



ON THE AGENDA: BREXIT AND BEYOND

ART. 50 TEU: A WELL-DESIGNED SECESSION CLAUSE

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ABSTRACT: Art. 50 TEU has been criticised because it allegedly grants EU Member States an unfettered right to unilateral *secession*, which questions the EU's quasi-federal character and fosters its disintegration. This *On the Agenda* demonstrates that this widespread pessimism is unjustified, since it is based on an exceedingly formalistic reading of the law. Secession (from States) and withdrawal (from international organisations) is always possible *de facto*: the relevant question is whether constitutional provisions ensure an orderly secession and discourage casual recourse thereto. Art. 50 TEU arguably constitutes a "well-designed secession clause", since it ensures the EU's unity in withdrawal negotiations, limits the discretion of the departing State regarding the activation and termination of the withdrawal procedure, and induces it to reach a compromise with the Union. Art. 50 thus ensures a fair balance between the concern for the EU's integrity and the democratic and federal principles that inspire it.

KEYWORDS: withdrawal – secession – Brexit – Art. 50 – negotiation – unilateral.

I. INTRODUCTION

Withdrawal from the EU has long been a matter of legal debate, and has drawn particular attention after the Brexit referendum. The *exit* of an EU Member State raises numerous legal questions concerning issues such as the options available to the departing

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State after withdrawal,¹ the judicial settlement of withdrawal-related disputes,² or the procedure for withdrawal, set in Art. 50 TEU. The latter is an especially crucial problem, which remains under researched.

Art. 50 TEU attracted significant criticism, because it is allegedly vague³ and explicitly recognises the right of EU Member States to unilaterally withdraw from the Union. Pursuant to this provision, “any Member State may decide to withdraw from the Union”, by notifying its intention to do so and either negotiating “arrangements for its withdrawal” or waiting for two years. The possibility of unilateral withdrawal is theoretically problematic because it allegedly contradicts the integrationist rationale of the Treaties⁴ and questions its (quasi-)federal nature.⁵ While unilateral withdrawal is perfectly conceivable in the context of international organisations, unilateral secession from federations is generally excluded.⁶ The right to unilateral withdrawal from the EU might purportedly have negative practical consequences. By giving EU members “an unfettered right to unilateral withdrawal”,⁷ Art. 50 seems to ensure “State primacy” throughout the withdrawal procedure, enabling EU members to “control the process of withdrawal to their own benefit”.⁸ Art. 50 may therefore result in some sort of “regressive, gradual disintegration of the EU”.⁹

¹ See H.P. GRAVER, *Possibilities and Challenges of the EEA as an Option for the UK After Brexit*, in *European Papers*, 2016, Vol. 1, No 3, www.europeanpapers.eu, p. 803 *et seq.*; P. MANZINI, *In caso di Brexit*, in *Eurojus*, 14 June 2016, rivista.eurojus.it.

² See e.g. F. CASOLARI, *Il labirinto delle linee rosse, ovvero: chi giudicherà la Brexit?*, in *SidiBlog*, 27 April 2017, www.sidiblog.org.

³ J. FRIEL, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, in *International and Comparative Law Quarterly*, 2004, p. 426; H. HOFMEISTER, “*Should I Stay or Should I Go?*”. A Critical Analysis of the Right to Withdraw from the EU, in *European Law Journal*, 2010, pp. 594-595; S. WIEDUWILT, *Article 50 TEU. The Legal Framework of a Withdrawal from the European Union*, in *ZEuS Zeitschrift für Europarechtliche Studien*, 2015, pp. 195-196.

⁴ P. ATHANASSIOU, *Withdrawal and Expulsion from the EU and EMU: Some Reflections*, in *European Central Bank Legal Working Paper Series*, no. 10, 2009, p. 25.

⁵ The ideas of *federalism* and *federation* are of course polysemic, see e.g. M. CLAES, M. DE VISSER, *The Court of Justice as a Federal Constitutional Court: A Comparative Perspective*, in E. CLOOTS, G. DE BAERE, S. SOTTIAUX (eds), *Federalism in the European Union*, Oxford: Hart, 2012, pp. 83-85; R. SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009. Suffice to say that the present contribution elucidates some similarities and differences between EU law and the law of some federal States in respect of secession/withdrawal.

⁶ See *infra*, section II.

⁷ H. HOFMEISTER, “*Should I Stay or Should I Go?*”, *cit.*, p. 592. See also J. FRIEL, *Providing a Constitutional Framework*, *cit.*, pp. 424-427; J. HERBST, *Observations on the Right to Withdraw from the European Union: Who are the “Masters of the Treaties?”*, in *German Law Journal*, 2006, pp. 1758-1760; A.F. TATHAM, “*Don’t Mention Divorce at the Wedding, Darling!*”: *EU Accession and Withdrawal after Lisbon*, in A. BIONDI, P. EECKHOUT (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 2012, p. 152 *et seq.*

⁸ J. FRIEL, *Providing a Constitutional Framework*, *cit.*, p. 426. See also A.F. TATHAM, “*Don’t Mention Divorce at the Wedding*”, *cit.*, pp. 151-152.

⁹ H. HOFMEISTER, “*Should I Stay or Should I Go?*”, *cit.*, p. 599.

Arguably, these criticisms are not well founded. Art. 50 TEU does not recognise an *unfettered* right to unilateral withdrawal, but introduces an important limitation to unilateralism: the obligation to follow a rigorous procedure.¹⁰ By subjecting withdrawal to strict procedural conditions, Art. 50 TEU is likely to encourage the departing State to cooperate and to compromise.¹¹ Therefore, it is submitted – contrary to a widespread view – that Art. 50 constitutes a “well-designed secession clause”,¹² which discourages casual recourse to withdrawal from the EU. Instead of contradicting the integrationist rationale of the Treaties, Art. 50 may ensure an orderly withdrawal process and contribute to remedy the EU’s democratic deficit. By providing for a systemic analysis of Art. 50 TEU, this *On the Agenda* contributes to the debate on the identity of the Union as a *sui generis* subject, and provides insight into the impact that Art. 50 TEU may have in practice. It is worth noting that this *On the Agenda* focuses on a specific aspect relating to the withdrawal from the EU – the right to unilateral withdrawal – and does not seek to exhaustively chart the developments concerning the UK’s withdrawal from the EU. It is also worth stressing that the *On the Agenda* focuses on the law as it stands, not on its historical evolution, and does not purport to verify whether the effects of Art. 50 were intended by its drafters.

The *On the Agenda* is divided in six sections. Section II introduces the concepts of unilateral secession (from States) and withdrawal (from international organisations). Section III shows that, while Art. 50 allows for unilateral withdrawal, it does not necessarily question the rationale of European integration: more important than the abstract possibility to “secede” are the procedural restrictions to secession. The *On the Agenda* then demonstrates that Art. 50 fosters an orderly withdrawal process and discourages “secession” from the EU, in three ways. Firstly, Art. 50 ensures the unity of the EU during withdrawal negotiations (section IV). Secondly, Art. 50 restrains the discretion of departing States regarding the activation and termination of the withdrawal procedure (section V). Thirdly, it is contended that the very concept of unilateral withdrawal under Art. 50 is better understood as a risk for the withdrawing country, rather than as a right that the withdrawing State may exploit (section VI). The theoretical and practical impact of Art. 50 TEU on the process of European integration are discussed in the conclusion (section VII).

¹⁰ Cf. C. CLOSA, *Interpreting Article 50: Exit and Voice and...What about Loyalty*, in *EUI Working Papers*, no. 71, 2016, p. 5.

¹¹ Cf. S. MANCINI, *Secession and Self-Determination*, in M. ROSENFELD, A. SAJÒ (eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, p. 495.

¹² This definition is borrowed from W. NORMAN, *Negotiating Nationalism: Nation-Building, Federalism and Secession in the Multinational State*, Oxford: Oxford University Press, 2006, p. 175; see further *infra*, section III.

