Scotland in the EU: Comment by DIMITRY KOCHENOV

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In his reply to Prof. Douglas-Scott's legally sound and rich analysis of the political realities surrounding the prospects of EU membership for independent Scotland, Prof. Weiler is absolutely right to underline that the 'European' side of the Scottish referendum has a lot to say about the essence of the contemporary European Union: 'the ideals of solidarity and integration on which Europe stands'. In the context of the values and ideals Europe is founded upon (2TEU), upholds and is obliged to promote internally (3(1–3) TEU) and externally (3(5)TEU), several possible misunderstandings could arise, flashed out by the Scottish independence referendum. These relate, especially, to the role the Union should play in ensuring that its values are upheld and observed. Three such misunderstandings in particular come to mind. They concern the consequences of Member State mutations in the context of EU law (should the EU recognize the consequences of successful legally impeccable secessions?); the adaptability of EU law in dealing with the changing landscape of evolving statehoods in Europe (should the EU seek the best possible options to accommodate the newly-emerging states as Members as soon as possible, should they so desire and can it do so legally speaking?); and the key function of the Union vis-à-vis its Member States (should the EU obstruct state-creation by preserving the *status quo* of the 28 and ignoring the will of the people of the newly emerging states?). This brief contribution will defend the following options in reply to the three conundrums:

1. Legally sound and constitutionally impeccable secessions are legally meaningful and should be fully recognized by the EU: adherence to the values of democracy and the Rule of Law makes it impossible for the Union to ignore such developments.
2. The EU should respect the will of the people of the newly-emerging states to *remain* 'in Europe' by deploying all the palette of its legal-political tools to accommodate them as Members if they so wish as soon as possible, ensuring the continuity of EU citizenship and the Internal Market, thus fulfilling its main task, i.e. ensuring the choice for peace, democracy and prosperity in Europe. There is no reason to exclude newly-emerging states from the *acquis* and the values which the Union (as well as all its component Member States) hold dear. A political choice to ensure such inclusion is required.
3. The respect of the values on which the Union is founded presumes and implies that the Union has been created precisely *to disrupt* the post-WWII euro-tribalist *status quo* (to borrow from Prof. Weiler again), rather than preserve it while punishing those deviating from it. The EU is thus not a punishing hand, particularly not a hand punishing in the name of sovereign statehood. In this context, not offering EU membership to the newly emerging states like Scotland *de facto* amounts to a direct interference in the process of their democratic self-determination the legality of which is not disputed, deployed in defense of an obscure and unspecified interest of ensuring that the map of Europe remains the same – an *ultra vires* action deprived of any ethical justification.

In this context it is essential to realize that the Union cannot be possibly expected to throw its weight behind ensuring that there is no choice for the nations seeking independence within Europe – it is *not* the Union's realm. The contrary would amount to turning the EU into an instrument of blackmail of the emerging states by the existing state entities which is radically

deprived of any purpose and is in strong contradiction with the values of democracy and the rule of law which the Union espouses. The statements of the former President of the Commission concerning the necessity to deploy Article 49 TEU in all cases are thus not only insensitive – politically and legally speaking – but also make the Union intervene, on the side of the (r)UK in the sound debates about Scottish future, corrupting the values the EU is preaching. Professor Douglas-Scott is thus overwhelmingly correct in criticizing the fetishization of Article 49, which has not been designed to become a blackmail instrument deployed on the side of the preservation of *status quo* at the expense of all the values of Article 2. My main conclusion, to give a pre-taste right away, is that the European Union cannot possibly be construed as an instrument to punish democratically and legally sound deviations from the pre-existing reality of 28 Member States: an existing state necessarily cannot have any bigger ethical value (if any at all) compared with a newly-formed state in Europe. Unlike what Prof. Weiler submits, Scottish independence only becomes a brand of 'Euro-tribalism' if Scotland – either in the expression of its own will, or as a result of mounting pressure – decides *not to be part* of the European family of nations united in the European Union. This is so since the EU, with its values of peace, democracy, the rule of law and human rights protection, is precisely the reply, as Weiler rightly notes, to the disastrous heritage of engrained nationalism, plaguing Europe for so long. The EU is the reply to the absolute sovereignty ideologies, the 'tamer' of states and the promoter of liberal, inclusive and tolerant nationhood, what Will Kymlicka (in his reaction to Benhabib) – but also Neil MacCormick wrote about so convincingly. There is no dispute about the fundamental contribution of the European Union to the development of the continent, including the taming of illiberal – tribal – statehood. What is fundamental in this context, it seems to me, is to see the critical difference between a Scotland in Europe (the Scotland of the Yes campaign) and an independent Scotland excluded from the EU (the Better Together Article 49 fetishization story so unhelpfully supported by Mr Barroso). The second – 'Euro-tribalism' – option, as all the participants of this debate would no doubt agree, is not really an attractive one. The first one, however, should be a welcome development, should the said values be upheld in the context of the articulation of independence: we all agree that the referendum to take place in the very near future is fully recognized as *legal* in national UK law and in international law. In other words, Scotland is not to be reproached for doing anything wrong. In this context, suggesting that a Scottish story of moving towards independent statehood is somehow corrupt because of its nationalist nature is only sound if the doors of the Union are closed for Scotland. Knowing that being part of the EU is the *essential aspiration* of the Scottish leaders the deployment of this argument is overwhelmingly problematic. What is tribalism if not an inflicted condition when Scotland is confronted with the threats to make its EU accession problematic? Even leaving aside the harmful nature of having Scotland out for the EU, the UK (with so many ties to Scotland) and for Scotland alike, the deployment of tribalism as a critique of the Scottish move thus leaves much to be desired. Even more problematic, though, is to critique the reality shaped by the EU, which clearly makes independence a much more attractive option – on the latter, Professor Weiler is absolutely right. In the context where the Internal Market, EU Citizenship and the Principle of non-discrimination on the basis of nationality function in unison to reshape the state-level legal reality in Europe, the role played by a Member State – as opposed to any state outside the EU – as well as the legal-political limits erected by the EU, which limit the extent of (harmful) state action, signify that the very scrutiny of what the state is for in the contemporary European legal context should proceed based on different considerations, compared with non-EU states – somewhat akin to Philip Allott's democracy / diplomacy distinction. The fact that the EU makes it much easier to question the assumed reasons behind the existence of the 28 Member States in a situation when independence within the EU (the internal enlargement) does not bring with it all the dangers of 'absolute' self-determination is a key sign of the Union's success. It empowers meaningful self-determi-

