Things We Lost In The Fire:
EU Constitutionalism After Brexit

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SUMMARY

1. Introduction: Things We Lost in the Fire

It is undeniable that the withdrawal of the United Kingdom (UK) from the European Union (EU) represents the most significant institutional challenge for the European project to this date. Such a challenge is felt at different levels and has been at the centre of attentions of the legal community. In this context, the focus has so far been put on the difficulties posed by the UK's constitutional arrangements underlying the triggering of Article 50 TEU[1]. The famous *Miller*[2] litigation has worked as an important test tube to understand the nature of the "decision to withdraw from the Union in accordance with [the withdrawing state] constitutional requirements" mentioned in Article 50(1) TEU. This is, however, mostly an internal matter that must be settled by each Member State who eventually decides to leave.

From the standpoint of EU law, scholars have here and there questioned the scope of withdrawal and its impact on the nature of the EU legal order. It is feared that Brexit radically changes the nature of European integration in so far as it demonstrates that the EU project is not definitive and can be reverted[3]. In this context, attention has been drawn to what Europe has lost with the triggering of Article 50 TEU.

In reality, despite the fact that it was generally expected that Article 50 TEU would never be implemented in practice, from a conceptual point of view, its mere presence in the Treaties is generally considered to be a manifestation of the intergovernmental dimension underlying to EU cooperation, contrasting with the trend towards a more perfect form of federal integration[4]. In this light, the actual triggering of Article 50 TEU by a Member State would mean going backwards to a more *imperfect* form of cooperation between the Member States and would represent a setback in the process of integration. To a certain extent, the withdrawal provision, somehow echoing the subjection of EU law to International law, could be seen as a kind of "Trojan horse" holding the potential to, from the inside, put an end to the conquests of EU constitutionalism.

1 Gordon, Michael, 2016, "Brexit: a Challenge for the UK Constitution, of the UK Constitution?", in *European Constitutional Law Review*, 12, pp. 409-444, referring to Brexit as "the prompt for a potentially remarkable recalibration of the UK constitution which was neither expected nor prepared for".

2 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

3 It is significant that Brexit has been referred to the "most selfish decision ever made since Winston Churchill saved Europe with the blood, sweat and tears of the English", Speech by MEP Esteban González Pons before the European Parliament on the 60th anniversary of the Treaties of Rome.

4 See e.g., Mesquita, Maria José Rangel, 2005, "Forças e fraquezas do Tratado que estabelece uma Constituição para a Europa: cinco breves tópicos de reflexão", in *O Direito,* 137, IV-V, p. 820, speaking of a clear concession to intergovernmentalism and interstatehood.

To this assumed conceptual nature of Article 50 TEU, one must add the symbolism Brexit necessarily entails. In fact, it is clear that withdrawal of the UK from the EU involves more than the loss of one Member State. The trust on an ever-growing project grounded on the so-called "spill-over" effect appears compromised. In what Europe enshrines of a never-ending process, of hope in a united Europe, and of an optimistic trust in the future, Brexit represents its lowest moment. This symbolic dimension is not legally irrelevant. On the contrary, it is emblematically mentioned in the Treaties pursuant to which the Member States, "in view of *further* steps to be taken in order to *advance* European integration"[5] solemnly established among themselves the European Union, "marking a *new stage* in the *process* of creating an *ever closer* union among the peoples of Europe"[6].

Also, it is also unquestionable that Brexit puts us far from the precedents and of the so-called two-speed Europe that has served to limit the degree of participation of the UK in EU policies through opt outs, enhanced cooperation mechanisms and other *ad hoc* arrangements. On the one hand, Brexit does not involve a mere adjustment to the geographic scope of application of the Treaties. Membership of the EU is inherently and definitely affected. Constitutional amendment will be necessary, notably to Articles 52 TEU and 355 TFEU, and Protocols no. 15, 20, 30 and 31, to name the most obvious provisions. On the other hand, although the framework of the future relations between the EU and the UK is yet to be determined, it is clear that whatever solution is reached, the UK will be excluded from the vast majority of the EU fields of action, and what is currently the exception will become the rule.

However, although it is clear that something has been lost along the way, it is important not to forget that the UK is leaving a constitutional polity. In this light, the purpose of this paper is to highlight the need to understand Brexit in the wider context of EU constitutionalism, by *(i)* demonstrating that withdrawal from federal organisations is not unprecedented, and does not necessarily reflect the intergovernmental nature of European integration, and by *(ii)* pointing out how exiting the EU may, on the contrary, contribute to reinforce the constitutional nature of the Union under whose lens it necessarily needs to be assessed and negotiated.

5 See Preamble of the TEU.

6 Cf. Article 1 TEU. It is not a coincidence that one of David Cameron's demands on the eve of the Brexit referendum was the withdrawal by the UK of the expression "an ever closer union among the peoples of Europe", enshrined in the Treaties.