II. THE PROBLEM OF UNILATERAL SECESSION AND WITHDRAWAL

The debate on the constitutional identity of the EU often addresses the analogy between the Union, on the one hand, and international organisations and States, on the other hand. The rules on the withdrawal from the EU may provide for an important argument in this debate, as the founding treaties of international organisations and States' constitutions address this issue in a different manner.

Consensual withdrawal (from international organisation) and secession (from States) are not exceedingly problematic. Art. 54 of the Vienna Convention on the Law of Treaties (hereinafter, 1969 Vienna Convention) expressly enables States to withdraw from a treaty (such as the founding treaty of an international organisation) whenever they obtain the "consent of all the parties". Similarly, international law seems to enable a province to secede from a State by reaching an agreement with the latter. The principle of self-determination suggests that, in international law terms, provinces have a right "to resolve their future status through free negotiation" with their State.¹³ The constitutional law of certain States appears to hinder consensual secession, since it postulates the *indivisibility* of the country.¹⁴ Nonetheless, it is clear that at least certain States – notably federations and devolved States – expressly recognise the right to consensual secession of all or some of their territories.¹⁵ For instance, the Constitution of Ethiopia acknowledges that "every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession", coming into effect "when the Federal Government will have transferred its powers to the council of the Nation, Nationality or People who has voted to secede".¹⁶ Similarly, the Anglo-Irish Agreement of 1985 stipulates that, if a majority of the people of Northern Ireland clearly wish for the establishment of a united Ireland, the parties will introduce legislation to give effect to that wish.¹⁷ The right to secession may not be spelled out in the law, but nonetheless be recognised in the case-law. The Supreme Court of Canada, in particular, acknowledged the right of provinces to "seek" independence, provided that they democratically decide to secede and negotiate secession with the federation and the other

¹³ UK Minister of State, Foreign and Commonwealth Office, written answer to Lord Hylton, in UK Parliament, Hansard Report, Written Answers (Lords) of 23 January 1991, hansard.millbanksystems.com. See also J. CRAWFORD, *The Creation of States in International Law*, Oxford: Oxford University Press, 2007, pp. 394-395.

¹⁴ E.g. Croatia, France, Romania, Slovakia, and Spain, see W. NORMAN, *Negotiating Nationalism*, cit., pp. 124-126.

¹⁵ See also P. RADAN, *Secession in Constitutional Law*, in A. PAVKOVIC, P. RADAN (eds), *The Ashgate Research Companion to Secession*, Farnham: Ashgate, 2011, p. 333 *et seq.*

¹⁶ Art. 39, para. 1, of the Constitution of Ethiopia.

¹⁷ Art. 1 of the Agreement between the Government of Ireland and the Government of the United Kingdom, concluded on 15 November 1985.

provinces.¹⁸ The regulation of secession is evidently not uniform in these three cases; nonetheless, these examples demonstrate that, in some situations, consensual secession from States may be possible.

Unilateral withdrawal and secession, i.e. withdrawal and secession that are not the product of a negotiation,¹⁹ are more problematic. Unilateral withdrawal from international organisations is possible when it is expressly allowed by the statute of an international organisation.²⁰ For example, Art. XV of the WTO agreement enables a Member State to unilaterally withdraw upon the expiration of six months from the date on which the State has given notice of withdrawal to the organisation. Similarly, Art. 1 of the League of Nations' Covenant stipulated that any Member State could, after two years' notice of its intention so to do, withdraw from the League.²¹ Under Art. 56, para. 1, of the 1969 Vienna Convention, withdrawal from an international organisation is possible even if it is not explicitly foreseen in its statute, provided that: it is established that the parties intended to admit the possibility of withdrawal (Art. 56, para. 1, let. a)), or a right of unilateral withdrawal is "implied by the nature of the treaty" founding the organisation (Art. 56, para. 1, let. b)). According to some authors, it may be presumed that the nature of the treaties establishing international organisations generally implies the right to unilateral withdrawal. In principle, "anything which is not conceded in favour of the international organisation is retained by the Member State";²² in the absence of an express stipulation, it may be presumed that the international organisation does not put any limitation on the right of the Member States to withdraw.²³ It should be noted, at any rate, that the practice in this respect is not straightforward.²⁴

While unilateral withdrawal from international organisations seems often possible, unilateral secession from States encounters several obstacles. International law appears to be neutral with respect to unilateral secession. There generally is neither a right to unilateral secession by parts of independent States²⁵ nor a prohibition of such a

¹⁸ Supreme Court of Canada, judgment of 20 August 1998, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 82.

¹⁹ On the definition of unilateral secession, see *ibid.*, para. 86.

²⁰ See Art. 54 of the 1969 Vienna Convention, *cit.*

²¹ Covenant of the League of Nations, adopted on 28 April 1919.

²² N. SINGH, *Termination of Membership of International Organisations*, Southwark: Stevens & Sons, 1958, p. 80.

²³ *Ibid.*; see further R.A. WESSEL, *You Can Check Out Any Time You Like, But Can You Really Leave? On 'Brexit' and Leaving International Organizations*, in *International Organizations Law Review*, 2016, pp. 201-205.

²⁴ See T. CHRISTAKIS, *Article 56, 1969 Vienna Convention*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary, Vol. 1*, Oxford: Oxford University Press, 2011, p. 1275.

²⁵ J. CRAWFORD, *The Creation of States*, *cit.*, p. 415. The colonial context constitutes an exception to this general rule. Furthermore, a right to secession may allegedly be the last resort for ending oppression (so-called remedial secession), but it is doubtful whether such a right actually exists, see *inter alia* J. VIDMAR, *Remedial Secession in International Law: Theory and (Lack of) Practice*, in *St. Antony's International Review*, 2010, p. 37 *et seq.*

secession.²⁶ The principle of territorial integrity of States may potentially be questioned by unilateral secession, but, as noted by the International Court of Justice, the “scope of the principle of territorial integrity is confined to the sphere of relations between states”,²⁷ and does not address non-State entities such as separatist groups. One should note, in any event, that a State constituted through unilateral secession is unlikely to receive wide recognition in the international community;²⁸ hence, the ultimate success of such a secession may be at risk.²⁹ Domestic laws are more hostile to unilateral secession from States.³⁰ Even the States that acknowledge the possibility of secession usually subordinate it to some action of the original State, e.g. transferral of power (e.g. Ethiopia), the adoption of a law (e.g. United Kingdom), or the conclusion of an arrangement with the breakaway province (e.g. Canada).³¹ The original State must be involved in the secession procedure because, as noted by the Canadian Supreme Court, States are characterised by “close ties of interdependence” based on shared values, which would be put into question by unilateral secession.³² Some form of negotiation between the State and the separatist entity is required to address the interests of the entire country and of its citizens.³³

Unilateral secession, therefore, seems to set international organisations apart from States: while unilateral withdrawal is often possible in the case of international organisations, it is generally impossible in the case of States, including federations. Consequently, the possibility to dissolve an entity “only by mutual agreement” is sometimes taken as an indicator of its statehood.³⁴

III. DOES THE RIGHT TO UNILATERAL SECESSION/WITHDRAWAL MATTER?

Given the different regulation of unilateral secession in international organisations and States, one may be tempted to assess the constitutional identity of the European Union by verifying whether its Member States have a right to unilateral withdrawal.

²⁶ T. CHRISTAKIS, *The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?*, in *Leiden Journal of International Law*, 2011, p. 73 *et seq.*

²⁷ International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, advisory opinion of 22 July 2010, para. 81.

²⁸ Cf. J. CRAWFORD, *The Creation of States*, cit., p. 414.

²⁹ Supreme Court of Canada, *Reference re Secession of Quebec*, cit.

³⁰ An exception is provided by the Constitution of Saint Kitts and Nevis, whose Art. 113 gives Nevis the right to unilateral secession.

³¹ See *supra*, footnotes 16-19.

³² Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 149. Cf. H. DE WAELE, *The Secession Conundrum – Through the Looking Glass*, in *European Constitutional Law Review*, 2015, p. 614.

³³ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 151.

³⁴ R.L. WATTS, *Comparing Forms of Federal Partnerships*, in D. KARMIS, W. NORMA (eds), *Theories of Federalism: A Reader*, London: Palgrave, 2005, p. 235.

