BREXIT AND ARTICLE 50 TEU: A CONSTITUTIONALIST READING

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Abstract

This article considers the constitutional requirements and implications of Article 50 TEU for the EU. It argues that it is essential to read Article 50 in light of the features of the Treaty of which it forms part together with its drafting context, that of the Convention on the Future of Europe, as well as the substantive protections of EU constitutional law. The article demonstrates that important constitutional constraints are in place in EU law, which can affect the most significant debates in the withdrawal process, namely: the manner in which notification to withdraw from the Union is given; the revocability of a decision to withdraw; and the legal basis and content of the withdrawal agreement. Most importantly, a reading of Article 50 informed by key constitutional features of the EU legal order stipulates clear duties for the EU to respect the UK's constitutional requirements and to protect, in any eventual agreement, acquired rights for EU citizens in the UK and UK citizens in the EU, by emphasizing the illegality of a non-compliant withdrawal agreement from the EU perspective.

1. Introduction

Never before has a provision of EU law become so well known in such a short space of time as Article 50 TEU. In a seismic vote on 23 June 2016, the British people decided with a clear but by no means overwhelming majority that the United Kingdom (UK) should leave the EU. The UK Government and Parliament have now decided to give effect to that vote by formally notifying the EU of the UK's intention to withdraw in a letter delivered to the President of European Council on 29 March 2017.[1]

Article 50 TEU itself is a sparsely worded provision, which raises more questions than it answers, and which is of course wholly untested.[2] Now that the withdrawal process has formally commenced, it is clear that in addition to any concerns it may raise from the viewpoint of national law,[3] it will be governed by the law of the EU in a number of ways. This article advocates and articulates a constitutionalist interpretation of Article 50 TEU. Our overarching argument is that withdrawal requires compliance with EU constitutional law, which comprises respect for national constitutional requirements as well as key EU values, such as democracy, the rule of law, the protection of fundamental rights including non-discrimination on grounds of nationality, and EU citizenship.

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[1] See European Council Press Releases and Statements, "Statement by the European Council (Art. 50) on the UK notification", No. 159/17, 29 Mar 2017, <www.consilium.europa.eu/en/press/press-releases/2017/03/29-euco-50-statement-uk-notification/> (last visited 3 Apr. 2017).

[2] On the difference with prior withdrawals, see Tatham, "Don't mention divorce at the wedding, darling!: EU accession and withdrawal after Lisbon" in Eeckhout, Biondi, and Ripley (Eds.), *EU Law After Lisbon* (OUP, 2012), p. 148.

[3] *R (Miller)* v. *Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) ("*Miller* Divisional Court"); *R (on the application of Miller and another) (Respondents)* v. *Secretary of State for Exiting the European Union* (Appellant) [2017] UKSC 5 ("*Miller* Supreme Court").

A constitutionalist reading has significant implications for the nature and conduct of the negotiations, but also – should an agreement be reached - for the content of the withdrawal agreement and the shape of the future relationship between the UK and the Union. This article demonstrates the need for considered assessment of these commitments on both sides of the Channel - and not just negotiation through intergovernmental bargaining. A constitutionalist reading of Article 50 also builds on recent appeals for a "kinder, gentler Brexit".[4] It illustrates that a non-punishing approach towards withdrawal is not merely a question of the Union's charitable disposition but that it is, rather, *mandated* by the Union's obligation to respect constitutional requirements of a withdrawing State, the rights of individuals, and its own very values.

Indeed, there is no denying that the withdrawal of one of its largest Member States is a moment of crisis for the Union and a difficult test for the effectiveness of its institutions. A return to functional intergovernmentalism without sincere, explicit, and consistent regard for the constitutional commitments made in the Treaties would deeply undermine the idea that the EU is built not just upon mutual interests, but also the rule of law. By contrast, a constitutionalist approach towards the negotiations is an opportunity to affirm that the structures built over the last sixty years have truly come to constitute a new mode of post-State organization, premised on cooperation, genuine respect for common values and fundamental rights, and a supranational citizenship, which could see the Union through a new era following the UK's withdrawal.[5] In other words, a constitutionalist reading of Article 50 is the only possible reading of the provision that enables the EU to preserve its *sui generis* character as a new legal order that creates rights and obligations for its subjects, and remains a significant part of their legal heritage.[6]

The article is structured as follows. First, we further articulate why a constitutionalist reading of Article 50 is essential by drawing support both from the drafting context in which the provision was inserted into the treaties and the very nature of the withdrawal process (section 2). We then discuss in more detail what the drafting context of this provision reveals about the political intentions that shaped it (section 3), before going on to apply these findings to the different aspects of Article 50 itself. We address, in particular, the necessity of withdrawal in accordance with UK constitutional law and the need for the EU to respect this; the nature and timeframe of the negotiations and agreement; and the rights of individuals and national and supranational parliaments in the process (section 4).

2. The need for a constitutionalist reading

From the perspective of EU law, it is clear that Article 50 TEU is situated in a quintessentially constitutional place: as the Court famously put it in *Les Verts*, the Treaties are the Union's "constitutional charter".[7] Still, as Dieter Grimm has argued, EU law suffers from a problem of over-constitutionalization,[8] insofar as it labels "constitutional" provisions that do not fulfil the functions of constitutional law, namely to safeguard the proper process of government.[9] It must therefore be emphasized that the argument for a constitutionalist reading of Article 50 does not

[4] Weiler, "Editorial: The case for a kinder, gentler Brexit", 15 I-CON (2017).
[5] See further Fabbrini, "How Brexit opens a window of opportunity for Treaty reform in the EU", (2016) Delors Institut/Bertelsmann Stiftung: Spotlight Europe, <www.delorsinstitut.de/2015/wp-content/uploads/2016/09/spotlight_europe_01_2016.pdf> (last visited 29 Mar. 2017).
[6] Case C-26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, EU:C:1963:1.
[7] Case C-294/83, *Parti Ecologiste "Les Verts"* v. *Parliament*, EU:C:1986:166, para 23.
[8] Grimm, "The democratic costs of constitutionalisation: The European case", 21 ELJ (2015), 469-471.
[9] Loughlin, *The Idea of Public Law* (OUP, 2003), pp. 5-7.

stem from a mere reference to the ECJ's case law. The need for such a reading becomes evident as soon as the provision is considered in the light of the historical context of its drafting and the nature of withdrawal from the Union, more broadly.

As Kostakopoulou has put it, withdrawal is "anchored" in the constitutional character of the Union as a freely associative, rather than coercive, project.[10] Whereas it was the Lisbon Treaty that ultimately brought it within EU law, the right of voluntary withdrawal was negotiated within the Convention on the Future of Europe, and formed part of the Constitutional Treaty.[11] The Constitution's withdrawal clause was adopted without any fundamental changes by the Lisbon Intergovernmental Conference, becoming Article 50 TEU.[12] This historical context constitutes a first, immediate reason for a constitutionalist reading. The fact that Article 50 enters the EU legal order at this constitutional moment is significant. It coincides with the point at which the Union attempted to draw up a framework of governance that fulfilled aspirations of further political integration and was premised on common values, a binding Charter of Fundamental Rights, and a commitment to the principles of democracy and the rule of law. In this sense, Article 50 has an "inherently specific" constitutional context, which sheds light on its interpretation.[13]

Indeed, Article 50 is of a constitutional character not only in formal but also in substantive terms. To paraphrase Bruce Ackerman: when considering what the constitution of the EU actually constitutes,[14] it would be impossible not to make reference to membership of and distancing from that Union, i.e. who takes part therein and who does not. One can hardly imagine provisions that are more "constitutional" in character than those concerning the make-up, objectives, membership, and withdrawal from the EU. In regulating the latter process, Article 50 is directly constitutive of what the EU is. The interpretation of Article 50 affects the Union's very identity as a constitutional order committed to 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".[15] To adopt any interpretation thereof other than a constitutionalist one would amount to an implicit refutation of that identity - one that distinguishes the Union from other international organizations.[16]

The need for a constitutionalist reading is confirmed by the fact that Article 50 does not operate in a vacuum. It regulates withdrawal from a series of specific protections guaranteed by EU law over several decades, so that its terms must be assessed in light of the spirit of the TEU and the Union's most basic commitments. It is indeed obvious that a national decision such as Brexit and the process of withdrawal that it triggers raise concerns about the safeguarding of the values mentioned above.[17] For example, extricating the UK from the *acquis communautaire* is a complex, wide-ranging and intrusive legal exercise, which raises questions of respect for constitutional guarantees relating to acquired rights and the rule of law.