2. The Possibility of Leaving the EU: Before and After Article 50 TEU

I. Before the entry into force of the Lisbon Treaty, in the absence of an express provision, it was not clear whether a Member State could withdraw from the Union[7]. In 1982, Hill noted that several authorities adhered "to the view that the treaties establishing the European Communities have placed Europe in an irreversible process of European integration"[8]. This was consistent with the goal expressed in the Treaty's preamble to strive for "an ever closer union among the European peoples", which necessarily excluded the right of a Member State to withdraw. Also, the Court of Justice of the European Union (CJEU) stated in *Costa*[9] that the States had created "a Community of unlimited duration", limiting their sovereignty through a transfer of powers and establishing "an independent legal order", thus suggesting that withdrawal was not legally possible.

However, several scholars noted that such possibility existed. Despite the constitutional nature of the EU and of its autonomous legal order, authors considered that there was a fundamental right to withdraw based either on the Vienna Convention on the Law of the Treaties of 1969[10], either on customary international law[11]. In fact, the CJEU's statements for in of themselves were not sufficient to exclude the right to withdraw from the EEC. It could be argued that *Costa* did not address the issue at all, as one thing is the duration of the Treaty (which in contrast, for instance, with the ECSC Treaty was and is still not pre-determined), while another is the possibility of exiting the Community/Union, which would subsist if one of the States decided to leave. Thus, the unlimited duration of the Treaty would not preclude the possibility of terminating the project if the contracting parties so wished. Also, *Costa* dealt mostly with the principle of supremacy which in itself does not exhaust the constitutional difficulties involved in the European project. It is clear that the latter are not restricted to the legal relationship between national law and EU law, but go to the heart of sovereignty

7 In Portugal, the issue has been addressed, a.o., by Duarte, Maria Luísa, 2005, *Estudos de Direito da União e das Comunidades Europeias II*, Coimbra, Coimbra Editora; Mesquita, Maria José Rangel, "Forças e fraquezas do Tratado que estabelece uma Constituição para a Europa", pp. 807-836; Patrão, Afonso, 2010, "O Direito de abandonar a União Europeia à luz do Tratado de Lisboa: a extinção do direito de livremente abandonar a União?", in M. Costa Andrada, M. João Antunes and Susana A. Sousa (org.) *Studia Jurídica*, Vol. IV, Coimbra, Coimbra Editora, pp. 755-794.

8 Hill, John, 1982, "The European Economic Community: the Right of Member State Withdrawal", in *Journal of International and Comparative Law*, 12, p. 338.

9 Case 6/64, *Costa v. ENEL,* ECR 1964, p. 1195.

10 See *e.g.*, Patrão, Afonso, "O Direito de abandonar a União Europeia à luz do Tratado de Lisboa", p. 782, basing the right to withdraw on Article 56(1)(b) of the Vienna Convention on the Law of the Treaties.

11 See *e.g.*, Hill, John, *The European Economic Community*, pp. 344 *seq*.

and the right to self-determination of the peoples of Europe (even if the scope of this right is controversial in of itself).

In light of the above, no Member State protested against the UK right to withdraw when the Labour government was elected in 1974, with a manifesto to pledge to hold a referendum on the issue. Although the issue was not tested at the time, as a large majority voted in favour of staying in the EEC, it was assumed that Britain could have left if she so wished[12].

In addition, it is customary to mention in this ambit the cases of Algeria, Greenland and Saint Barthélémy as precedents of withdrawing communities. Algeria left the EEC when it gained independence from France although withdrawal did not result in any revision of France's level of participation in the Communities. Greenland left the EEC in the early 1980s, assuming the status of Overseas Countries and Territories (OCT) list country, determining a change in the geographic scope of the Treaties but not in Denmark's membership of the EU[13]. The same happened with Saint Barths when the island voted to secede from Guadeloupe, and the local government called on France to review the island's relationship with the EU. Saint Barthélémy became an OCT as of 2012.

Thus, before Article 50 TEU, although the issue was long discussed, there were sufficient bases to argue for the possibility of leaving the EU based either on history, legal arguments, political outcomes[14], or mere factual considerations. Dougan noted that "even though the current Treaties have been concluded for an indefinite period and contain no express provisions permitting a Member State to exit the Union, it is beyond doubt that – politically and legally – nothing can prevent a country from seceding should it wish to do so"[15]. In practice, the EU would hardly have ways to prevent withdrawal. Notwithstanding, there was also strong evidence suggesting that withdrawal would not be done in a legal *vaccum* and that it would have to be implemented in a negotiated manner[16].

12 The UK threatened to leave the EU at least two times before. Additionally to the 1974 election, in 1981, the Labour Party promised that if it was elected it would withdraw from the EEC without even holding a referendum.

13 See e.g., Weiss, Friedl, 1985, "Greenland's withdrawal from the European Communities", in *European Law Review*, 10(3), pp. 173-185.

14 Hill discussed the possibility of Germany exercising the right to withdraw which it had previously reserved in case of reunification and the hypothesis of a Member State turning into a form of communist government. See Hill, John, *The European Economic Community*, p. 355.

15 Dougan, Michael, 2008, "The Treaty of Lisbon 2007: Winning Minds, not Hearts", in *Common Market Law Review*, 45(3), p. 668.

16 Berglung, Sara, 2006, "Prison or Voluntary Cooperation? The Possibility of Withdrawal from the European Union", in *Scandinavian Political Studies*, 29 (2), pp. 147-167.

In light of the above, neither the inclusion of Article 50 in the TEU nor it's triggering by the UK represent in of themselves a loss in the process of European integration. The possibility of exiting the Union had been on the table before, and had been politically discussed and partially implemented.