Before the Lisbon reform, the issue was unclear, since EEC/EU Treaties were silent on this topic. In principle, one may potentially argue that unilateral withdrawal from the EEC/EU was possible under Art. 56, para. 1, let. b), of the 1969 Vienna Convention, given the EEC/EU's character as an international organisation (see above, section II).³⁵ However, it seems more reasonable to regard unilateral withdrawal from the EEC/EU as illegitimate, because it contradicted the nature of the EU as an organisation based on "obligations undertaken unconditionally and irrevocably by Member States".³⁶ It is not possible to reach definitive conclusions, in any event, because no Member State ever sought withdrawal from the European Communities.

The European Constitution and, then, the Lisbon Treaty, introduced a withdrawal clause, in what is now Art. 50 TEU. This provision was first proposed by the European Convention Praesidium, reportedly to fight anti-EU media propaganda in the UK. As noted by Brian Kerr, a British member of the Praesidium, "we wanted to defuse the canard that you are tied to the EU, with no way out, proceeding to an unknown destination".³⁷ Art. 50 TEU provides for the right to unilateral withdrawal from the EU because it expressly stipulates that a Member State may autonomously leave the Union by notifying the European Council of its intention and either concluding a "withdrawal agreement" with the Union or waiting for "two years after the notification".

The existence of an explicit right to unilateral withdraw from the European Union might potentially be regarded as evidence for the thesis that the EU is not a State³⁸ and that its (quasi-)federal character is questioned. In fact, certain pro-EU members of the European Convention complained that the right to withdrawal confirmed the EU's character as a *traditional* international organisation.³⁹ Even the representatives of some Member States criticised this provision at first.⁴⁰ Conversely, less EU-enthusiastic commentators praised Art. 50 TEU. The German Constitutional Court, in particular, noted that Art. 50 TEU made explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union. Therefore, according to that

³⁵ See, to that effect, German Federal Constitutional Court, decision of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

³⁶ Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, para 18. See further J. HILL, *The European Economic Community: The Right of Member State Withdrawal*, in *Georgia Journal of International and Comparative Law*, 1982, p. 335 *et seq.*

³⁷ Quoted in A. MACDONALD, P. TAYLOR, *Federalists Tried to Kill EU Exit Clause; Now Britain Wants to Dodge It*, in *Reuters*, 28 June 2016, uk.reuters.com.

³⁸ T. LOCK, *Why the European Union is Not a State*, in *European Constitutional Law Review*, 2009, p. 414.

³⁹ Cf. Proposition d'amendement à l'Article: 46 – Déposée par Madame ou Monsieur: M. Louis Michel, M. Karel de Gucht, M. Elio di Rupo, Mme Anne Van Lancker, membres de la Convention et M. Pierre Chevalier et Mme Marie Nagy, membres suppléants de la Convention ainsi que par Monsieur Patrick Dewael, observateur, annexed Explication éventuelle, web.archive.org.

⁴⁰ The then German Foreign Minister Joschka Fischer, for instance, declared that "this clause should be struck out. [...] So far there has been no need for an exit provision for the Union", quoted in A. MACDONALD, P. TAYLOR, *Federalists Tried to Kill EU Exit Clause*, cit.

Court, Art. 50 TEU “underlines the Member States’ sovereignty” and shows that the current state of development of the European Union “does not transgress the boundary towards a state”.⁴¹

Both the praise and the criticism for Art. 50 TEU are arguably too formalistic. While it is true that national constitutions generally prohibit unilateral secession, the absence of a right to unilateral secession does not render secession impossible. Numerous States, including several EU Members,⁴² were created through unilateral secession. Secessions are indeed “ordinary events in international life”.⁴³ As noted by the Canadian Supreme Court, “although under the Constitution there is no right to pursue secession unilaterally, [...] this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community”.⁴⁴

Democratic constitutions may even stimulate secession, albeit indirectly. To appropriately respect the rights to freedom of expression and freedom of association, democratic States must tolerate the advocacy of secession, the formation of parties with secessionist platforms, and the participation of such parties in provincial governments.⁴⁵ Secessionists may therefore be in strong bargaining positions, which they might reinforce by calling for referenda on independence. States can hardly prevent a provincial authority to hold a consultative referendum, and may find it difficult not to negotiate with the secessionists after their victory in that consultation. In fact, it is possible that a popular secessionist movement without a legal means to pursue its political agenda “may give rise to political uncertainty, and possibly worse (in some cases, the certainty of violence)”.⁴⁶

As unilateral secession is always possible *de facto*, the mere constitutional recognition of the right to secede is not necessarily decisive *per se*, and does not constitute conclusive evidence of the EU’s identity as a traditional international organisation. Instead of focusing on formalistic aspects, one should arguably verify whether constitutional norms actually hinder or facilitate secession. It may be assumed that federations discourage recourse to secession to preserve their integrity. A traditional international organisation, on the contrary, is presumably neutral in respect of secession, since its exist-

⁴¹ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 329.

⁴² This is the case of Belgium, Croatia, Estonia, Greece, Ireland, Latvia, Lithuania, and Slovenia.

⁴³ D. KOCHENOV, M. VAN DEN BRINK, *Secessions from EU Member States: The Imperative of Union’s Neutrality*, in *European Papers*, 2016, Vol. 1, No 1, www.europeanpapers.eu, p. 72.

⁴⁴ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 106. See further P. RADAN, *Secession in Constitutional Law*, cit., pp. 341-342.

⁴⁵ W. NORMAN, *Negotiating Nationalism*, cit., p. 194.

⁴⁶ *Ibid.*, p. 191.

ence depends on the will of its Member States. In other words, the question is not *whether* there is a right to unilateral secession, but rather *how difficult* secession might be.

According to some authors, the two questions are correlated, since the mere existence of a right to secede “makes the move to ‘exit’ part of the normal game”,⁴⁷ thereby increasing “the availability of the ultimate option”.⁴⁸ Secession clauses allegedly create “dangers of blackmail”,⁴⁹ since powerful provinces may threaten secession in order to obtain special conditions or privileges. These arguments are partially convincing, since secession clauses might indeed clarify the costs of *exit*, which may potentially be lower than the costs of continued membership in the original State. The constitutional recognition of secession might reduce, in particular, the risk of civil war, thereby rendering secession less costly and more probable.⁵⁰

However, these arguments seem to ignore that secession is *always* part of the normal game, even when it is illegal. For instance, the prohibition of secession in the Spanish Constitution does not deter Catalan nationalists from pursuing secession. Since “everyone is aware that secession can occur regardless of its legal legitimacy”, as noted by Mancini, the constitutional prohibition of secession “does not necessarily prevent strong subunits from achieving a strong bargaining position” *vis-à-vis* their States.⁵¹ Hence, blackmailing may potentially take place notwithstanding the illegitimacy of secession: to pacify separatist movements, several States have had to provide sub-national groups with a high degree of autonomy.⁵² Similar considerations apply, *a fortiori*, to the European Union. Long before the official acknowledgement of the right to withdraw from the EU, the UK held a referendum on the EEC membership (1975) and *blackmailed* the other Member States into providing special conditions (e.g. opt-outs) and privileges (e.g. the so-called UK rebate).

Some authors have noted that secession clauses may have a beneficial effect for States because they can be engineered to increase the costs of exit and ensure an orderly withdrawal process. As noted by Weinstock, a secession clause may force secessionists to make “a cold and lucid cost/benefit analysis of withdrawing versus remaining in the existing federation, that is, to consider seriously the legal obstacles that they must overcome before they can successfully secede”.⁵³ A “well-designed secession clause”, as defined by Norman, should provide for clear procedural rules that ensure an

⁴⁷ H. ARONOVITCH, *Seceding the Canadian Way*, in *Publius*, 2006, p. 558.

⁴⁸ *Ibid.*

⁴⁹ C.R. SUNSTEIN, *Constitutionalism and Secession*, in *University of Chicago Law Review*, 1991, p. 633 *et seq.*; see also C. CLOSA, *Interpreting Article 50*, *cit.*, p. 17.

⁵⁰ I thank an anonymous reviewer for pointing this out.