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[10] Kostakopoulou, "Brexit, voice and loyalty: Reflections on Article 50 TEU", 41 EL Rev. (2016), 488.
[11] The right of voluntary withdrawal from the Union was initially envisaged as Art. 46 in Ch. X of the first part of the Constitution entitled "Membership of the Union". It was renumbered Art. 59 in the Constitution's final draft.
[12] The Presidency Conclusions of the Brussels European Council of 21-22 June 2007, in which the main reforms to the Constitutional Treaty are discussed mention the withdrawal clause only in passing: see Brussels European Council Presidency Conclusions, 20 July 2007, 11177/1/07 REV 1, para 16.
[13] Dowdle and Wilkinson, "On the limits of constitutional liberalism: In search of a constitutional reflexivity", (2015) NUS Law Working Paper, 6-7.
[14] Ackerman, "The Storrs lectures: Discovering the constitution", 93 *Yale Law Journal* (1984), 1040.
[15] Art. 2 TEU.
[16] Case C-26/72, *Van Gend en Loos*.
[17] See Letsas, "The Constitution and the folly of majoritarianism", *UK Constitutional Law Blog*, 20 Feb. 2017, <www.ukconstitutionallaw.org/2017/02/20/george-letsas-the-constitution-and-the-folly-of-majoritarianism/> (last visited 10 Mar. 2017).

One need look only at the debate about safeguarding current rights to work and rights of residence of EU citizens in the UK, or instead using them as a "bargaining chip" in the Brexit negotiations.[18]

The degree to which the rights of citizens are at stake in the Article 50 process puts the need for a constitutionalist reading most sharply into focus. These rights are not confined to human rights. The direct effect of EU law, be it in the form of provisions in the Treaties or EU legislation, is an enormous rights-generating factory, as the Court of Justice famously found in *Van Gend en Loos*.[19] Often, EU law creates directly effective rights and duties, enforceable in national law, without even using a rights vocabulary. Rights may simply be created through the imposition of obligations, on the EU institutions,[20] the Member States,[21] or private actors.[22] Take a principle as fundamental as the free movement of goods. The relevant TFEU provisions do not, in their terms, confer any rights to free trade on private parties; they impose obligations on the Member States. But the direct effect and primacy of these provisions mean that both individuals and companies have an enforceable right to "free cross-border trade" which trumps any inconsistent national law.[23]

This system of rights is not a theoretical construct. It is part and parcel of the daily lives of millions of people, both in the UK and elsewhere in the EU. Indeed, the rights that EU law generates are beyond enumeration, or even classification. They are scattered throughout all EU policies and thousands of pieces of legislation.[24] What follows is definitely incomplete and strictly illustrative. There are rights to free trade, in goods and services;[25] rights to free movement of capital and free establishment;[26] rights to free movement of persons, accompanied by rights to work, to reside, not to be discriminated against on grounds of nationality.[27] There are broader rights to equality;[28] political rights;[29] employment and social rights;[30] consumer rights;[31] environmental rights;[32] rights to agricultural subsidies;[33] rights to have foreign judgments enforced;[34] rights of immigration and family reunification;[35] rights to

[18] See Mantouvalou, "EU citizens as bargaining chips", *UK Constitutional Law Blog*, 14 July 2016, <www.ukconstitutionallaw.org/2016/07/14/virginia-mantouvalou-eu-citizens-as-bargaining-chips/> (last visited 10 Dec. 2016).
[19] Case C-26/72, *Van Gend en Loos*.
[20] Perhaps most illustratively, see the creation of rights in the *Kadi* litigation: Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat* v. *Council and Commission*, EU:C:2008:461; Joined Cases C-584, 593, & 595/10 P, *Commission and Others* v. *Kadi*, EU:C:2013:518.
[21] Case C-26/72, *Van Gend en Loos*.
[22] Case C-36/74, *Walrave and Koch*, EU:C:1974:140; Case C-415/93, *Bosman*, EU:C:1995:463; Case C-43/75, *Defrenne* v. *Sabena*, EU:C:1976:56.
[23] See Case C-8/74, *Dassonville*, EU:C:1974:82; Case C-171/11, *Fra.bo*, EU:C:2012:453.
[24] Andrew Duff notes that over 1200 regulations and directives currently apply to the UK: Duff, "After Brexit: A new Association Agreement between Britain and Europe", *Policy Network Paper*, Oct. 2016, <www.policy-network.net/publications_download.aspx?ID=9435> (last visited 11 Dec. 2016), 8.
[25] Arts. 34 and 56 TFEU respectively.
[26] Arts. 56 and 49 TFEU respectively.
[27] Arts. 45, 21, 18 TFEU; Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 Apr. 2011 on freedom of movement for workers within the Union, O.J. 2011, L 141/1.
[28] Arts. 21-26 Charter of Fundamental Rights of the European Union, O.J. 2012, C 326/02 (EUCFR); Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16.
[29] Arts. 20 and 22 TFEU.
[30] Community Charter of the Fundamental Social Rights of Workers, O.J. 1989, C 120/52; Arts. 27 et seq. EUCFR.
[31] Art. 12 TFEU; Art. 38 EUCFR.
[32] Art. 191 TFEU; Art. 37 EUCFR.
[33] Art. 171 TFEU.
[34] Council Regulation (EC) 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2011, L 12/1 ("Brussels Regulation").

privacy and data protection.[36] Overarching all of these rights is the EU Charter of Fundamental Rights, which proclaims a number of them to be fundamental and ensures their respect within the scope of application of EU law.[37]

Brexit does not mean that all these rights will be lost. The UK Government proposes to put a Great Repeal Bill before Parliament which, contrary to its title, would keep most EU law on the statute book as a post-Brexit starting-point.[38] However, some rights *will* inevitably be lost, as the *Miller* litigation established, for example the right to vote for the European Parliament, and to stand as a candidate in elections to the European Parliament.[39] Other rights are contingent on how the future relationship is constructed. That relationship can never keep all rights resulting from full membership intact, or else Brexit would make no sense. Given the UK's dualist system, the rights that do survive will be rights under international law. They may be incorporated into domestic law, but will no longer benefit from the direct effect and primacy of EU law.[40]

Moreover, in light of the uncertainty inherent in the political nature of the withdrawal process, which is one of negotiation, many EU law rights are rendered vulnerable. This is the case for those rights which cannot be maintained in the absence of their recognition by all Member States, for example rights of free movement, including those of UK citizens to work and reside in other Member States. What could also be lost is a certain level of entrenchment of EU law rights, particularly but not exclusively those which flow from the EU Treaties and the Charter. That is a function of the high political threshold for obtaining any amendment, let alone termination of such rights: all Member States have to agree, in accordance with their constitutional requirements.[41] Even rights which merely result from EU secondary legislation may be more difficult to amend than rights conferred by domestic legislation.[42]

This entrenchment has a strong counter-majoritarian streak. For example, even if many EU citizens who have benefited from free movement may be regarded as part of globalization's elites, they do constitute a minority in fundamental rights terms. The Brexit referendum campaign, vote, and subsequent developments pose a threat to their rights in a variety of ways, which we consider in further detail in following sections. The impact of withdrawal on rights, particularly of those people living in the UK, but also of UK citizens in other Member States, commands an understanding of Article 50

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[35] Directive 2004/38/EC of the European Parliament and of the Council of 29 Apr. 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. 2004, L 229/35.