II. Commenting on Article 50 TEU on occasion of the entry into force of the Lisbon Treaty, Allan Tatham suggested that it was best not to mention divorce at the wedding[17]. This may explain why the possibility of leaving the EU has only been introduced in the last amendment to the Treaties. Legal silence would discourage Member States to leave or even consider leaving the EU, in so far as the uncertainties surrounding the exiting process began with the discussion on its mere possibility. *Sub silentio*, it was arguable that Member States simply could not leave the EU.

Hence, the anxieties caused by the inclusion of a withdrawal mechanism in the Lisbon Treaty were only compensated by the conviction and sincere hope that said mechanism would never be used[18]. That conviction may also explain the incomplete nature of Article 50 TEU and the doubts surrounding its current application resulting therefrom.

In any case, although it may be wise not to discuss separation when committing to a "happily-ever-after-union", it is common that couples, as well as institutions, anticipate the possibility of things not working out as initially planned, thereby providing for exit solutions. That is, for instance, in the marital context, the role of prenuptial agreements in case of divorce.

The legal basis for leaving the EU originates from the works of the Convention for the Future of Europe, which prepared the draft Constitutional Treaty (CT) later signed and at the end rejected by the States[19]. The provision was included in the CT in light of the fact that the UK disagreed with the political aspiration of a closer union that the CT set in motion[20]. Within the works of the Convention three basic models were discussed:

17 Tatham, Allan F., 2012, "'Don't Mention Divorce at the Wedding, Darling' EU Accession and Withdrawal after Lisbon", in A. Biondi, O. Eeckhout and S. Ripley (eds.), *EU Law after Lisbon*, New York, Oxford University Press, p. 128.

18 In Portugal, for instance, Afonso Patrão, stated that it was not believable that a Member State would ever decide to withdraw from the EU considering the positive results achieved by European integration and the degree of economic, social and political inter-independence between the states meanwhile generated. See Patrão, Afonso, "O Direito de abandonar a União Europeia à luz do Tratado de Lisboa", p. 789.

19 It corresponded to Article 60-I of the CT.

20 See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, "Part I of the Constitution: Article 59", <http://europeanconvention.europa.eu/docs/Treaty/pdf/46/global46.pdf>.

(i) state primacy: where a Member State would have the absolute, unconditional and unilateral right to withdraw from the Union;
(ii) federal primacy: where there would be a prohibition of withdrawing based on the premise that once a Member State always a Member State; and,
(iii) federal control: where Member States would retain the sovereign right to leave the Union, but subject to negotiations and approval by the remaining States.

Article 50 TEU intends to reflect the latter option. Thus, pursuant to said provision any Member State may freely decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw must notify the European Council of its intention. The European Council will then provide the guidelines that shall base the negotiations of the withdrawal agreement taking account of the framework for its future relationship with the Union. Said agreement will be negotiated pursuant to Article 218(3) TFEU and will be concluded on behalf of the Union by the Council of the EU, acting by a qualified majority, after obtaining the consent of the European Parliament.

Thus, although the triggering of Article 50 TEU is not dependent upon any substantive conditions for leaving the EU, it is subject to a strict procedure of negotiations involving both the states and the institutions[21]. Nonetheless, pursuant to Article 50(3) TEU, withdrawal will occur regardless of the existence of an agreement between the Union and the withdrawing state. Indeed, the Treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the withdrawal notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period[22].

III. Regardless of its obvious major political and legal impact, withdrawal from the Union tells us very little on the legal nature of the EU as a constitutional project. Even though the unilateral right of a Member State to withdraw is said to be typical of international treaties and not of state's constitutions, there are in reality all sorts of solutions.

21 See also Hofmeister, Hannes, 2010, "Should I Stay or Should I Go?: A Critical Analysis of the Right to Withdraw from the EU", in *European Law Journal*, 16(5), p. 592; Malathouni, Eliza, 2008, "Should I Stay or Should I go: The Sunset Clause as Self-Confidence or Suicide", in *Maastricht Journal of European and Comparative Law*, 15, p. 115.

22 Criticizing the two-year period provided for in the Treaties see *e.g.*, Herbst, Jochen, "Observations on the Right to Withdraw from the European Union: Who are the 'Masters of the Treaties'?", in Dann P., Rynkowski M. (eds.) *The Unity of the European Constitution. Beiträge zum ausländischen* öffentlichen *Recht und Völkerrecht*, Vol. 186. Springer, Berlin, Heidelberg, 2006, p. 1758.

Hence, whereas for instance the Treaty establishing the League of Nations included the possibility of withdrawal, as happens also with the International Monetary Fund and the GATTs, the United Nations Charter does not include such possibility. On the other hand, it is true that usually state constitutions' do not provide for exiting mechanisms. Hence, in the USA war was fought over the issue and the national constitution does not seem to allow for secession[23]. In *Texas v White*[24], the US Supreme Court accepted the doctrine of a perpetual and indissoluble union between the states where there is no place for reconsideration or revocation, except through revolution or consent[25]. Thus, in the USA, which paradoxically emerged from the "first formal secession proclamation in world history"[26] – withdrawal does not seem to be realistic. More recently, the Supreme Court of Alaska considered secession to be clearly unconstitutional[27].