⁵¹ S. MANCINI, *Secession and Self-Determination*, *cit.*, p. 495.

⁵² This is arguably the case, e.g., of India, Spain, and Belgium, as noted by D. HALBERSTAM, *Federalism: Theory, Policy, Law*, in M. ROSENFELD, A. SAJÒ (eds), *The Oxford Handbook*, *cit.*, p. 583.

⁵³ D. WEINSTOCK, *Toward a Proceduralist Theory of Secession*, in *Canadian Journal of Law and Jurisprudence*, 2000, p. 262 *et seq.*

orderly secession process and that enable the State to effectively defend its interests.⁵⁴ For instance, the clause may alert secessionists that they would be sitting across from “quite-possibly-hostile negotiators elected specially to represent the interests of the rump state”.⁵⁵ Thanks to a “well-designed clause”, secession may take place “in accordance with norms of democracy, justice and the rule of law”.⁵⁶

Therefore, it is worth wondering, not *whether* Art. 50 TEU enables withdrawal, but *how* this provision regulates secession from the EU. The next sections analyse the procedure for withdrawal from the EU, and suggest that Art. 50 constitutes a “well-designed secession clause”, for three reasons. In the first place, Art. 50 TEU reinforces the negotiating position of the Union, since it ensures its unity during the negotiations with the withdrawing State (section IV). Secondly, Art. 50 introduces considerable restraints to the discretion of the departing State, regarding the activation of the withdrawal procedure and its termination (section V). Thirdly, the very possibility of unilateral withdrawal foreseen by Art. 50 appears as a constraint for the withdrawing State, rather than an advantage (section VI).

IV. THE EU’S UNITY IN WITHDRAWAL NEGOTIATIONS

To promote an orderly secession, and to discourage abuses, “a well-designed secession clause” should enable the State – or, in our case, the EU – to negotiate with the departing sub-unit from a position of force. To achieve this result, the secession clause should ensure, first and foremost, the unity of the State (or EU) vis-à-vis the *secessionists*.

The unity of the EU’s representation is a notoriously complex problem.⁵⁷ The EU’s representation is usually fragmented on a *vertical* level, because the Union does not possess the plenitude of the foreign relations power.⁵⁸ The Union cannot adopt acts re-

⁵⁴ W. NORMAN, *Negotiating Nationalism*, cit., p. 175.

⁵⁵ *Ibid.*, p. 180.

⁵⁶ *Ibid.*, p. 175.

⁵⁷ See Court of Justice, opinion 1/94 of 15 November 1994, para. 108; opinion 2/91 of 19 March 1993, para 36; judgment of 19 March 1996, case C-25/94, *European Commission v. Council of the European Union*, para. 48; judgment of 2 June 2005, case C-266/03, *European Commission v. Luxembourg*, para. 60; judgment of 14 July 2005, case C-433/03, *European Commission v. Germany*, para. 66; judgment of 20 April 2010, case C-246/07, *European Commission v. Sweden*, paras 87-102.

⁵⁸ See E. CANNIZZARO, *Unity and Pluralism in the EU’s Foreign Relations Power*, in C. BARNARD (ed.), *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate, Collected Courses of the Academy of European Law*, Oxford: Oxford University Press, 2007, p. 194. The vertical representation may be fragmented for other reasons, too, notably the impossibility for the EU to participate in certain international organizations and the political resistance of certain Member States against the EU’s actorness in multilateral *fora*; this issue, at any rate, is not relevant in respect of Art. 50. See further J. SANTOS VARA, *EU Representation to International Organisations: A Challenging Task for the EEAS*, in L.N. GONZÁLEZ ALONSO (ed.), *Between Autonomy and Cooperation: Shaping the Institutional Profile of the European External Action Service*, Den Haag: CLEER, 2014, p. 65 *et seq.*

garding issues that do not fall within the scope of its competences, and must consequently conduct several international negotiations beside its own Member States.⁵⁹ This problem might be exacerbated during the negotiation of the arrangements for withdrawal. In the absence of a withdrawal clause in the Treaties, the Union would not have any competence to negotiate an agreement in this respect. Hence, the Union would be excluded from withdrawal negotiations. As noted in section II, withdrawal from an international organisation, in the absence of an explicit or implicit right to unilateral withdrawal, is possible when approved by all the parties, i.e. the other Member States. The negotiation for withdrawal from the Union, therefore, would take place by negotiation among the Member States, that is to say, *without the EU*. Such a multilateral negotiation would offer the departing country – especially, a big country – the opportunity to selectively offer benefits to specific Member States, thereby potentially playing one Member State against the other and dividing the Union.

Art. 50 TEU solves this problem. This provision expressly affirms that the withdrawing State must negotiate with the *Union*. Art. 50 thus ensures that the Member States are not directly involved in the negotiations, and prevents the withdrawing country from playing a divide-and-rule strategy. To be sure, the Member States can indirectly influence the negotiations, by issuing guidelines and directives (via the European Council and the Council)⁶⁰ and overseeing the talks (via Council Working Parties).⁶¹ They cannot, in any event, “bind the negotiator” to a specific strategy or negotiating position.⁶²

The EU's representation is often *horizontally* fragmented, too. The Treaties confer the power to represent the EU to a plethora of bodies, including the Commission, the High Representative, and the President of the European Council. The multiplication of the EU's representatives would obviously not contribute to the conduct of effective withdrawal negotiations. Art. 50 TEU solves this problem, as well. This provision stipulates that the Union should conduct negotiations “in accordance with Art. 218, para. 3 TFEU”, i.e. the negotiating procedure generally applicable to the agreements with third countries.

⁵⁹ This is the case of the so-called mixed agreements.

⁶⁰ European Council, Guidelines EUCO XT 20004/17 of 29 April 2017 following the United Kingdom's notification under Art. 50 TEU (hereinafter, European Council, Draft guidelines following the United Kingdom's notification); Council doc. XT 21016/17 of 22 May 2017, Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union (hereinafter, Council Directives for the negotiation of an agreement with the United Kingdom).

⁶¹ See Decision 2017/900/EU of the Council of 22 May 2017 concerning the establishment of the *ad hoc* Working Party on Art. 50 TEU chaired by the General Secretariat of the Council.

⁶² Court of Justice, judgment of 16 July 2015, case C-425/13, *European Commission v. Council of the European Union* [GC], para. 86; see further *ibid.*, paras 85-93.

As noted elsewhere,⁶³ Art. 218, para. 3, read in combination with other Treaty provisions, identifies the EU's negotiator with precision. The first such provision is Art. 17, para. 1, TEU, whereby the EU's external representation is ensured by the European Commission, "with the exception of": (a) the Common Foreign and Security Policy (CFSP), where agreements are negotiated by the High Representative (under Art. 27, para. 2, TEU); and (b) "other cases" provided for in the Treaties.⁶⁴ Art. 218, para. 3, TFEU does not provide for any *case* in which the Commission should not represent the Union. It rather confirms Art. 17, by stipulating that the Council must nominate the EU's negotiator "depending on the subject of the agreement envisaged", thereby meaning that the Commission negotiates non-CFSP agreements (*ex* Art. 17 TEU), while the High Representative negotiates CFSP instruments (*ex* Art. 27 TEU).⁶⁵ The Court of Justice has upheld this interpretation of the Treaties, by affirming that Art. 218 TFEU, with a view to establishing a balance between the Commission and the Council, provides that international agreements "are to be negotiated by the Commission" and then concluded by the Council.⁶⁶

According to several authors, the rules generally applicable to the negotiation of international agreements (Arts 218 TFEU and 17 TEU) should not be applicable to withdrawal negotiations. The political character of this procedure allegedly calls for inter-governmental mechanisms: withdrawal should be "negotiated only with the Council",⁶⁷ while the role of the Commission should be "minimal".⁶⁸ This argument is perhaps understandable from a political perspective, but does not seem to be legally sound. The Commission is conferred a power of representation by Art. 17, para. 1, TEU and limitations to such a power can only come from the wording of the Treaties, and not from general principles⁶⁹ or, *a fortiori*, from political considerations.