[36] Arts. 7-8 EUCFR; Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/31.

[37] Art. 51 EUCFR; Art. 6 TEU.

[38] Department for Exiting the European Union White Paper, "Legislating for the United Kingdom's Withdrawal from the European Union", Cm. 9446, Mar. 2017, <www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf> (last visited 3 Apr. 2017); see also Douglas-Scott, "The 'Great Repeal Bill': Constitutional chaos and constitutional crisis?", *UK Constitutional Law Blog*, 10 Oct. 2016, <www.ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/> (last visited 11 Dec. 2016); Simpson-Caird, "Legislating for Brexit: The Great Repeal Bill", *House of Commons Library Briefing Paper* No. 7793, 23 Feb. 2017, <www.researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf> (last visited 9 Mar. 2017).

[39] *Miller* Divisional Court, para 61; *Miller* Supreme Court, paras. 69-72.

[40] For a detailed analysis of the legal effects of withdrawal on different types of EU law rights in the UK, see Łazowski, "EU withdrawal: Good business for British business?", 21 EPL (2016), 121-126.

[41] Art. 48 TEU.

[42] McCrea, "Forward or back: The future of European integration and the impossibility of the status quo", 2017 ELJ, forthcoming.

that takes into account the role of rights in the EU legal order. The conferral of rights is a central feature of the EU's "constitution" and its construction over the years.[43] It has in turn been a key aspect of membership of the Union.

What does a constitutionalist reading entail then? The answer to that question follows in part below, when we explore some of the key questions and issues that Article 50 presents (section 4). In more general terms, however, we agree with Streinz that the Brexit process must first of all be a cooperative one, since the duty of cooperation enshrined in Article 4(3) TEU continues to bind the EU institutions, the UK, and the other Member States, for as long as Brexit is not complete.[44] The guiding principle in the negotiations for a withdrawal agreement must therefore be respect for EU constitutional law, and the rule of law and the protection of rights are paramount in this regard. A constitutionalist reading of Article 50 also requires respect for other EU values, such as democracy, which points to the role of parliaments in the process. It further needs to be consistent with the principles governing the division of competences between the EU and its Member States, including questions of legal basis. A constitutionalist reading also means that, when it comes to defining the EU's future relationship with the UK, as a non-Member State, the negotiations need to take account of the core objectives of EU external action. These include the promotion of the EU's values and interests; the protection of its citizens and of human rights; and free and fair trade.[45]

Our constitutionalist reading stands in contrast with a purely intergovernmental or internationalist reading. It is also one which is not focused on a purely textual interpretation of Article 50. That provision is an important constitutional guide to the withdrawal process. Its authors, however, could not have foreseen the range of issues and questions which a specific withdrawal (Brexit) may throw up. EU constitutional principles and provisions must fill the gaps, and may even modify what under a plain reading seems incontrovertible - for example the firmness of the two-year deadline for the withdrawal agreement (see section 4.3.3. below).

3. Lessons from the *travaux*

It is often said that Article 50 was never intended to be used,[46] and that it was hastily drafted. However, the records of the Convention on the Future of Europe show that it was seriously considered and debated. Since the Article 50 process is unprecedented, an adequate constitutional analysis must take account of the information regarding the content and goals of this provision that emerges from its drafting context. Furthermore, from a constitutional perspective, the intentions of the drafters are significant and are likely to play a role in the interpretation of Article 50 should it come before the ECJ. While in the past the Court made use of a teleological methodology that did not place emphasis on the drafters' actual intentions, as Lenaerts and Gutiérrez-Fons have explained, this was largely the case because the *travaux* of the founding Treaties were not available.[47] As a conscious effort was made to render the consultation and drafting process of the Constitution for Europe as open and transparent as possible, references to the *travaux* are now justified and

[43] Weiler, "The transformation of Europe", 100 *Yale Law Journal* (1991), esp. 2417-19. See also Stone Sweet, *The Judicial Construction of Europe* (OUP, 2004), p. 53.
[44] Streinz, "Cooperative Brexit: Giving back control over trade policy", (2017) I-CON, forthcoming.
[45] See Art. 3(5) TEU.
[46] O'Brien, "Article 50 was designed 'NEVER to be used' - says the man who wrote the EU divorce clause", *Sunday Express*, 23 July 2016, <www.express.co.uk/news/world/692065/Article-50-NEVER-to-be-used-Europe-Brexit-Italy-Prime-Minister> (last visited 10 Dec. 2016).
[47] Lenaerts and Gutiérrez-Fons, "To say what the law of the EU is: Methods of interpretation and the European Court of Justice", (2013) *EUI Working Paper AEL 2013/09*, 21.

constitutionally welcome.[48] Indeed, in light of the fact that many provisions of the Constitutional Treaty (including Art. 50) were copied into the Lisbon Treaty, the ECJ has become more receptive to interpretations based on preparatory documents and these are likely to play an important role in the future.[49]

While there is no explanatory memorandum or official guide to Article 50, the debate about its terms can be meaningfully reconstructed from the proposed amendments. They do not answer all interpretative questions, but at a minimum constitute evidence of some of the main concerns and political intentions that surrounded the provision's creation. The *travaux* highlight that issues concerning rights, legal bases, and institutional balance were considered, thus making the case for a constitutionalist reading stronger. They are also particularly useful in shedding light on the meaning of one of the most central questions in the Brexit debate: what constitutes a Member State's valid decision to withdraw from the Union in accordance with its own constitutional requirements and to what extent the Article 50 process is dependent on that decision.

The vagueness that characterizes Article 50 today was linked to the delegates' inability to reach agreement concerning the strictness of the withdrawal process and, hence, on a more precise wording for the provision itself. This can be attributed to the very different perspectives on the goals and nature of the Constitutional Treaty. The clause was inserted in light of the fact that the UK disagreed with the political aspiration of a closer union that the Constitution set in motion.[50] In turn, Member States that supported the constitutionalizing project at the time, such as Germany (represented in the negotiations by then Foreign Minister Joschka Fischer), actively opposed its insertion.[51] That opposition was shared by most of the other founding States, as well as by the EU institutions.[52] Notably, a group of representatives from the European Parliament proposed that, if the provision were maintained, further safeguards should be added to ensure that it does not privilege the withdrawing State.[53] They argued, for example, that the article should balance the ability to leave with a power for the Union to expel a Member State.[54] Their reasoning was that "such a parallel right of the Union to expel Members would also reduce the risk of political blackmailing through the means of exit threats".[55]

Other important concerns raised in the course of the drafting of the withdrawal clause were the maintenance of individual rights, the protection of Union values, and respect for international law.[56] One of the most interesting suggestions was the introduction of an Article 50bis, which would create an alternative form of membership of the Union for those members that wished to remain closely linked to the EU but did not share the political ambition of further unification, such as the UK. The proposal, made by Andrew Duff, Lamberto Dini, Paul Helminger, Rein Lang, and Lord Maclennan, would essentially have allowed for associate (rather than full) membership of the Union, entailing economic cooperation without an "ever closer union" in other fields.[57]

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[48] Ibid.
[49] Ibid., 24.
[50] 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", 39, <european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf> (last visited 19 Dec. 2016)
[51] Ibid., 18.
[52] See ibid; e.g. the Dutch, Portuguese, Luxembourgish, German, Greek, and Austrian representatives had sought its deletion.
[53] Ibid., 5.
[54] Ibid.
[55] Ibid., 7.
[56] Ibid., 24, 20 and 26.
[57] Ibid., 8.