In Spain, the unilateral secession of Catalonia was also considered to be unconstitutional on the basis of national sovereignty. The latter is said to lie exclusively with the Spanish people: "*unidad ideal de imputación del poder constituyente y, como tal, fundamento dela Constitución y del Ordenamiento jurídico y origen de cualquier poder político*"[28]. According to the Spanish Constitutional

23 Lincoln's words in his message to Congress in July 4, 1861, are famous: "[a]nd this issue [the dissolution of the Union] embraces more than the fate of these United States. It presents to the whole family of man the question whether a constitutional republic or democracy a government of the people, by the same people can, or cannot, maintain its territorial integrity against its own domestic foes. It presents the question whether discontented individuals, too few in numbers to control administration according to organic law, in any case, can always… break up their Government, and thus practically put an end to free government upon the earth. It forces us to ask: 'Is there, in all republics, this inherent, and fatal weakness?' 'Must a government, of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?'"

24 *Texas v White* 74 US 700, 725.

25 Hence, "[w]hen Texas became one of the United States, she entered into an indissoluble relation. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration or revocation, except through revolution or through consent of the States."

26 Ryan, Erin, 2017, "Secession and Federalism in the United States: Tools for Managing Regional Conflict in a Pluralist Society", in *Oregon Law Review*, Vol. 96; FSU College of Law, Public Law Research Paper No. 806, available at SSRN: https://ssrn.com/abstract=2775377, p. 8. It is also noticeable that at the subnational level, there are several examples of peaceful secession in the U.S.A., as happened for instance with the Carolinas and the Dakotas.

27 *Scott Kohlhaas* v. *State of Alaska*, Office of the Lieutenant Governor, No. S-11866, November 17, 2006. Quoting *Texas v. White*, the Alaskan Supreme Court affirmed that "the act which consummated her admission to the Union was something more than a compact; it was the *incorporation* of a new member into the political body" and "it was final". As such, "when the forty-nine flag was first raised at Juneau, [the] Alaskans committed [themselves] to that *indestructible* Union for good or ill, in *perpetuity*. To suggest otherwise would 'disparage the republican character of the National Government'".

28 Author's translation: *"ideal unity to which the constituent power is imputable, and therefore the foundation of the Constitution and of the Legal Order and origin of any political power*". See Spanish Constitutional Court Decision no. 42/2014, 25th March 2014, available here: http://hj.tribunalconstitucional.es/en/Resolucion/Show/23861.

Court, under the current constitutional arrangements only the Spanish people is sovereign, and it is so in an exclusive and indivisible manner, so that no fraction of the people can claim said quality and have the right to break what the constitution considers "*la indisoluble unidad de la Nación española*"[29]. Notwithstanding, the Court acknowledged Catalonia's constitutional right to decide its own fate ("*derecho a decidir de los ciudadanos de Cataluña*"). However, such right is not considered to be a manifestation of self-determination or regional sovereignty, but a political aspiration, in so far as it is exercised in a manner consistent with the national constitution, with respect to the principles of democracy, pluralism, legality, transparency, Europeism, the role of Parliament, participation and dialogue.

Curiously, the Spanish Constitutional Court considered that its verdict was similar to the one reached by the Canadian Supreme Court in its ruling of 1998 on the secession of Québec[30], although both courts in reality came to different decisions. In fact, the Canadian Supreme Court has accepted that secession from the federal Union corresponds to an inherent right of the states, founded on the principle of democracy[31]. However, as the Court pointed out, democracy "means more than simple majority rule" as it "exists in the larger context of other constitutional values"[32]. In the Canadian experience, those values include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would necessarily put those relationships at risk. Thus, as the Constitution vouchsafes order and stability, secession of a province "under the Constitution" could not be achieved unilaterally, that is, without *principled negotiation* with other participants in the Confederation within the existing constitutional framework. In this light, the Court considered that Québec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. "Democratic rights under the Constitution cannot be divorced from constitutional obligations"[33]. On the one hand, "the continued existence and operation of the Canadian constitutional order could

29 Author's translation: "the indissoluble unity of the Spanish nation". As a consequence, a regional community cannot unilaterally initiate a referendum to decide its integration in Spain.

30 Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

31 Following the Supreme Court's Decision, the Parliament of Canada passed the Clarity Act (*Loi sur la clarté référendaire*) establishing the conditions under which the Government of Canada would enter into negotiations that might lead to secession following such a vote by one of the provinces. Two days after the Clarity Act had been introduced in the Canadian House of Commons, the *Parti Québécois* government passed an Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State in the National Assembly of Québec.

32 Para. 149.

33 Para. 151.

not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada"[34]. Therefore, the other provinces and the federal government would have no basis to deny the right of the government of Québec to pursue secession. However, on the other hand, that would be so true only if, so long as in doing so, Québec respects the rights of others[35].

In light of the above, it becomes clear that the possibility to withdraw is neither typical of nor limited to intergovernmental organisations and does not necessarily compromise federalism or constitutionalism. In particular, the Canadian experience makes clear that withdrawal from a constitutional polity can be pursued within the framework of its constitutional values and principles.