The Declaration of the Member States of 15 December 2016 confirms the above interpretation of Arts 17 and 50 TEU and 218 TFEU. In that Declaration, EU States "invited" the Council to nominate the Commission as the "Union negotiator" (a figure that apparently corresponds to what Art. 218, para. 3, TFEU defines as the "head of the Union's

⁶³ M. GATTI, P. MANZINI, *External Representation of the European Union in the Conclusion of International Agreements*, in *Common Market Law Review*, 2012, pp. 1707-1711.

⁶⁴ See e.g. Arts 34, para. 1, TEU and 219, para. 3, TFEU.

⁶⁵ See further M. GATTI, P. MANZINI, *External Representation*, cit., p. 1709.

⁶⁶ *European Commission v. Council of the European Union*, case C-266/03, cit., para. 62.

⁶⁷ A.F. TATHAM, *Don't Mention Divorce at the Wedding*, cit., p. 154.

⁶⁸ P. NICOLAIDES, *Withdrawal from the European Union: A Typology of Effects*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 222. See also C. CURTI GIALDINO, *Oltre la Brexit: brevi note sulle implicazioni giuridiche e politiche per il futuro prossimo dell'Unione europea*, in *Federalismi.it*, 2016, www.federalismi.it, p. 20.

⁶⁹ Cf. Court of Justice, judgment of 6 July 1982, joined cases 188/80, 189/80 and 190/80, *France et al. v. European Commission*, para. 6.

negotiating team”).⁷⁰ The States also welcomed the nomination of Michel Barnier as the Commission’s “Chief negotiator”. The Declaration arguably contains a legal imprecision, as it stipulates that the negotiating team will have to include a representative of the “rotating presidency of the Council” and that “Representatives of the President of the European Council” will participate in the negotiation sessions. This arrangement constitutes, in my view, a violation of the Commission’s institutional autonomy: having been conferred a power of external representation, the Commission should be free to determine the arrangements for the exercise of that power.⁷¹

This violation of the Commission’s prerogatives, in any case, is unlikely to have a dramatic impact on the negotiations. The practice of the EU’s negotiating teams suggests that the “head of the Union’s negotiating team” controls the entire negotiation and ensures its unity. In several occasions, the Council appointed teams, composed of representatives of the High Representative and of the Commission, to negotiate so-called Framework Agreements with third countries, involving both CFSP elements (to be negotiated by the High Representative) and non-CFSP elements (to be negotiated by the Commission). The EEAS⁷² and the Commission Secretariat-General entered into an inter-service arrangement⁷³ – called “Operational Guidelines” – to regulate the conduct of negotiating teams in respect of Framework Agreements.⁷⁴ Pursuant to these guidelines, the “Chief negotiator” has authority on the entire team, to the extent that he/she “give[s] the floor to the relevant EEAS and Commission experts” during the negotiating sessions.⁷⁵ While the negotiation of the Brexit agreement is not identical to the negotiation of a Framework Agreement,⁷⁶ it is probably managed in a similar manner: the EU’s

⁷⁰ Statement after the informal meeting of the 27 Heads of State or Government of 15 December 2016, in European Council Press Release 782/16 of 15 December 2016, para. 3.

⁷¹ See Art. 249, para. 1, TFEU. See also the opinion of AG Mengozzi delivered on 29 January 2015, case C-28/12, *European Commission v. Council of the European Union*, para. 55.

⁷² The EEAS assists the High Representative, see Art. 27, para. 3, TEU.

⁷³ Probably, these arrangements are not binding, see M. GATTI, *European External Action Service: Promoting Coherence through Autonomy and Coordination*, Leiden: Brill, 2016, pp. 198-200, 259-260; M. GATTI, *Diplomats at the Bar: The European External Action Service before EU Courts*, in *European Law Review*, 2014, pp. 679-680.

⁷⁴ Commission Secretariat-General and EEAS, Note for the Attention of Director-Generals and Heads of Service: Operational Guidelines for the Preparation and Conduct of Negotiations for Framework Agreements with Third Countries Involving Both the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy (HR). This document is on file with the author, and is neither dated nor published in open sources.

⁷⁵ See further M. GATTI, *European External Action Service*, cit., pp. 259-260.

⁷⁶ Framework agreements are negotiated by the High Representative and the Commission, while the Brexit agreement is negotiated by the Commission and the representatives of the Council and the European Council. Furthermore, one should note that the Framework Agreements addressed by the Operational Guidelines (see above) are only those whose negotiations are led by the EEAS on behalf of both the High Representative and the Commission. The fact remains, at any rate, that the “Operational Guidelines”

“Chief negotiator” presumably leads the whole team. The Declaration of 16 December seems to confirm this, since it acknowledges that the representatives of the President of the European Council will participate in negotiations merely “in a supporting role”.⁷⁷

In summary, the silence of primary law on withdrawal would force the Union to speak with 27 voices. Art. 50 TEU ensures that there remains only one: the Chief negotiator of the Commission.

V. THE NOT-SO-UNILATERAL CHARACTER OF WITHDRAWAL UNDER ART. 50 TEU

Art. 50 TEU arguably constitutes a “well-designed secession clause”, not only because it allows the EU to speak with one voice, but also because it constrains the discretion of the departing State, thereby preventing it from abusing the procedure. In other words, the procedure introduced through Art. 50 TEU limits the unilateral character of the withdrawal from the Union.⁷⁸ Section V.1 explores the restrictions to the departing State’s discretion relating to the activation of the withdrawal procedure. Section V.2 analyses the restraints to unilateralism regarding the termination of the procedure.

V.1. OBLIGATION TO PROMPTLY ACTIVATE THE WITHDRAWAL PROCEDURE

Pursuant to Art. 50 TEU, para. 1, each EU Member may decide to withdraw from the Union “in accordance with its own constitutional requirements”. Subsequently, the departing State should simply “notify” the European Council of its “intention” to open negotiations with the Union, and eventually cease to be an EU Member, either after the conclusion of an agreement with the EU or after two years.⁷⁹

At first sight, the departing State seems to enjoy unfettered discretion regarding the activation of the withdrawal procedure. This discretion might potentially be used to exert control on the withdrawal process. One may expect, in particular, that the departing State might seek to delay the notification of its intentions to conduct informal negotiations before the formal withdrawal procedure begins. Such a strategy would allow the departing State to extend *de facto* the short negotiation period imposed by Art. 50 (which plays against the withdrawing state’s interests, as section VI will show). The launch of informal negotiations before the notification would also enable the departing State to conduct talks with individual Member States, thereby undercutting the EU’s position in the subsequent formal negotiations.⁸⁰

clarify the relationship between the “Chief negotiator” and the other members of the negotiating team, which is the most relevant element for the purpose of the present analysis.

⁷⁷ See Statement after the informal meeting of the 27 Heads of State or Government (2016), cit., para. 3.

⁷⁸ Cf. C. CLOSA, *Interpreting Article 50*, cit., p. 5.

⁷⁹ On the possibility to revoke the notification see *infra*, section V.2.

⁸⁰ Cf. European Council, Draft guidelines following the United Kingdom’s notification, cit., para. 2.

A closer inspection reveals that the Treaties do not give unfettered discretion to the departing State regarding the activation of the withdrawal procedure. According to Art. 50 TEU, the withdrawing State must (“shall”) notify its intentions to the EU. This notification should arguably be performed in a rapid manner. Pursuant to Art. 4, para. 3, TEU, the Member States must “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives”. Arguably, a delay in the notification would bring about insecurity, which might, in turn, prevent the Union from effectively pursuing its objectives, such as maintaining a “stable currency”, ensuring the “efficient functioning” of its institutions, or promoting the “well-being of its peoples”.⁸¹ Therefore, if the departing State arbitrarily delayed the notification of its decision to withdraw, it would arguably violate Arts 4, para. 3, and 50 TEU.⁸²

Such a violation of the Treaties can be effectively sanctioned. The Commission may initiate an infringement procedure directly against the departing State, though such a procedure would only lead to a penalty payment, which might not necessarily force the withdrawing State into compliance.⁸³ Recourse to indirect means of enforcement may be more effective. The Commission might refuse to negotiate the withdrawal agreement before the departing State notifies its intentions, and may impose similar restraints on the Member States, by threatening them with an infringement procedure in case they held talks with the departing country. The case law of the CJEU suggests indeed that the duty of loyalty, codified in Art. 4, para. 3, TEU, prevents the Member States from conducting negotiations in areas covered by EU competences and from dissociating from a “concerted common strategy” defined within the Council”.⁸⁴ As noted in the Council’s negotiating directives for the Brexit withdrawal agreement, Art. 50 confers on the Union a “competence to cover in this agreement all matters necessary to arrange the withdrawal”.⁸⁵ Even if that were not the case, Art. 50 would at least enable the EU to define a “common strategy” from which EU Member States cannot dissociate

⁸¹ See preamble and Art. 3 TEU.