A series of other amendments intended to render withdrawal more cumbersome were proposed by Dominique de Villepin, who represented France.[58] He had suggested that withdrawal should be made conditional on a form of "irreconcilable differences" between the withdrawing State and the EU following a Treaty change and that it should be required that a solution be sought within the Council first. He also asked that a limitation period be introduced before re-accession.[59] Although he only suggested a two-year period, this seems to have been inspired by Alain Lamassoure's vision of the Constitutional Treaty, which had a federalist character, strictly regulating withdrawal and including a 20-year limitation clause before re-accession.[60] Of the initial accounts of Article 50, though, most delegates seemed to favour Robert Badinter's proposal, which was more pragmatic.[61] Still, the more onerous clauses Badinter had proposed, such as the payment of damages to the Union by the withdrawing State for any losses incurred through the negotiations, were not inserted.[62]

It follows that Article 50(1) is the key to the withdrawal process: provided there is a valid constitutional decision to withdraw, a Member State can notify the European Council of its decision to do so under Article 50(2), and then negotiate its future relationship with the Union (Art. 50(3)). This is not to say that there are no limitations on what can be negotiated as part of a future relationship on the part of the EU, but EU law clearly recognizes this freedom for the withdrawing State. The withdrawal process envisaged in Article 50 is not subject to specific conditions. It is indeed possible for a State to leave without any agreement at all.

The fact that clauses for further limiting the provision had been proposed in the negotiations and enjoyed some support nonetheless merits further discussion. The text of Article 50 was in fact changed substantially from the first[63] to the final draft of the Constitution.[64] While the first draft did not contain any limitations on the withdrawing State's re-accession to the Union, two important provisos were added in the Constitution's final draft: first, that the two-year period for the negotiations could only be extended by unanimity (Art. 59(3)); and second, that a State wishing to withdraw would need to make a new application for accession (Art. 59(4)). This suggests that the broad discretion allowed in respect of the unilateral withdrawal decision in the provision's opening paragraph was intended to be counter-balanced, first, by conditions intended to prevent the withdrawing State holding the Union hostage in the negotiations and, second, by the insertion of disincentives for using Article 50. Both of these restrictions were intended to guard against the possibility of triggering Article 50 in a politically opportunistic fashion, or by "opponents of Europe in the Member States" - a key concern for those who opposed its insertion.[65]

These aspects of the genesis of Article 50 are relevant to the contrast between a constitutionalist and an intergovernmental or internationalist understanding of the withdrawal process. Prior to the entry into force of Article 50, majority opinion held that withdrawal from the EU was possible, but only through a consensual process

[58] Ibid., 4.
[59] Ibid.
[60] European Convention, "The European Union: Four possible models", contribution by Mr Lamassoure, member of the Convention, 3 Sept. 2002, CONV 235/02.
[61] Tatham, op. cit. *supra* note 2, 148.
[62] European Convention, "A European Constitution", contribution from M. Robert Badinter, alternate member of the Convention, 30 Sept. 2002, CONV 317/02.
[63] European Convention, "Document from the Praesidium: Preliminary draft Constitutional Treaty", 28 Oct. 2002, CONV 369/02.
[64] European Convention, "Draft Treaty establishing a Constitution for Europe", 18 Jul. 2003, CONV 850/03.
[65] List of proposed amendments, cited *supra* note 50 at 45.

under Article 54 of the Vienna Convention on the Law of Treaties (VCLT).[66] The differences between such an interpretation and a constitutionalist reading are arguably significant. For example, on the question whether the Article 50 process is the only permissible Brexit route, Article 54 VCLT supplies a negative answer, as it juxtaposes withdrawal by consent of all the parties with withdrawal in conformity with the provisions of the treaty in issue. Article 50, by contrast, created a unilateral right, particularly because of the two-year cut-off to the attempt to achieve a negotiated withdrawal. It must indeed be emphasized that withdrawal under Article 50 is an "unfettered" right for the withdrawing State:[67] it imposes neither an obligation to reach agreement nor, even, an obligation to negotiate. If the withdrawing State chose to leave the Union without doing either, it could do so, and would be considered withdrawn two years after notification.

The EU constitution therefore protects the right of withdrawal better than international law does. The constitutional concept is that exit from the EU polity must always be possible - and that it must allow sufficient freedom, without any necessary lock-ins of a future relationship.[68] We do not contest the merits of that concept.[69] At the same time, though, a "no-deal" withdrawal clearly offends all that EU constitutional law holds dear, in terms of rights protection, the rule of law, and the duty of cooperation. Thus, while it may not impose an obligation on the withdrawing State to negotiate, Article 50 does, as Hillion has put it, impose a "best endeavours obligation" on the EU to negotiate and reach an agreement.[70] The counterpart to the unilateral right of withdrawal must indeed be to read Article 50 as embodying an exceptionally strong preference for a negotiated, orderly, and well transitioned withdrawal, over the "no-deal" outcome, at least on the part of the EU. This is in line both with the Council's guidelines following the UK's notification[71] and, more broadly, with the way in which the EU generally handles constitutional crises. The history of those crises shows that, invariably, the EU goes to great lengths to find a negotiated settlement of some kind. Instances are the social rights chapter at Maastricht, the creation of the euro and of Schengen, justice and home affairs integration, and the EU Charter of Fundamental Rights: each accompanied with a UK opt-out (or a clarification in the case of the Charter). Other instances are the first Irish referendum on the Lisbon Treaty, or the Danish opt-outs. It is therefore very much part of the EU's constitutional ethos to resolve crises through negotiation, and we consider that the EU is under a constitutional obligation to do all it can to avoid a "no-deal" Brexit.[72]

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[66] See Tatham, op. cit. *supra* note 2.

[67] Hofmeister, "'Should I stay or should I go?' - A critical analysis of the right to withdraw from the EU", 16 ELJ (2010), 592.

[68] See Kostakopoulou, op. cit. *supra* note 10.

[69] For debate on the merits, see Klabbers, "Continent in crisis", 27 EJIL (2016), 553; Costa, "Interpreting Article 50: Exit and voice and… What about loyalty?", (2016) *EUI Working Papers* RSCAS 2016/71.

[70] Hillion, "Leaving the European Union, the Union way: A legal analysis of Article 50", (2016) *Swedish Institute for European Policy Studies*: *European Policy Analysis*, 2016-8, 6 <www.sieps.se/sites/default/files/Leaving%20the%20European%20Union,%20the%20Union%20way%20(2016-8epa).pdf> (last visited 29 Mar. 2017). See also Medhi, "Brèves observations sur la consecration constitutionnelle d'un droit de retrait volontaire" in Demaret, Govaere and Hanf (Eds.), *30 Years of European Legal Studies at the College of Europe/30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74–2003/04* (P.I.E.-Peter Lang, 2005).

[71] Council of the European Union, "Draft guidelines following the United Kingdom's notification under Article 50 TEU", 31 Mar. 2017, XT 21001/17, 5, para 6.

[72] This can be contrasted with the position detailed in the Guidelines, ibid., 3, para 1, emphasizing that there can be no "cherry picking" on the part of the UK.

4. The application of a constitutionalist reading of Article 50

So far, our discussion has shown that the avoidance of political opportunism and the safeguarding of due process under national constitutional law underpinned the drafting of Article 50, despite the vagueness of the provision's final text. These concerns and the possible implications of a constitutionally unregulated withdrawal need to be accommodated in the interpretation of this provision. In the remainder of our discussion, we analyse how the withdrawal process can in fact be carried out compatibly with a constitutionalist reading of Article 50.