Hence, it is submitted that Article 50 TEU in itself does not threaten the constitutional nature of the European legal order. Things go the other way around: withdrawal from the EU must be understood against the backdrop of EU constitutionalism. This means that, from a conceptual point of view, withdrawal from the EU cannot be assessed under the lens of intergovernmental cooperation, calling for the application of International law rules and principles. On the contrary, leaving the EU needs to be assessed and negotiated from the standpoint of European constitutionalism, with respect to the core values on which the EU is based. In this conception, the key to understanding and implementing Brexit lies not in *Costa* but in *Les Verts*[36], where the CJEU firstly acknowledged the European Treaties as the constitutional charter of a Community/Union based on the rule of law.

3. EU Constitutionalism After Brexit

Hence, although it does not amount to a typical example of secession – in the sense that secession involves the effort of group or section of a state with a view to achieving statehood on the international plane – Brexit cannot be discussed from the perspective of International law but of constitutional law. It would be a serious misapprehension of the European project to discuss the details of withdrawal from the standpoint of International law. Leaving the EU is not merely ceasing a classical form of international cooperation. Withdrawal from the EU must be grasped and implemented in the framework of the constitutional

34 Para. 151.

35 Para. 151. The Court acknowledges that the negotiations that followed a vote to withdraw would have to address the potential act of secession as well as its possible terms. They would need to address the interests of the other provinces, the federal government, Québec and indeed the rights of all Canadians both within and outside Québec, and specifically the rights of minorities. Cf. para. 152 *seq*.

36 Case 294/83, *Les Verts/Parliament*, ECR 1986, p. 1339.

compound that binds the States to each other and to the Union, and of the duties Member States undertook when they accepted to be part of a EU based on the rule of law. In this sense, Brexit is as much a challenge to the UK constitution as it is to the European one.

The consequences of this view are twofold. On the one hand, EU fundamental principles and values must guide withdrawing negotiations. On the other hand, they must be fully respected in the course of the withdrawing process. Said fundamental principles and values stem clearly from the wording of the Treaties. At the outset, Article 2 TEU mentions the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are said to be common to the Member States in "a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Taking into account the constitutional experience of the EU, it is possible to try to assess some of the legal and political implications of the above mentioned principles in the context of Brexit negotiations.

Freedom, Democracy and Equality. To begin with, the possibility of exiting the EU tests the essence of self-government which is at the core of European liberal democracies. The discussion on whether the decision to leave the Union can be justified on the grounds of the right to self-determination under International law is, in this context, futile. Membership of a project founded on democracy must entail the acknowledgement of the possibility to leave. In its deepest routes, democracy lies with the freedom of choice, and thus the freedom to join and the freedom to leave. Article 50 TEU must be interpreted against this background.

Also, in its core, democracy means consent by majoritarian decision-making. To a certain extent, this principle is reflected on Article 50 TEU pursuant to which the Council of the EU decides by qualified majority. Notwithstanding, more importantly, understanding withdrawal through the lens of democracy means accepting that negotiations must account for the interests of the 28th democratic majorities in the EU. The withdrawing process involves in reality a multilateral negotiation. Although Article 50 TEU provides for the Council of the EU and Commission to be the frontrunners of the negotiations, it is important not to lose sight that there are 28th democratic majorities whose interests must be taken into consideration in the process.

Democracy also means the need for debate and deliberation and consequently the duty to engage in constructive discussions to address the concerns of dissenting voices. The duty to negotiate is also a consequence of the degree of interdependence between the States resulting from participation in the EU. In this light, it is clear that exit conditions cannot be unilaterally dictated by the

withdrawing state. It is noticeable that in the prior case of Greenland, Denmark did not attempt at a unilateral withdrawal, but looked rather for a negotiated way-out. Thus, without surprise, Article 50 TEU provides that the Union shall conclude an agreement with the withdrawing State which must be negotiated pursuant to the common Treaty provisions.

Also, it is unquestionable that negotiations must be carried out in good faith. This obligation is enshrined in the Treaties, flowing from the well-known principle of loyal cooperation. In particular, the second paragraph of Article 4(3) TEU provides that Member States are under the obligation "to take *any appropriate measure*, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union". These constitutional obligations go well beyond the general duties of good faith imposed on states when negotiating or withdrawing from international treaties, notably under Articles 18 or 65 of the Vienna Convention on the Law of the Treaties. In this respect, the CJEU has expanded significantly the scope of the obligations resulting from the principle of loyal cooperation, and has not hesitated to intervene when such a breach was found to have been committed either by the States or the EU institutions[37].

Additionally, although democracy also helps to explain why the seceding state MEPs' may still take part in the deliberation regarding withdrawal[38], the solution regarding the state's representative in the Council of the EU may be more difficult to understand[39]. In fact, pursuant to Article 50 TEU, with the exception of the withdrawing decision, the withdrawing state representative in the Council of the EU continues to participate in the Council's meetings, discussions and decisions. This solution may create disruptions with regard to the adoption of legal acts and their respective financial consequences destined to produce effect after Brexit is fully implemented. Democracy demands cautious in the scope of participation of the UK ministers in the Council of the EU and in the exercise of the right to vote in decisions which will not be applicable to the UK in due time.