⁸² Cf. C. HILLION, *Leaving the European Union, the Union Way: A Legal Analysis of Article 50 TEU*, in *Swedish Institute for European Policy Studies (SIEPS) European Policy Analysis*, 2016, www.sieps.se, p. 3; C. CURTI GIALDINO, *Oltre la Brexit*, cit., p. 21.

⁸³ On infringement procedures and Art. 50 TEU, see A. LAZOWSKI, *Withdrawal from the European Union and Alternatives to Membership*, in *European Law Review*, 2012, pp. 531-532. More generally, one should note that EU Treaties do not allow the Member States to *expel* another Member State, not even when it violates a primary law provision (such as Art. 4, para. 3, TEU). As repeatedly noted by the CJEU, “a Member State cannot, in any circumstances, plead the principle of reciprocity and rely on a possible infringement of the Treaty by another Member State in order to justify its own default”. See Court of Justice, judgment of 14 February 1984, case 325/82, *European Commission v. Germany*, para. 11; cf. P. ATHANASSIOU, *Withdrawal and Expulsion*, cit., pp. 31-38.

⁸⁴ See *European Commission v. Sweden*, cit., paras 87-104; *European Commission v. Germany*, cit., para. 66; *European Commission v. Luxembourg*, cit., para. 60.

⁸⁵ Council Directives for the negotiation of an agreement with the United Kingdom, cit., para. 5.

themselves. In any event, it seems clear that Art. 50 prevents EU Member States from conducting their own negotiations with the withdrawing country.

Given the possibility of infringement procedures, negotiations between EU countries and the departing State are unlikely to take place. Therefore, the withdrawing State has little interest in delaying the notification *ex* Art. 50, para. 2. One may argue that, by enforcing the duty of loyalty of the other Member States, the Commission may indirectly ensure compliance with the duty of loyalty of the departing country.

The practice seems to confirm that the departing State is unlikely to gain a negotiating advantage by strategically delaying the notification under Art. 50. After the Brexit referendum (June 2016), the British government delayed the notification of its intentions for an indefinite period, and apparently sought to open informal negotiations with EU Members on issues such as the status of EU citizens in the UK.⁸⁶ The EU and its Member States called for an immediate activation of Art. 50, and refused to conduct “any negotiation, formal or informal, before we receive a notification”.⁸⁷ The UK, in the hope of convincing the “remaining Members of the EU [...] to have some preparatory work”, committed to activate Art. 50 before March 2017.⁸⁸ Even this attempt at stimulating pre-notification negotiations failed. The UK invoked Art. 50 in March 2017, nine months after the Brexit referendum, apparently without having conducted any substantial negotiation with its partners.

V.2. ABSENCE OF A RIGHT TO UNILATERALLY REVOKE THE NOTIFICATION UNDER ART. 50 TEU

Another restriction to the allegedly unilateral character of Art. 50 concerns the termination of the withdrawal procedure: once the departing State has invoked Art. 50, it cannot unilaterally stop the withdrawal process.

The development of the negotiations might possibly convince the withdrawing State that any plausible exit option is in reality worse than continuing to remain in the EU.⁸⁹ In this situation, the termination of the withdrawal procedure may seem the better option. A *consensual* termination of the withdrawal procedure seems possible: since the Union and the withdrawing State may agree to extend the negotiation period, *ex* Art. 50, para. 3, TEU, they might also agree upon a *sine die* extension, that is, a *de facto* ter-

⁸⁶ UK Government, Policy Paper of 2 February 2017, *The United Kingdom's Exit From and New Partnership with the European Union*, www.gov.uk, p. 30.

⁸⁷ J.-C. JUNCKER, *Letter to the Members of the College*, 28 June 2016, reported by *EU & Democracy*, 12 October 2016, euanddemocracy.ideasononeurope.eu. See also A. McSMITH, *German leaders furious at UK's reluctance to invoke Article 50*, in *The Independent*, 27 June 2016, www.independent.co.uk.

⁸⁸ R. MERRICK, *Article 50: EU President Rejects Theresa May's Call for Early Start to Preliminary Brexit Negotiations*, in *The Independent*, 2 October 2016, www.independent.co.uk.

⁸⁹ P. CRAIG, *Brexit: A Drama in Six Acts*, in *European Law Review*, 2016, p. 465.

mination of the procedure.⁹⁰ It is to be noted, at any rate, that such a consensual termination would require approval by unanimity in the European Council, which might not be easily obtained.

It has been argued that the withdrawing state has the right to *unilaterally* revoke the notification of the national decision to withdraw.⁹¹ Since the Art. 50 procedure is based on the unilateral notification of the national decision to withdraw, the unilateral revocation of such a notification may possibly lead to the termination of the withdrawal procedure. Some authors have supported this argument by stressing that, pursuant to Art. 68 of the 1969 Vienna Convention, a State may revoke the notification of its intention to withdraw from a treaty “at any time before it takes effect”.⁹² As Art. 50 TEU does not expressly exclude the right to unilaterally revoke the notification of the intention to withdraw, such a right is allegedly “implicit”.⁹³ Furthermore, it has been noted that the conclusion of a withdrawal agreement under Art. 50 TEU requires the consent of the departing state, which, during the course of negotiations, may “change its mind and withdraw from the exit negotiation”.⁹⁴ In such a case, there would no longer be a decision to withdraw within the meaning of Art. 50, para. 1, since “the original decision had been changed in accordance with national constitutional requirements”.⁹⁵

The existence of a right to unilaterally stop the withdrawal process would affect the dynamics of the negotiations: should the withdrawing State be unsatisfied with the deal it is offered, it may simply block the process and return to its original status as an EU Member. It might even consider re-activating the Art. 50 procedure after a few months, or a few years, in the hope of obtaining better conditions. Such a scenario would evidently favour the withdrawing State and would considerably weaken the Union's position. In such a context, any Member State would be “entitled to threaten exit, notify it to the European Council, open negotiations under Art. 50, para. 2, and seek to enhance its

⁹⁰ In principle, it is possible to argue that “the logic and context of Art. 50 suggests that extensions of the time limit are temporary”, see S. PEERS, *Article 50 TEU: The uses and Abuses of the Process of Withdrawal from the EU*, in *EU Law Analysis*, 8 December 2016, eulawanalysis.blogspot.it. One may doubt, however, whether such a restrictive interpretation of Art. 50 would prevail in practice once all EU Member States had agreed to terminate the withdrawal procedure.

⁹¹ See, *inter alia*, A. YOUNG, *Brexit, Article 50 and the “Joys” of a Flexible, Evolving, Un-codified Constitution*, in P. ELEFThERiADiS (ed.), *Legal Aspects of Withdrawal from the EU: A Briefing Note*, in *University of Oxford Legal Research Paper Series*, no. 47, 2016, p. 21; D. WYATT, *Supplementary written evidence to the UK Parliament*, March 2016, data.parliament.uk, para. 2.

⁹² Arts 67 and 68 of the 1969 Vienna Convention, cit.