4.1. The decision to withdraw belongs to the withdrawing State, "in accordance with its own constitutional requirements"

Article 50(1) provides that "any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements". Article 50(2) adds that the "Member State which decides to withdraw shall notify the European Council of its intention". As discussed earlier, in the negotiations on Article 50, the question of what should amount to a decision to withdraw was discussed extensively. Not only had there been proposals to qualify the possibility of taking that decision by making it dependent on Treaty change or compliance with EU values. It had also been suggested that the phrase "in accordance with its own constitutional requirements" should be removed altogether as it was not in the EU's interest, because it entrusted it with the oversight of national constitutional requirements.[73] The retention of this phrase is therefore significant. It suggests that respect for the constitutional requirements of a withdrawing State, whatever these may be, *must* underpin the withdrawal process, even if it is less expedient or costlier for the Union.

This is in line with the advocated constitutionalist interpretation of Article 50, in that it makes express reference to respect for domestic constitutional rules. Other international treaties, conventions and agreements that contain withdrawal clauses do not make such reference.[74] They are based on a classic international law paradigm, which treats States as unitary actors whose domestic constitutional arrangements are not a matter of international law. By contrast, the inclusion of a clause of respect for national constitutional identities in Article 4(2) TEU renders respect for national constitutional traditions part of the EU's own constitution.[75]

Obviously, the precise nature of the requirement under Article 50(1), as well as its enforceability, are still open to debate. While the matter was intensely litigated in the UK, up to the highest level, it would appear that the UK has not yet determined precisely what its constitutional requirements are except in a very general manner. In particular, the Supreme Court's ruling in *Miller* merely confirmed that, in light of the principle of parliamentary sovereignty, the Government cannot notify under Article 50 without Parliament's express authorization, which was the key question in the proceedings.[76] Complying with this ruling, the Government put the European Union (Notification of Withdrawal) Bill before Parliament. While the House of Lords proposed amendments to the Bill regarding the protection of acquired rights for EU

[73] List of proposed amendments, cited *supra* note 50 at 60.

[74] Helfer, "Terminating treaties" in *The Oxford Guide to Treaties* (OUP, 2012), pp. 641-3: Approximately 60% of treaties surveyed contain an exit clause, but their terms vary significantly depending on their subject, e.g. bilateral investment treaties often contain a "continuation of effects" clause; arms treaties sometimes require a justification of withdrawal etc.

[75] See, on this point, Von Bogdandy and Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", 48 CML Rev. (2011), 1417; Millet, "The respect for national constitutional identity in the European legal space: An approach to federalism as constitutionalism" in Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014).

[76] *Miller* Supreme Court, para 101.

citizens in the UK and the reservation of a second vote in Parliament after an agreement had been negotiated, the House of Commons overrode these amendments, and the legislation received the royal assent on 16 March 2017. A parliamentary sovereignty traditionalist might therefore argue that there is no further need to determine what the constitutional requirements of the UK are; the (European Union) Notification of Withdrawal Act is constitutionally unchallengeable because the will of parliament cannot be the subject of judicial review.[77] While we cannot examine UK constitutional law in detail in this paper, we have significant reservations on this point regarding aspects of parliamentary sovereignty that the courts in *Miller* did not examine.

More specifically, in *Miller*, the Supreme Court simply found that "the change in the law", which the implementation of the result of the referendum requires "must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation".[78] It refrained from looking further into this question, stating that "what form such legislation should take is entirely a matter for Parliament".[79] But does this mean that Parliament can, through a single act, give *carte blanche* to the Government to negotiate the UK's withdrawal? Or must Parliament be in a position to vote on the terms of the agreement itself, in a way which does not involve a mere rubber-stamping at a later stage in the process?

A powerful legal opinion by Sir David Edward and others (hereafter "Edward et al. Opinion") points to the contrary.[80] The Edward et al. Opinion argues that the UK's constitutional requirements include the need for Parliament to approve the withdrawal agreement, because it is that agreement which will ultimately determine the fate of current rights under EU law.[81] The mere parliamentary authorization of the Article 50 notification is insufficient, because it does not determine any actual changes to UK law after withdrawal. On the basis of *Miller*, therefore, the authors argue that a valid constitutional decision to withdraw in accordance with the principle of parliamentary sovereignty can ultimately be taken only at the conclusion of the Brexit negotiations.[82] Under the UK constitution, that decision is conditional on ultimate parliamentary approval, and it is only at the end of the Article 50 negotiations, when the terms of withdrawal are clear, that there can be a *final decision* on such withdrawal. Even if there is no withdrawal agreement, it is but Parliament which can decide, at the end of the two-year process, that the UK leaves the EU. That means that, under UK constitutional law, withdrawal is a process requiring a series of steps.

Under EU law, the question that the Edward et al. Opinion raises is whether their understanding of the UK's constitutional requirements can be reconciled with the terms of Article 50. On a bare reading of this provision, the decision to withdraw (para 1) and its notification, which starts the two-year period (para 2), are sequential. However, a constitutionalist interpretation requires deep and genuine respect for the withdrawing Member State's constitutional requirements. In the UK context, those requirements mean that the ultimate withdrawal decision can only be taken once the terms of the withdrawal agreement and of the future relations between the withdrawing State and the EU are fully known. Under Article 50(1), the EU should respect this. Furthermore, this conception has merit, in particular because it is only in the face of sufficient knowledge of the terms of withdrawal that a fully considered

[77] See *R (Jackson)* v. *Attorney General* [2005] UKHL 56.
[78] *Miller* Supreme Court, para 121.
[79] Ibid., para 122.
[80] Edward, Jacobs, Lever, Mountfield and Facenna, "In the matter of Article 50 of the Treaty on European Union", Opinion for Bindmans LLP, 10 Feb. 2017, <www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf> (last visited 3 Apr. 20170.
[81] Ibid., paras. 22-23.
[82] Ibid., paras. 26-28.

decision can be taken. The Brexit debate amply shows this in the sense that the sharpest critique of the referendum is that voters were unable to know what the terms of Brexit were going to be.[83] Moreover, there is some support for such a reading in the text of Article 50, since paragraph 2 refers to notification only of the "intention" to withdraw - thus suggesting, as we shall further argue below, that the decision previously taken under Article 50(1) may be reversed.

Accordingly, whereas this position may not hold true for constitutional orders in which parliamentary sovereignty is not a key constitutional requirement, or indeed where the decision to withdraw may reflect a settled position on a particular policy,[84] in the legal and political context of Brexit, the constitutionally sound approach is to look at withdrawal as a process, more than as a punctual decision. Indeed, as Gordon has noted, Brexit is driving profound changes in the constitutional requirements of the UK itself, as it is causing a sharp - and unusually rapid - codification of these requirements through litigation.[85] In line with the voluntary nature of withdrawal under Article 50(1), Article 50 should therefore be read overall in a way that accommodates the UK's uncodified, political constitution as a form of constitutional organization inherently susceptible to change through politics.[86]

4.2. Revocability of the intention to withdraw

Since the UK's decision to withdraw is not necessarily to be considered a fixed one, taken prior to notification, a further key question for the overall constitutionality of the withdrawal process arises: to what extent is a duly notified intention to withdraw revocable – or, to use Lord Pannick's now famous analogy in *Miller*, must the bullet, once fired, necessarily reach its target?[87] The courts in *Miller*[88] did not rule on this point, as the parties had accepted that the notification is irrevocable, and the outcome of the *Miller* litigation did not depend on it.[89] In any event, UK courts would not have been in a position to decide this question: it relates clearly to the interpretation of Article 50, a provision of Union law and, as such, would have required a reference to the ECJ. The question of revocability therefore remains alive and of crucial legal importance.

The wording of Article 50 does not offer much help when it comes to revocability. After stating that a Member State "may decide to withdraw from the Union in accordance with its own constitutional requirements", Article 50 stipulates that the Member State in question "shall notify the European Council of its intention". Thus, Article 50 clearly distinguishes the decision to withdraw (para 1) from its notification (para 2). While, as Jean-Claude Piris has put it, "intentions" can change,[90] textually Article 50(2) does not concern the notification of a mere political intention, but of an intention based on a *decision* to withdraw taken in accordance with a Member State's

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[83] Cf. Weale, "The democratic duty to oppose Brexit", lecture delivered at UCL on 8 Dec. 2016, <www.ucl.ac.uk/political-science/news/articles/121216> (last visited 13 Mar. 2017).