Lastly, the possibility of revocation of Brexit must also be assessed under the principles of freedom, democracy and equality between the States. On the one hand, if Member States are committed to integration, the group of the 27

37 See e.g., Case C-246/07 *Commission/Sweden* (PFOS), ECR 2010 p. I-3317.

38 Dougan is critical of this solution, arguing that once a Member State has exercised its unilateral and unconditional right to withdraw from the Union, "there is no good reason to offer its MEPs the right to exercise any influence (yet alone a potentially decisive one) over the agreement which will determine the future relations between that country and the Union". See Dougan, Michael, "The Treaty of Lisbon 2007", p. 688. We respectfully disagree. Also with regard to the judges of the CJEU it seems clear that they should maintain their positions until withdrawal effectively occurs.

39 See Friel, Raymond Y., 2004, "Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution", in *International and Comparative Law Quarterly*, 53(2), p. 426.

must accept the possibility of the UK to revoke its decision to withdraw[40]. On the other hand, if the UK revokes its withdrawal decision it must be prepared to accept the consequences resulting from the frustration of expectations created on both the other States and on the EU institutions, and its possible impact on non-withdrawal conditions[41].

Rule of law and fundamental rights. It has been noted that Article 50 TEU does not in itself render fundamental rights applicable as a matter of EU law nugatory during the process of removal from the EU[42]. On the contrary, EU constitutionalism requires that priority is given to the rights of EU citizens *during* and *after* Brexit. Without surprise, from the very beginning, the European Council guidelines prioritized the issue[43]. The need to provide as much clarity and legal certainty as possible to citizens is also reflected in the Council of the EU and Commission's documents on Brexit[44]. Indeed, the rule of law imposes that disentanglement of a Member State from the Union is not done in a scenario of chaos or anarchy, which Lincoln in his time considered as inevitable[45]. Thus, all European institutions have consistently called for an "orderly withdrawal" of the UK from the EU. In this ambit, the Commission has proposed to prolong the status of EU citizenship for those who have shaped their lives under EU law. This entails protecting living EU citizens in the UK and UK citizens in the EU at several levels as if Brexit would not take place[46].

40 See also Eeckhout, Piet, Frantziou, Eleni, "Brexit and Article 50 TEU: A Constitutionalist Reading" (December 23, 2016), available at SSRN: https://ssrn.com/abstract=2889254, p. 41, considering that unilateral revocation of the decision to withdraw should be possible provided that it is done in good faith.

41 See Sari, Aurel, "Biting the Bullet: Why the UK is Free to Revoke its Withdrawal Notification under Article 50 TEU", available at https://ukconstitutionallaw.org/2016/10/17/aurel-sari-biting-the-bullet-why-the-uk-is-free-to-revoke-its-withdrawal-notification-under-article-50-teu/.

42 See Eeckhout, Piet, Frantziou, Eleni, "Brexit and Article 50 TEU", p. 21.

43 The European Council noted that "[t]he right for every EU citizen, and of his or her family members, to live, to work or to study in any EU Member State is a fundamental aspect of the European Union. Along with other rights provided under EU law, it has shaped the lives and choices of millions of people. Agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority for the negotiations. Such guarantees must be effective, enforceable, non-discriminatory and comprehensive, including the right to acquire permanent residence after a continuous period of five years of legal residence. Citizens should be able to exercise their rights through smooth and simple administrative procedures." See European Council (Art. 50) guidelines following the United Kingdom's notification under Article 50 TEU.

44 All available at https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en.

45 In his First Inaugural Address on March 4, 1861 Lincoln affirmed that "[p]lainly, the central idea of secession is the essence of anarchy".

46 See *e.g.*, Working paper "Essential Principles on Citizens' Rights", TF50 (2017) 1 Commission to EU27; Position paper on "Essential Principles on Citizens' Rights", TF50 (2017) 1/2 – Commission to UK.

The obligation to respect individual rights applies to the UK as well. It is significant that before the official notification to the EU, the House of Lords urged the UK government to proceed with a unilateral guarantee of the rights of EU citizens in the UK.

It must be highlighted that even where fundamental rights are not at stake, any arbitrary form of regression of any vested rights can be "constitutionally destabilising, to the extent that they are prejudicial to the principles of legal certainty and legitimate expectations"[47]. These principles are part of the EU constitutional order, and they entail important consequences at the level of publication of the results of the negotiations, adequate notice periods to those who may be individually affected[48], and more importantly the adoption of provisional rules and transitional periods[49].

Lastly, the loss of EU citizenship of UK citizens deserves some consideration, especially with regard to those citizens who have not consented to it. It is settled EU law that citizenship of the Union tends to be the "fundamental status" of nationals of the Member States[50]. The CJEU considers that "by reason of its nature and consequences" the loss of EU citizenship falls within the jurisdiction of the CJEU[51]. According to the Court, even though EU law does not compromise the principle of International law pursuant to which acquisition and loss of nationality is a matter of national competence, the exercise of that power in respect to citizens of the Union is amenable to judicial review under EU law. In particular, "having regard to the *importance* which primary law attaches to the status of citizen of the Union", a decision to withdraw naturalisation "must take into account the *consequences* that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the *loss of the rights enjoyed by every citizen of the Union*"[52]. In light of this case-law, and despite of being a necessary consequence of withdrawal, it is clear that the legality of the process of losing EU citizenship triggers EU constitutional guarantees and may merit oversight by domestic courts and the CJEU itself.