⁹³ C. STREETEN, *Putting the Toothpaste Back in the Tube: Can an Article 50 Notification Be Revoked?*, in *UK Constitutional Law Association Blog*, 13 July 2016, ukconstitutionallaw.org. See also, to that effect, C. CLOSA, *Is Article 50 Reversible? On Politics Beyond Legal Doctrine*, in *Verfassungsblog*, 4 January 2017, verfassungsblog.de; A. SARI, *Biting the Bullet: Why the UK Is Free to Revoke Its Withdrawal Notification under Article 50 TEU*, in *UK Constitutional Law Association Blog*, 17 October 2016, ukconstitutionallaw.org.

⁹⁴ P. CRAIG, *Brexit: A Drama in Six Acts*, cit., p. 464

⁹⁵ *Ibid.*

position within the Union by using ‘strategically’ the withdrawal option”.⁹⁶ The right to unilaterally terminate the withdrawal procedure might thus stimulate recourse to Art. 50 and the disintegration of the EU.

However, it would not seem that Art. 50 provides for a right to unilaterally revoke the notification of the intention to withdraw from the Union. Art. 50 affirms that the withdrawal process may terminate in two manners: the parties may conclude a withdrawal agreement, or, “failing that”, withdrawal is automatic after two years. In both cases, the procedure ends with the withdrawal of the departing Member State. Art. 50 consequently implies that withdrawal is the only natural outcome of the procedure. Such an interpretation of Art. 50 is corroborated by the duty to cooperate in good faith, enshrined in Art. 4, para. 3, TEU.⁹⁷ It would indeed be impossible to conduct withdrawal negotiations in good faith if one of the parties could threaten to terminate them whenever they lead in a direction it does not approve.⁹⁸

Since the withdrawal from the EU is regulated by Art. 50 TEU (*lex specialis*), and that provision never acknowledges the right to unilaterally terminate the procedure, it appears inappropriate to postulate the implicit existence of such a right on the basis of international law (*lex generalis*). Even assuming that Art. 68 of the 1969 Vienna Convention corresponds to international customary law (which is not certain),⁹⁹ one might use it to fill a gap in the Art. 50 procedure only if such a gap existed, which is not the case. Art. 50 provides for a clear and complete procedural path. Firstly, a Member State decides to withdraw (para. 1) and notifies its intention to withdraw (para. 2). Then, (i) it concludes a withdrawal agreement with the EU, and *it withdraws from the Union* or (ii) it does not conclude a withdrawal agreement and, after two years, *it withdraws from the Union* (para. 3). As EU Treaties do not offer a third option, one should probably refrain from postulating its existence on the basis of an uncertain international custom.

Unilateral termination of the procedure remains impossible, in my opinion, notwithstanding the possible change in the domestic decision of the withdrawing country. It is not the decision to withdraw that starts the withdrawal process, but the *notification* of such a decision. Once the decision has been notified, the procedure starts. A subsequent change in the national decision does not affect the previous notification and, consequently, cannot stop the withdrawal procedure.

⁹⁶ F. MUNARI, *You Can't Have Your Cake and Eat it Too: Why the UK Has No Right To Revoke Its Prospected Notification on Brexit*, in *SIDIBlog*, 9 December 2016, www.sidiblog.org.

⁹⁷ See, in particular, *European Commission v. Sweden*, cit., para. 77; Court of Justice, judgment of 27 February 2007, case C-355/04, *Segi and Others v. Council of the European Union* [GC], para. 52.

⁹⁸ See, to that effect, F. MUNARI, *You Can't Have Your Cake and Eat it Too*, cit.

⁹⁹ Cf. T. TZANAKOPOULOS, *Article 56, 1969 Vienna Convention*, in O. CORTEN, P. KLEIN (eds), *The Vienna Conventions on the Law of the Treaties: A Commentary, Vol. 1*, Oxford: Oxford University Press, 2011, p. 1564 *et seq.*

A unilateral termination of the Art. 50 procedure would remain impossible even if the change of heart of the withdrawing State were determined by a referendum. It has been argued that, in such a scenario, “the EU would not wish to be forced to push out of the door a state that had bona fide changed its mind”.¹⁰⁰ Yet, one should stress that a consensual termination of withdrawal procedures would always remain possible: the departing State and the other EU Members may always agree (by unanimity) to stop the withdrawal process. The necessity to reach an agreement with all EU Members would constitute an obstacle for the withdrawing State, but there seems to be nothing shocking in the idea that a Member State, which is not forced to activate the withdrawal procedure, may have difficulty blocking it.¹⁰¹

In fact, the democracy principle cannot be invoked to trump the principle of equality, the rights of individuals, or the operation of democracy in the other Member States or in the EU as a whole.¹⁰² The withdrawal process requires “the reconciliation of various rights and obligations by negotiation between two legitimate majorities”:¹⁰³ the majority of the population of the withdrawing State and that of the EU as a whole. The concern for democracy may require the departing State to respect the will of the majority of its population, even when it is inconstant, but it cannot force other States to do the same. The mere invocation of Art. 50 TEU is likely to bring about instability, which potentially harms the interests of the entire EU population. It seems reasonable that the departing state should negotiate some form of compensation for the disruption it caused.

VI. UNILATERAL WITHDRAWAL FROM THE EU: RIGHT OR RISK?

The last reason why Art. 50 TEU constitutes a “well-designed secession clause” is probably the most important and – paradoxically – it coincides with the reason why this provision has been so fiercely criticised: the possibility of unilateral withdrawal.

Pursuant to Art. 50, paras 2 and 3, TEU, after the notification, the Union “shall negotiate and conclude an agreement” with the departing State. EU Treaties cease to apply to the departing State “from the date of entry into force of the withdrawal agreement” or, failing that, “two years after the notification”. This means that the departing State might allegedly invoke Art. 50 and hold “the threat of withdrawal over the EU”, knowing that after two years “withdrawal will take effect in any event”.¹⁰⁴ Seen from this perspective, Art. 50 TEU may look like Art. 1 of the League of Nations’ Covenant, which enabled any Member State to withdraw after two years’ notice of its intention so to do. This read-

¹⁰⁰ P. CRAIG, *Brexit: A Drama in Six Acts*, cit., p. 465.

¹⁰¹ Cf. T. CHRISTAKIS, *Article 56, 1969 Vienna Convention*, cit., p. 1264: “There is nothing shocking in the idea that States, which are not forced to enter into a treaty regime, may have difficulty leaving it”.

¹⁰² Cf. Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 91.

¹⁰³ *Ibid.*, para. 152.

¹⁰⁴ J. FRIEL, *Providing a Constitutional Framework*, cit., p. 426.

ing of Art. 50, which is essentially the one espoused by the German Constitutional Court in the judgment on the Lisbon Treaty, truly “underlines the Member States’ sovereignty”.¹⁰⁵

At first sight, the practice may seem to confirm that Art. 50 emphasises the sovereignty of the Member States. According to Theresa May, if the EU failed to accommodate the British requests, the UK would pursue unilateral withdrawal, without concluding any withdrawal agreement with the Union: “no deal for Britain is better than a bad deal for Britain”.¹⁰⁶ This scenario is usually referred to as “Hard Brexit”. However, the credibility of UK’s threat is questionable. The withdrawal agreement is expected to provide for “transitional or interim arrangements to mitigate the shock” that would follow a Hard Brexit.¹⁰⁷ For instance, the withdrawal agreement might provide for “a time-limited prolongation of Union *acquis*”,¹⁰⁸ which may remain in force until the Union concludes a trade agreement with the UK. A Hard Brexit would prevent the establishment of any transitional arrangement in the aftermath of the withdrawal. Therefore, post-Brexit EU-UK trade would be regulated by the rules of the WTO: trade in goods would be likely to face “significant tariffs” and trade in services would be subject to “much greater restrictions”.¹⁰⁹ Such restrictions would be particularly problematic for the UK. As noted by the British government before the referendum, “a considerably larger proportion of the UK economy is dependent on the EU than vice versa. [...] Taken as a share of the economy, only 3.1 per cent of GDP among the other 27 Member States is linked to exports to the UK, while 12.6 per cent of UK GDP is linked to exports to the EU”.¹¹⁰

If the negotiations between the EU and the departing State could last indefinitely – which would be the case in the absence of Art. 50 – the problem of a *hard* withdrawal would never materialise. The withdrawing State might simply continue the negotiations until it reaches a favourable result; unilateral withdrawal would remain a threat to be used only in extreme cases. However, Art. 50 TEU imposes a deadline to withdrawal negotiations: two years. This time limit is very short, considering that the negotiations concern sensitive issues, such as the status of EU citizens in the departing country. Moreover, one should note that the negotiators are likely to need a long time to reach a compromise that satisfies the departing State, a majority of EU governments (which must approve the agreement in the Council),¹¹¹ as well as a majority of European Parliament members. To be sure, Art. 50 TEU allows for an extension of the negotiating

¹⁰⁵ German Federal Constitutional Court, judgment of 30 June 2009, cit., para. 329.