[84] For instance, this was arguably the case in relation to Greenland, where the debate about membership specifically concerned the EU fisheries policy: see further Tatham, op. cit. *supra* note 2.

[85] Gordon, "Brexit: A challenge for the UK constitution, of the UK constitution?", 12 EuConst (2016), 411.

[86] Ibid., 436-437.

[87] Transcript of *Miller* Divisional Court hearing, 19, <www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf> (last visited 1 Dec. 2016).

[88] The Supreme Court affirmed the Divisional Courts finding on this, at para 26.

[89] Eeckhout, "Miller and the Art 50 notification: Revocability is irrelevant", *London-Brussels One-Way or Return: A cross-channel Europe blog by Piet Eeckout*, 14 Nov. 2016, <www.londonbrussels.wordpress.com/2016/11/14/miller-and-the-art-50-notification-revocability-is-irrelevant/> (last visited 11 Dec. 2016).

[90] Piris, "Article 50 is not for ever and the UK could change its mind", *Financial Times*, 1 Sept. 2016, <www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926> (last visited 11 Dec. 2016).

constitutional requirements. In turn, an intention of this kind has a clear legal meaning and constitutional implications for the EU, as laid down in Article 50(3), namely the commencement of a two-year process for exit. In the run-up to *Miller* (and, as noted above, in *Miller* itself), the assumption was that notification would set in motion an irrevocable state of affairs - a two-year clock that could no longer be stopped by UK action alone.[91]

In line with the discussion offered by the Edward et al. Opinion, though, the analysis of whether and when a notification of withdrawal can be revoked must be deepened. We fully agree with Paul Craig's point that if a Member State *bona fide* changes its mind about leaving, it would be absurd for the EU - and indeed for other Member States - to force it to withdraw based on the assumed irrevocability of Article 50.[92] We also agree with Sarmiento that it would "make no sense" for other EU Member States not to accept such a change of heart, in light of the political and economic repercussions that a withdrawal would cause to the EU overall.[93] Article 50 can certainly be stopped if everyone believes that this would be in their common interest. Yet, the only question that bears constitutional and not just political relevance is whether there is a possibility for a State *unilaterally* to revoke its notification, even if other Member States and the Union institutions would prefer to go ahead with withdrawal.

In our view, the distinction between the decision to withdraw and the notification of the intention to do so is again critical. A Member State is entitled to decide, in accordance with its constitutional requirements, to withdraw from the EU. If that Member State re-considered that decision, within the two-year timeframe, there would no longer be a domestic constitutional basis for withdrawal.[94] The reference to constitutional requirements in Article 50(1) suggests that, in order to revoke the notification, the withdrawing State would simply need to show that the decision to withdraw is no longer compatible with its constitutional requirements in that a new decision has been taken.[95]

As Phillipson has noted, to draw any clear-cut distinction between Article 50(1) and Article 50(2) would be deeply formalistic.[96] It is not possible to ensure genuine respect for the constitutional requirements of the withdrawing State, particularly in the UK context, if these are not respected throughout the withdrawal process. Depending on what the constitutional requirements are, that could mean the rejection of the decision to withdraw by Parliament only, or by Parliament after a new referendum.[97] It must be emphasized, though, that in order for a new decision not to withdraw to reverse the withdrawal process, that decision would need to be about withdrawal altogether, and not just about the rejection of a specific agreement.

There is of course a need to avoid abuse of Article 50. The structure of the provision tilts the scales in favour of the EU at the negotiation stage, at least to some extent. But it could not be otherwise. In light of the autonomous power to decide to withdraw in accordance with its own constitutional requirements that Article 50

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[91] See, most notably, King, Hickman and Barber, "Pulling the Article 50 'trigger': Parliament's indispensable role", *UK Constitutional Law Blog*, 27 June 2016, <www.ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> (last visited 29 Mar. 2017).

[92] Craig, "Brexit: A drama in six acts", 41 EL Rev. (2016), 464.

[93] Sarmiento, "Miller, Brexit and the (maybe not to so evil) Court of Justice", *Verfassungsblog*, 8 Nov. 2016, <www.verfassungsblog.de/miller-brexit-and-the-maybe-not-to-so-evil-court-of-justice/> (last visited 11 Dec. 2016).

[94] See Craig, op. cit. *supra* note 92 at 464.

[95] Ibid.

[96] Phillipson, "A dive into deep constitutional waters: Article 50, the prerogative and parliament", 79 MLR (2016), 1069.

[97] On the latter point see Gordon, op. cit. *supra* note 85 at 429.

affords the withdrawing State, it is logical that the provision then balances that discretion with stricter conditions upon notification. The scope for abuse is clear: a State wishing to withdraw could notify, engage in a two-year negotiation, withdraw that notification, and then re-notify and repeat the process. That would have the effect of holding the Union and other Member States hostage to an extended negotiation without engaging the unanimity requirement set out in Article 50(3). And it is precisely that possibility that, in light of the *travaux*, the drafters of the provision had sought to prevent.

However, the possibility of abuse would be prevented by the requirement that withdrawal of the notification should be in good faith. At this stage, the extent to which the withdrawing State would be required to prove that it was acting based on a genuine change of heart is difficult to predict. In light of the fact that EU law has a distinct, but fairly limited doctrine of abuse of law,[98] and has never encountered that question in similar circumstances, the matter could be litigated before the ECJ. Still, if a Member State could not withdraw its notification after changing its mind, that would amount to expulsion from the Union - a possibility that is considered and rejected in the *travaux* of the provision.[99] It would also be contrary to the principles of good faith, loyal cooperation,[100] and the Union's commitment to respect the Member States' constitutional identities[101] - all of which are constitutional principles requiring respect by EU institutions.

Yet, in the absence of abuse, it is difficult to detect constitutionally sound reasons for rejecting revocability. It is true that revocation would be intrusive, both at a political level for the EU and the other Member States, and at a personal and business level for persons and companies making arrangements for withdrawal. But so is a withdrawal which goes ahead. There can hardly be a legitimate expectation on something as fundamental as withdrawal from the EU.

A last point concerns the comparison with international law. Even if we reject an internationalist reading of Article 50, that comparison is instructive. Article 68 VCLT accepts that a withdrawal notification can be revoked "at any time before it takes effect". Earlier, we established that Article 50 differs from the Vienna Convention in that it confirms a unilateral right to withdrawal. The reason is a constitutionalist one: exit from the EU polity must always be possible. It follows that Article 50 cannot be construed as prohibiting revocability where international law does not: that would completely contradict the respect for a domestic constitutional decision which lies at the heart of the rationale and structure of this provision.

Thus, overall, provided there is a new decision not to withdraw taken in good faith, the Article 50 clock can be stopped. After all, "the goal of the Union is integration, not disintegration".[102]

4.3. The withdrawal agreement

4.3.1. Legal basis

Article 50(2) TEU lays down the procedure to be followed for the negotiation of an agreement, between the EU and the withdrawing State, "setting out the arrangements

[98] See Saydé, "Defining the concept of abuse of Union law", 33 YEL (2014), 138 and, more generally, Saydé, *Abuse of EU Law and Regulation of the Internal Market* (Hart, 2014). The concept of abuse in EU law so far has mainly concerned issues such as the abuse of welfare protections (see e.g. Case C-333/13, *Dano,* EU:C:2014:2358) and questions of a regulatory "race to the bottom" due to convenient choice of law - a question that became particularly clear in Case C-438/05, *ITWF* v. *Viking Line*, EU:C:2007:772.

