2013.

<sup>137</sup> ‘For now they 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 Anshel Pfeffer, ‘Jews on Scottish independence: More faintheart than Braveheart’, *HaareZ*, 26 Oct. 2012.

<sup>138</sup> Union with Scotland Act 1706, Arts. 18, 19.

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<sup>139</sup> A good summary of this movement by one of its critics, A. McCall Smith (1976) *Scots Law in Comparative Context*, in: J. P. Grant (ed.), *Independence and Devolution. The Legal Implications for Scotland* (Edinburgh: W. Green), pp. 153-161, at pp. 153-154.

<sup>140</sup> In fact, especially the provisions on moveable or personal property in the Sale of Goods Act clearly show Roman-law concepts and thinking.

<sup>141</sup> The argument is s. 17 and s. 18, rule 1 of the Sale of Goods Act 1979.

<sup>142</sup> J. Viscount of Stair (1981) *The Institutions of the Law of Scotland*, D. M. Walker (ed.) (Edinburgh and Glasgow: The University Presses of Edinburgh and Glasgow), book II, 3, 14, p. 337.

<sup>143</sup> Anon. (1889) Current Topics: Sale of Goods Bill, *Juridical Review* 1, p. 311.

<sup>144</sup> Austrian General Civil Code (ABGB), §§ 380, 424, 425.

<sup>145</sup> Compare my article (also on the value of the Austrian Civil Code for Scots law), Rahmatian, Ref. 92, p. 32, which had no influence in Scotland at all.

<sup>146</sup> This may explain why many European academics at Scottish law schools have not engaged much with Scots private law, as H. L. MacQueen (2017) *Quo vadis?*, *Juridical Review*, 1, pp. 9-19, at p. 14, remarked.

<sup>147</sup> Rahmatian, Ref. 96, pp. 24-25; A. Rahmatian (2007) *Universalist Norms for a Globalised Diversity: on the Protection of Traditional Cultural Expressions*, in: F. Macmillan (ed.) *New Directions in Copyright Law*, vol. 6 (Cheltenham: Edward Elgar Publishing), pp. 199-231, at pp. 209-210; Rahmatian, Ref. 109, pp. 14-15; A. Rahmatian (2018) *The political purpose of the “mixed legal system” conception in the law of Scotland*, *Maastricht Journal of European and Comparative Law* (online preview).

<sup>148</sup> The national-socialist government turned the Weimar constitution ineffective by passing various acts under emergency legislation, starting with the Emergency Decree or ‘Ermächtigungsgesetz’ (Verordnung des Reichspräsidenten zum Schutz von Volk und Staat) of 28 February 1933 (RGBl. I S. 83). A few articles of the Weimar Constitution still apply, see Art. 140 German Basic Law 1949.

<sup>149</sup> E. Fraenkel (2010) *The Dual State. A Contribution to the Theory of Dictatorship* (Clark, NJ: Lawbook Exchange), pp. 3, 65.

<sup>150</sup> E.g. Federalist No. 10 (Madison), Federalist No. 19 (Madison), Federalist No. 69 (Hamilton), see A. Hamilton, J. Madison, J. Jay (2003) *The Federalist Papers* (New York: Bantam Classic), pp. 53, 108, 418-420, 423.

<sup>151</sup> Craig and De Búrca, Ref. 87, pp. 8, 50-51.

<sup>152</sup> As also confirmed by the Constitutional Reform Act 2005, s. 1. On the rule of law (legality, certainty, equality, access to justice for enforcement of rights), see e.g. J. Jowell (2015) *The Rule of Law*, in: J. Jowell, D. Oliver, C. O’Cinneide (eds), *The Changing Constitution*, 8<sup>th</sup> ed. (Oxford: Oxford University Press), pp. 13-37, at pp. 19-24.

<sup>153</sup> Kames (Lord Kames, Henry Home) (1763) *Essays upon Several Subjects concerning British Antiquities*, Appendix, 3<sup>rd</sup> ed. (Edinburgh: A. Kincaid and J. Bell), pp. 201, 203 (emphasis added). The text was first published in 1747. Here cited after the 3<sup>rd</sup> ed. of 1763: the passage ‘which is that of self-preservation’ was added in the 1763 edition.