¹⁰⁶ *Theresa May’s Brexit Speech in Full*, in *The Independent*, 17 January 2017, www.independent.co.uk.

¹⁰⁷ UK House of Lords, Paper no. 72 of 13 December 2016, *Brexit: The Options for Trade*, www.publications.parliament.uk, para. 262.

¹⁰⁸ Council Directives for the negotiation of an agreement with the United Kingdom, cit., para. 19.

¹⁰⁹ UK House of Lords, *Brexit: The Options for Trade*, cit., para. 210.

¹¹⁰ UK Government Policy Paper of 29 February 2016, *The Process for Withdrawing from the European Union*, www.gov.uk.

¹¹¹ Obviously, the withdrawing state would not participate in the vote, see Art. 50, para. 4, TEU.

time, but subordinates such an extension to an onerous condition: a unanimous decision of the European Council, approved by the departing State.

Art. 50 TEU thus places the departing State in an uncomfortable position: either it swiftly reaches a compromise with the EU, or it risks a *hard* withdrawal, which would be particularly negative for its economy and society. The vulnerability of the departing State may therefore have “an impact on the dynamic of the negotiations”, as recognised by the British government:¹¹² having greater interest in a swift conclusion of the withdrawal agreement, the departing State is likely to make significant concessions to the EU.

The practice seems to confirm this reading of Art. 50 TEU. The UK delayed the activation of Art. 50 for nine months, ostensibly because of a concern for timing issues. Theresa May made this clear in September 2016, by affirming that “we shouldn’t invoke Art. 50 immediately [...] because when we hit Art. 50, when we invoke that, the process at the EU level starts. They say that that could take up to two years”.¹¹³ The behaviour of EU institutions and Member States further confirms that the time limit of Art. 50 plays against the interests of the departing State: they demanded a swift activation of Art. 50, and resolutely refused to conduct any negotiation before Art. 50 was invoked (see above, section V.1).

Therefore, it would seem that the unilateral character of the Art. 50 procedure should be put into perspective.¹¹⁴ From a purely formalistic viewpoint, this provision enables unilateral secession, thereby underlining the Member States’ sovereignty and potentially promoting the EU’s disintegration. A more realistic assessment permits to see Art. 50 in a different light. Unilateral withdrawal, rather than a right, appears as a risk for the departing State. By threatening a *hard* withdrawal, Art. 50 *de facto* compels the departing State to negotiate and compromise, thereby ensuring that the withdrawal process addresses the interests of the entire Union, and not only those of the departing State. The *risk* of unilateral withdrawal may thus paradoxically discourage careless recourse to the *right* to unilateral withdrawal in the future.

VII. CONCLUSION: A WELL-DESIGNED SECESSION CLAUSE

Art. 50 TEU has been criticised in the literature and in the public debate because it allegedly grants EU Member States an unfettered right to unilateral withdrawal, which questions the EU’s quasi-federal character and fosters its disintegration.¹¹⁵ This *On the Agenda* demonstrates that Art. 50 TEU plays the opposite function, since it ensures an orderly withdrawal process and discourages casual recourse to *secession*.

¹¹² UK Government, *The Process for Withdrawing from the European Union*, cit.

¹¹³ See P. DOMINICZAK, *Theresa May to Decide over Brexit Talks, No 10 Says, after Boris Johnson began Setting Brexit Strategy*, in *The Telegraph*, 23 September 2016, www.telegraph.co.uk.

¹¹⁴ Cf. A. LAZOWSKI, *Withdrawal from the European Union*, cit., pp. 527-528.

¹¹⁵ See *supra*, section III.

The analysis suggests that the widespread pessimistic view of Art. 50 is based on a formalistic reading of this provision, which focuses on the abstract possibility of unilateral withdrawal. From this perspective, Art. 50 TEU might truly appear as a challenge for the EU's federal aspirations and for its very survival. However, this formalistic approach divorces law from reality. Secession (from States) and withdrawal (from international organisations) is always possible *de facto*: the relevant question is whether constitutional provisions, such as Art. 50, permit (or not) a good management of the secession process and whether they discourage (or not) casual recourse to secession.

This contribution suggests that Art. 50 promotes an orderly withdrawal from the Union, since it ensures the EU's unity in withdrawal negotiations, limits the discretion of the departing State, and induces it to reach a compromise with the Union. Unilateral withdrawal from the EU is possible, but is also discouraged. Art. 50 may thus function as a "safety valve" for European integration:¹¹⁶ when the pressure (of Euroscepticism) rises too high, the withdrawal of a Member State enables the Union to release some *steam* in a controlled manner, thereby reducing the risk of *explosions*.

Art. 50 arguably ensures a fair balance between the concern for the EU's integrity and the principles that inspire European integration. In a federal and democratic Union, "the clear expression of the desire to pursue secession" by the population of a State must "give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire".¹¹⁷ The very possibility of secession from the Union may potentially contribute to reduce the democratic deficit of the EU, and reinforce its legitimacy: Art. 50 makes clear that the membership of the Union is now a choice, not a necessity.

The design of Art. 50, while generally satisfactory, was probably not thought out in detail, and remains imperfect. Ideally, this provision should be more precise. It should, in particular, define a deadline for the invocation of withdrawal (see above, section V.1)¹¹⁸ and expressly prohibit the unilateral termination of the procedure (see section V.2). These flaws, however, do not prevent Art. 50 from functioning as a "well-designed secession clause" that "discourages secessionist resentment", while allowing for withdrawal "in accordance with norms of democracy, justice and the rule of law".¹¹⁹ There-

¹¹⁶ Expression used by Giuliano Amato, quoted in C. BALMER, *Father of EU Divorce Clause Demands Tough Stance on British Exit*, in *Reuters*, 21 July 2016, www.reuters.com.

¹¹⁷ Supreme Court of Canada, *Reference re Secession of Quebec*, cit., para. 88.

¹¹⁸ An amended Art. 50, para. 2, might stipulate, for instance, that a Member State that decides to withdraw must notify the European Council of its intention "not later than six months after having decided to withdraw from the EU". Some degree of uncertainty would remain because the decision to withdraw would always be taken in accordance with "national constitutional requirements", pursuant to Art. 50, para. 1. National constitutional law may not precisely define the legal act that embodies a decision to withdraw. Yet, the insertion of a specific deadline in Art. 50 would at least make it clear that the withdrawing State cannot delay the notification of its intentions *ad libitum*.

¹¹⁹ See *supra*, footnote 12 and section III.

fore, a revision of Art. 50 TEU may perhaps be desirable, but does not appear indispensable at present.

One cannot exclude that Art. 50, despite the criticism it received, may inspire the drafting of other secession clauses at the national level. Democratic States find it increasingly difficult to deny demands for independence backed by public opinion, and are hard pressed to prevent populous or rich seceding regions from exploiting their greater bargaining power in the context of secession negotiations.¹²⁰ To address this problem, States might search for inspiration at the international level. Art. 50 TEU, in particular, provides for elements that national constitutions may consider importing,¹²¹ such as unity in withdrawal negotiations (see above, section IV) or the temporal delimitation of withdrawal procedures (section VI). As States experience increasing centrifugal forces, formalistic differences from the EU, including the right to secession, may turn out to be less important than substantive similarities, such as the need to ensure a proper balance between the principles of integrity, federalism, and democracy.

¹²⁰ Cf. S. MANCINI, *Secession and Self-Determination*, cit., p. 495.

¹²¹ *Ibid.*, p. 499.