[99] List of proposed amendments, cited *supra* note 50 at 5.

[100] Art. 4(3) TEU.

[101] Ibid., Art. 4(2).

[102] Duff, op. cit. *supra* note 24 at 9.

for its withdrawal, taking account of the framework for its future relationship with the Union". A bare reading of the provision reveals some noteworthy points. The withdrawal agreement is subject to a qualified-majority vote in the Council and needs the consent of the European Parliament. However, there is no individual role for the Member States, and the withdrawal agreement does not need their approval (it is not a "mixed" agreement). Further, the "arrangements for … withdrawal" are wholly undefined, except for the proviso that account should be taken of the framework for the future relationship. This is unspecific language open to a range of different interpretations.

At the time of writing, the prevailing view in the EU appears to be that the withdrawal agreement can or will only deal with the actual terms of withdrawal, and that the future relationship will need to be negotiated post-Brexit when the UK will have become a third country.[103] There is also speculation about a transitional period, the terms of which may or may not be part of the withdrawal agreement. As regards any future agreement, it is frequently pointed out that such an agreement is likely to be mixed, with all the attendant difficulties of securing approval by all Member States in accordance with their constitutional requirements.[104]

However, a constitutionalist reading of Article 50 requires that these various assumptions be subjected to a deeper analysis. There is a whole body of law on EU competence, internal and external; on the reasons for mixed agreements; and on the appropriate legal basis for the conclusion of an international agreement.[105] As no decisions have been taken yet on how withdrawal and future relations will be structured, it is too early to offer any in-depth analysis. Nevertheless, the existing body of law allows for some initial comments on the proposed course of action.

A first question is the extent to which the withdrawal agreement could regulate the future relationship between the UK and the EU. The wording of Article 50(2) instructs the negotiators to take account of the framework for the future relationship. These are enigmatic terms, in that they neither spell out what is meant by this "framework" nor whether that framework needs to be part of a separate agreement. Textually, all that can be said is that the withdrawal agreement should include references to the future relationship. However, it is less obvious to read Article 50 as conferring competence on the EU to regulate, in the withdrawal agreement, both the terms of withdrawal *and* the full organization of the future relationship. That would appear to involve substantially more than "setting out the arrangements for … withdrawal".

It must nonetheless be noted that agreements concluded by the EU may have more than one provision in the EU Treaties as their legal basis. In terms of EU legal principle, we do not see any significant barriers to a withdrawal agreement which also regulates the future relationship on a legal basis different from Article 50 TEU. If that future relationship were confined to trade matters, Article 207 TFEU would constitute the relevant provision. If, however, the future relationship includes a range of EU policy areas in which the UK may wish to continue to cooperate with the EU, as could perhaps be expected despite all the talk about a "hard Brexit", an association pursuant to Article 217 TFEU ought to be considered. The latter provision is as vague as Article 50, in that an association is barely defined: it involves "reciprocal rights and obligations, common action and special procedure". The ECJ has determined that an association agreement empowers the EU to guarantee commitments towards non-

[103] Draft guidelines, cited *supra* note 71, para 4. For a useful summary of this view, see Flavier and Platon, "Brexit: A tale of two agreements?", *European Law Blog*, 30 Aug. 2016, <www.europeanlawblog.eu/?p=3324> (last visited 11 Dec. 2016).

[104] See e.g. Maresceau, "A typology of mixed bilateral agreements" in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart, 2010), p. 17.

[105] See e.g. Eeckhout, *EU External Relations Law*, 2nd ed. (OUP, 2011), chapters 2-5.

Member States in all the fields covered by the Treaties.[106] The competence to conclude association agreements is, in substantive terms, the broadest external competence for which the EU Treaties provide. The judgment in *Demirel* is telling in this respect. It accepted that the association agreement with Turkey could provide for some measure of free movement of workers, even if at the time no express competences in the field of immigration from third countries had been conferred upon the EEC. An association agreement with the UK could, likewise, guarantee commitments in all the fields covered by the Treaties.[107]

An often heard argument against the combination of Article 50 (the withdrawal agreement) with an association or trade agreement regulating the future relationship consists of pointing out that the latter type of agreement can only be negotiated and concluded with a "third country" (see also Art. 218 TFEU).[108] The UK, by contrast, remains a Member State in the course of the withdrawal process, and the withdrawal agreement could therefore be seen as a *sui generis* agreement: with a Member State, but regulating its exit from the EU. Article 50, as the legal basis for such a *sui generis* agreement, could then not be combined with a legal basis regulating the future relationship with the UK as a third country.

However, such a distinction does not survive closer scrutiny. Article 50(3) conceives of the entry into force of the withdrawal agreement as coinciding with actual Brexit, i.e. with the UK being released from its Treaty obligations, losing its Member State status, and becoming a third country. The agreement therefore regulates the future relationship just as much as any other agreement would. Just think of one of the core features of the agreement in current political discourse: the protection of the rights of EU citizens in the UK, and UK citizens in the EU (the "acquired rights" issue). This protection will be part of the future relationship with the UK, just as much as any (hypothetical) decision to maintain tariff-free trade. Of course the withdrawal agreement will be negotiated when the UK continues to be a Member State, but what matters in legal terms (including questions of competence) is the nature of the international commitments undertaken at the point of conclusion and entry into force. The withdrawal agreement is, of necessity, predicated on the UK becoming a third country, and in that respect indistinguishable from a trade or association agreement with the UK based on Article 207 or 217 TFEU respectively, and negotiated in accordance with the provisions of Article 218 TFEU.

A further point to note is that, even if most association agreements are mixed agreements, it is doubtful whether the determination of the future relationship requires mixity. The justification for mixed agreements reflects the cardinal EU constitutional principle of limited and conferred powers. As clearly stated in Article 5(2) TEU, “competences not conferred upon the Union in the Treaties remain with the Member States”. Withdrawal, however, is a special case. In all matters covered by the Treaties, the EU Member States have conferred the power to regulate their relationship with the UK on the EU, simply by virtue of the UK's current membership. Take immigration as an example. The EU's competences to regulate immigration of third-country nationals are clearly defined, leaving most of the substance of immigration policies to national competence.[109] However, as far as UK citizens are concerned, there is at present no such national competence, because UK citizens are EU citizens benefitting from free movement.

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[106] Case C-12/86, *Demirel*, EU:C:1987:400, para 9 (at the time the Court of course referred to the EEC and to the EEC Treaty, but it can be assumed that today an association may cover policies in both the TEU and the TFEU).
[107] See also Case C-81/13, *UK* v. *Council* EU:C:2014:2449.
[108] See the Draft guidelines, cited *supra* note 71 at 4, para 4.
[109] Art. 79 TFEU.

The UK remains a Member State throughout the withdrawal process. If a full agreement on the future relationship were to be reached in the course of that process, it is difficult to see any strict legal reasons for mixity. The EU's implied powers doctrine may be relevant here.[110] Such powers normally flow from EU legislation, but in the pending proceedings on the EU-Singapore agreement the Commission advocates an extension to matters regulated in the Treaties themselves.[111] The argument is that the regulation of portfolio investment, whilst not within the scope of the concept of foreign direct investment in Article 207(1) TFEU, is within the EU's exclusive competence because such investment is covered by the TFEU provisions on free movement of capital. It remains to be seen whether this argument will be accepted, but at least it shows that the extension of an implied-powers type reasoning to the Treaties is not unimaginable.[112] Furthermore, there is of course also plenty of EU legislation - nearly the whole of the *acquis communautaire* - which risks being "affected" or whose scope will be altered by Brexit. This would normally trigger exclusive EU competence. It is true that the potential effect on the *acquis* is not a substantive one, but is more of a territorial kind. In that sense one cannot say that the existing case law on exclusive implied powers offers a clear precedent. Nevertheless, there is an obvious analogy, in that EU law has "occupied the field" of regulating the relationship between the UK and other EU Member States across the *acquis*.