Separation of Powers and Federalism. Separation of powers in the EU materializes at different levels. At the outset there is a division of competences between the States and the Union based on the principle of conferral. The latter constitutes the essence of federalist systems aimed at accommodating diversity

47 Eeckhout, Piet, Frantziou, Eleni, "Brexit and Article 50 TEU", p. 20.

48 *Ibidem*.

49 In this respect, it is interesting to note that in the period post-independence, EEC Law continued to apply temporarily in Algeria.

50 Case C-184/99 *Grzelczyk* ECR 2001, I-6193, para. 31.

51 Case C-135/08, *Rottmann*, ECR 2010, p. I-1449, para. 42.

52 Para. 56.

in unity. In this ambit, it is important to recall that EU federalism is not merely designed to protect and accommodate local cultures and traditions, or autonomous decision making by local communities. EU federalism accounts for national identities reflected in the constitutional structures of each Member State[53]. This protection ranges to the nuclear identity of the European peoples and the way the latter conceive themselves *vis-à-vis* the other groups and communities. This finding entails a two-sided consequence. On the one hand, withdrawal from the Union cannot ignore the constitutional difficulties and concerns of the withdrawing state. On the other hand, constitutional requirements of the remaining Member States may have to be accounted for in the withdrawing process. This means that negotiations may lead to different solutions regarding concrete Member States, with Ireland, Spain and Cyprus being the most obvious candidates.

EU federalism and the principle of conferral are also key to understanding the legal consequences surrounding the adoption of the agreement governing the future UK-EU relations. It is common for international agreements concluded by the EU to have more than one provision in the EU Treaties as their legal basis, depending on their scope and object. Thus, for instance, if the future relationship between the UK and the EU is confined to trade matters, Article 207 TFEU will constitute the relevant provision. If, however, the future relationship includes a range of EU policies, the conclusion of an association agreement under Article 217 TFEU may have to be considered. In this context, Eeckhout and Frantziou have noted that there seems not to be any compelling legal reasons for requiring the UK to withdraw from the EU first, before negotiating a new agreement on its future relationship[54].

Also in this respect, it is unclear whether the future relationship between the EU and the UK requires the conclusion of a mixed agreement, *i.e.* an international agreement concluded by the EU and its Member States. If it is clear that regarding withdrawal the Member States have conferred their powers exclusively to the EU, it is unclear whether they have done so with regard to their future relationship with the exiting state[55].

Additionally, separation of powers in the EU federal system also occurs at the level of EU institutions. In fact, the Treaties "set up a system for distributing powers among the different [Union] institutions, assigning to each institution its

53 Cf. Article 4(2) TEU.

54 See Eeckhout, Piet, Frantziou, Eleni, "Brexit and Article 50 TEU", p. 25.

55 See also Eeckhout, Piet, Frantziou, Eleni, "Brexit and Article 50 TEU", p. 25. It should be noted that, in the past, Greenland's withdrawal was combined with the introduction of new arrangements that allowed for the maintenance of close and lasting links between the EU and Greenland. The Greenland Treaty, signed in Brussels on 13 March 1984, was concluded by the Member States of the EU as it consisted of a Treaty amending, with regard to Greenland, the Treaties establishing the European Communities.

own role in the institutional structure of the [Union] and the accomplishment of the tasks entrusted to the [Union]"[56]. In this ambit, the CJEU has clarified that the EU institutions are bound by the so-called principle of the institutional balance which "means that each of the institutions must exercise its powers with due regard for the powers of the other institutions" and requires "that it should be possible to penalize any breach of that rule which may occur"[57]. Therefore, it is pivotal that the each EU institution is aware of the interests it represents and its role *vis-à-vis* the other institutions. The need to comply with this principle may explain why in the case of Greenland, the Council of the EU sought the opinion of Parliament, although it was not obliged to do so. In the current context, the solutions provided for in Article 50 TEU may leave room for doubts in the course of withdrawing negotiations. The multiplication of the number of actors leading the withdrawal process may bolster conflicts over the pace and contents of the negotiations, and it is not to be excluded that the institutions come to a point where they do not see eye to eye with regard to every withdrawal detail.

Likewise, understanding the EU as a federal project may contribute to solve one of the most difficult issues surrounding the exiting process, *i.e.,* the financial settlement. At this point it is yet unclear whether the UK must continue to pay contributions to the EU budget or reimburse monies to the Union. It is submitted that the solutions to the institutional and budgetary issues surrounding withdrawal should be grasped under the lens of EU federalism, notably by taking into consideration both the degree of mutual trust and interdependence created by European integration and the burden sharing inherent to EU membership.