nation, which can be sound for any grounds, including mercantilist ones: bread and circus are also valid reasons. At the same time, such independence ensures that the overarching legal space of the Union remains unchanged. Pushed to the extreme, secessions within the EU are more akin to changing the boundaries within federations and it is a good, rather than a bad thing, since the ethical significance of the states we have right now is as questionable a starting point for the analysis of the EU's internal realities as the lack of the ethical significance of an independent Scotland would be. Of course the EU suffers from many a deficit and the ideal of justice underlying it is probably not crystal clear. Its empowering contribution is not to be denied, however, as demonstrated by the Yes campaign making an emphasis on the Scotland in Europe and also by all the on-going history of EU enlargements. As masterfully shown by Wojciech Sadurski, one of the driving forces behind the willingness to join was precisely the fear of the 'full independence' as it were: the EU was expected to extend a helping hand in difficult times – both in terms of economic assistance and constitutional guarantees. This new reality – however troubled its day-to-day operation in some parts – empowers smaller states and by design questions statehood as such – humiliating the state, in the memorable words of Gareth Davies. This reality is precisely the anti-tribalism shield – a much better one, at that, than the ready-to-leave UKIP-empowered United Kingdom, unlike what Weiler seems to suggest. The added value of the EU thus amounts – and this is an extreme example again – to asking the Member States to justify their existence in the eyes of the people. The EU is a powerful vehicle of Socratic contestation, allowing – when theorized to its radical end – to ask for UK's justifications to have Scotland in in a situation where no fundamental assumptions favouring the *status quo* are necessarily accepted as something the EU should fight for. In the context of the EU the claims that self-determination is only possible as a result of mass crimes and humiliation makes no sense at all: the legal context is too different. Such a difference does not imply, however, that it has to be frozen. States came and states will go. What are, then, the reasons to be taken into account? The values of Article 2 – what the Union *and the Member States* are founded upon: democracy, the rule of law and human rights protection – seem to supply a sufficient starting point for thinking about this question. Missing a positive presumption in favour of the intact UK enjoying unquestionable sovereignty (states willing to stick to it do not join the EU), a legally sound referendum meets the Article 2 requirements. Approaching the whole context of European integration in this vein sheds some new light on the 'domino effect' feared by scholars. What is there to fear? That there will be too many commissioners? That Scots will feel more at home in their land? It is clear that the current developments – with no regard to the concrete outcome of the Scottish referendum – open up a new chapter in the history of Europe. Scotland is only the beginning. Instead of fighting what we are facing, blaming the EU for the legal political reality that it shaped which has always been skeptical (surprise surprise!) of state sovereignty, a constructive approach would be more helpful. The EU and the Member States should work together to ensure that the EU's institutions are reformed in sufficiently serious way not to suffer from the growing number of members (even if not Scotland, the remaining Balkan states are due to join anyway, so there is no new problem there) and that EU law in force is deployed in an inventive yet sound manner to ensure that the Internal Market does not shrink, that people are not made to choose between self-determination and EU citizenship and that the EU is not instrumentalized by those who are eager to turn it into a tool to punish those who question the *status quo*. In this sense, Sionaidh Douglas-Scott's opening statement is particularly valuable as it positively engages with the options for the future which are in everybody's interest, including the (r)UK – at least before the latter leaves the EU, preferring to go tribalist and to do it alone.

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