Justiciability and the role of the CJEU. It is not to be excluded that the CJEU comes to be involved in the withdrawing process. In so far as it implies the conclusion of international agreement(s) (either the withdrawal agreement and the agreement governing the future UK-EU relations, or a combination of both), the Court may be called to issue an opinion pursuant to Article 218(11) TFEU. It cannot also be left out that, during or after Brexit, either an action for infringement or an action for annulment is brought before the CJEU regarding the legality of the negotiation decisions. With regard to the role of courts in respect of secession, the Canadian Supreme Court adopted a conservative approach. Considering that the content and process of the negotiations would be essentially for the political actors to settle, the Supreme Court considered that "the reconciliation of the various legitimate constitutional interests [would be] necessarily committed

56 Case 70/88, *Parliament/Council*, ECR 1990, p. I-2041, para. 21.

57 The CJEU added: "[t]he Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must therefore be able to maintain the institutional balance and, consequently, review the observance of the Parliament's prerogatives when called upon to do so by the Parliament, by means of a legal remedy which is suited to the purpose which the Parliament seeks to achieve". See Case 70/88, *Parliament/Council*, ECR 1990 p. I-2041, para. 23.

to the political rather than the judicial realm precisely because that reconciliation [could] only be achieved through the give and take the negotiation process"[58]. Hence, echoing a type of "political-questions doctrine", the Supreme Court in Canada considered that to the extent that issues addressed in the course of negotiations "are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties"[59]. Although judicial self-restraint is not unknown to the CJEU – which very often applies the so-called margin of appreciation doctrine – there are other instances where the Court has not hesitated to oversee the legality of delicate political matters[60]. As such, Brexit may also pose a challenge to the CJEU providing it with yet another opportunity to rethink its role and position as an adjudicator in EU politics.

4. Concluding Remarks

If there were doubts surrounding the possibility of a Member State leaving the EU, they have been addressed by the inclusion of Article 50 TEU in the Treaties. Also, if there were doubts on the likelihood of a Member State actually leaving the EU they were solved by the decision of the British people to do so, and the subsequent triggering of said provision.

The importance of the UK leaving the EU must not be underestimated. In its "White paper on the Future of Europe" the European Commission has recently referred to it as one of the greatest challenges Europe is currently facing, together with the global financial crisis, the refugee crisis, terrorist attacks and the emergence of new global powers[61]. At the institutional level, Brexit is without any doubt "the most delicate of European projects"[62], and it is evident that it will entail significant consequences at multiple levels. Some of them have already been anticipated and are mentioned in the documents which for the moment serve as basis for the negotiations. In any case, much more will appear and many unforeseeable questions will arise.

So far, the legal debate on Brexit has focused mostly on what constitutes a valid triggering decision for purposes of Article 50 TEU, in particular in light of the internal difficulties posed by parliamentary sovereignty *v*. prerogative powers

58 Para. 101.

59 Para. 101.

60 The issue has been discussed in several cases. See e.g., the Opinions of the Advocates-General in Case C-120/94, *Commission/Hellenic Republic*, [1996] ECR I-1513 and Joined Cases C-402 and-415/05 P, *Kadi and Al Barakaat International Foundation/Council and Commission*, [2008] ECR I-6351.

61 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 6.

62 Gordon, Michael, "Brexit: a challenge for the UK constitution, of the UK constitution?", p. 410.

within the UK's constitutional legal order[63]. In this respect, it has been defended that Brexit should not cause one to reject the UK's political constitutionalist model and that one must look within the UK constitution for solutions[64].

The same thing could be said with regard to EU constitutionalism. In fact, Article 50 TEU raises equally important constitutional concerns for the EU legal order and its constitutional identity. The argument underlying this paper is the following: withdrawal from the EU cannot be interpreted from the perspective of International law thus entailing a setback in EU integration; it must be understood and executed against the backdrop of EU constitutional principles. Brexit brought to light what was already fairly clear: that the EU is not destined to be "one Union, under god, indivisible". The EU can be reverted and it is unclear whether it will endure as the institutional setting of the "organized world of tomorrow"[65]. Therefore, withdrawal from the EU must be seen not only as a practical solution for democratic challenges but also as an opportunity to test and apply what the EU taught Europeans best: democracy and the rule of law. As a consequence, even though the concrete contents of the negotiations are for political actors to define, the exit procedure, the conduct of the parties therein and the material outcomes must respect the core principles on which the EU is based.

"Things we lost in the fire" is a fairly well-known Hollywood movie from 2007 that contrary to what the title suggests is not about depression and loss, but about coping and surviving in the face of tragedy and the things that matter most in life. This is precisely the way Brexit should be faced: with the focus not on what we have lost with the unwanted triggering of Article 50 TEU, but on what we have learnt and construed as Europeans for the last 60 years. As the European Commission has put it, "the Union has often been built on the back of crises and false starts" and "has always been at a crossroads and has always adapted and evolved"[66]. Already in his memoirs, Jean Monnet wrote that the roots of the Community were "strong" and "deep in the soil of Europe. They have survived some hard seasons, and can survive more"[67]. The withdrawal of the UK from the EU is one more of those seasons, and yet another opportunity, certainly an historical one, "to renew our vows"[68], holding fast "to the fixed principles that have guided us since the beginning"[69].

63 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

64 Gordon, Michael, "Brexit: a challenge for the UK constitution, of the UK constitution?", p. 444.

65 Monnet, Jean, *Memoirs*, Doubleday&Company Inc., Garden City, New York, 1978, p. 524.

66 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 6.

67 Monnet, Jean, *Memoirs*, p. 523.

68 White paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025, p. 26.

69 Monnet, Jean, *Memoirs*, p. 523.