4.3.2. Protection of acquired rights

As there is a basis in the Treaties for a Member State to exit the Union and the maintenance of existing rights has not been made a precondition for exit, it might be assumed that, in principle, withdrawal can entail the loss of any rights associated with membership. Indeed, Article 50 does not specifically provide for guarantees of the status of EU citizens in the withdrawing State and *vice versa*. Furthermore, as noted earlier, at the Constitutional Convention a number of delegates had proposed amendments that safeguarded existing rights, which were not adopted.[113] However, there is a strong constitutional case for making the maintenance of acquired rights an essential element of an agreement.[114] A meaningful constitutional interpretation of Article 50 indeed requires in-depth consideration of respect for individual rights as one of the most settled features of the EU constitutional order to date.[115] That is especially the case insofar as agreement on the status of acquired rights was not reached during the *travaux*.[116]

Space does not permit exhaustive exploration of the vast array of issues that arise on the topic of acquired rights. We will therefore merely offer some limited

[110] See, for the latest account of implied powers, Opinion 3/15, *Marrakesh Treaty,* EU:C:2017:114.
[111] Opinion of A.G. Sharpston in Opinion 2/15, *FTA with Singapore*, EU:C:2016:992.
[112] See also Case C-431/11, *UK* v. *Council* EU:C:2013:589; and Case C-656/11, *UK* v. *Council* EU:C:2014:97 (confirming Art. 48 TFEU as the legal basis for new provisions on social security in the context of, respectively, the EEA and the EU-Switzerland agreement on free movement of persons).
[113] E.g. see Danish amendment, List of proposed amendments, cited *supra* note 50 at 20.
[114] See also the Draft guidelines, cited *supra* note 71.
[115] Opinion 2/13, EU:C:2014:2454; Joined Cases C-402 & 415/05 P, *Kadi and Al Barakaat*.
[116] We note that existing rights under EU law do not pertain merely to the doctrine of acquired rights under international law and, particularly Art. 70(1)b of the VCLT, which has a narrower reach. The latter doctrine would likely have a limited impact on the conduct of the negotiations: see Lalive, "The doctrine of acquired rights" in *Rights and Duties of Private Investors Abroad* (Matthew Bender, 1965), pp. 145 et seq.; Douglas-Scott, "What happens to 'acquired rights' in the event of a Brexit?", *UK Constitutional Law Blog*, 16 May 2016, <www.ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexit/> (last visited 19 Dec. 2016); Piris, "Should the UK withdraw from the EU: Legal aspects and possible options", *Foundation Robert Schuman Policy Paper* No. 355 (2015), 10, <www.robert-schuman.eu/en/doc/questions-d-europe/qe-355-en.pdf> (last visited 19 Dec. 2016). Instead, our concern is with the fate of the obligations that arise from EU law itself.

observations on the constitutional obligations of the UK and the EU, regarding: the protection of the rights to private and family life of UK nationals in the EU and EU citizens in the UK in the withdrawal agreement (4.3.2.1.); the protection against uncertainty during the negotiations for UK nationals in the EU and EU citizens in the UK (4.3.2.2.); the protection of other acquired rights in the withdrawal agreement, for those who have exercised them before the UK's withdrawal (4.3.2.3.); and, finally, the maintenance of rights associated with EU citizenship for UK nationals (4.3.2.4.). We cannot fully address a series of sub-issues that may be further explored and which we can only list here in outline, such as the precise degree to which human rights will remain protected in the UK after withdrawal under UK law; and the rights of EU citizens moving to the UK and UK nationals moving to the EU at different stages of the withdrawal process. We must also highlight that, in our discussion, we refer jointly to Strasbourg case law and the case law of the ECJ, premised on the settled position of full respect for the European Convention of Human Rights in EU law and without delving further into debates about the autonomy of EU law that may be raised in this context.[117]

4.3.2.1. Protection of the rights to private and family life in the withdrawal agreement

Regression in the level of protection of human rights is a key issue in the withdrawal process and must be addressed in the agreement itself. Insofar as the UK is concerned, it must be pointed out that the ECHR protects the right to reside and the right to family life of those who have made meaningful ties in the host Member State[118] and construes these concepts broadly.[119] It is clear that Article 8 ECHR will be engaged should the UK wish to expel EU citizens who will be largely covered by existing ECtHR case law.[120] At a minimum, the ECHR level of protection of the rights to private and family life must be maintained in the agreement. Any agreement that does not meet this level will be constitutionally challengeable in both the UK and the EU. Indeed, it is clear that precisely the same considerations apply to UK nationals currently residing in other EU Member States. All of the Member States remain signatories of the Convention and respect for the ECHR has underpinned the ECJ's case law from its early years.[121] It is therefore incontrovertible that, from the EU perspective, any negotiation or agreement that does not guarantee existing ECHR rights will be inherently problematic.

In fact, the main interpretative issues in this field do not concern this minimum. Rather, they pertain to the extent to which the rights to private and family life must be guaranteed in the sense in which they are understood in the EU at present. It is clear

[117] For a discussion of this point see further Eeckhout, "Opinion 2/13 on EU accession to the ECHR and judicial dialogue: Autonomy or autarky?", 38 *Fordham International Law Review* (2015), 955; Eeckhout, "Human rights and the autonomy of EU law: Pluralism or integration?", 66 *Current Legal Problems* (2013), 169.

[118] Ibid. See ECtHR, *Al-Nashif* v. *Bulgaria*, Appl. No. 50963/99, judgment of 20 June 2002, para 114; ECtHR, *Samsonnikov* v. *Estonia*, Appl. No. 52178/10, judgment of 3 July 2012; ECtHR, *Slivenko* v. *Latvia*, Appl. No. 48321/99, judgment of 9 Oct. 2003; ECtHR, *Anam* v. *United Kingdom*, Appl. No. 21783/08, judgment of 7 June 2011; ECtHR, *AA* v. *United Kingdom,* Appl. No. 8000/08, judgment of 20 Sept. 2011.

[119] ECtHR, *Niemietz* v. *Germany*, Appl. No. 13710/88, judgment of 16 Dec. 1992, para 29; ECtHR, *Onur* v. *United Kingdom,* Appl. No. 27319/07, judgment of 17 Feb. 2008, para 46; ECtHR, *Samsonnikov* v. *Estonia*, para 81.

[120] Human Rights Committee, "The human rights implications of Brexit: Written evidence from Dr Kirsty Hughes", HRB0009, <www.data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/written/38477.html#_ftn12> (last visited 11 Dec. 2016), paras. 5-25.

[121] See Case C-11/70, *Internationale Handelsgesellschaft*, EU:C:1970:114, para 4; see also Case C-4/73, *Nold* v. *Commission*, EU:C:1974:51, para 13; Case C-44/79, *Hauter* v. *Land Rheinland-Pfalz*, EU:C:1979:290, paras. 15-17.

that, for EU institutions and remaining Member States, the relevant interpretation of these rights will be not just that of the ECHR, but that of the Treaties and the Charter - that is the basis on which they will be held to account in the first instance.[122] Pursuant to Article 52 EUCFR, the level of protection offered by the Charter must meet the ECHR standard, but it can also go beyond it. EU law is indeed more extensive than the ECHR in its protection of the rights of citizens so that the process of the negotiations and any potential agreement are likely to require a heightened degree of constitutional scrutiny on the EU side.

More specifically, the right to private and family life requires observance within EU law under Article 7 of the Charter as well as Article 19(1) thereof, which protects against collective expulsions. Furthermore, when considered together, Article 7 EUCFR and Articles 20-21 TFEU in conjunction with secondary legislation,[123] create stronger rights to family reunification for EU citizens and their family members to enter the UK than the ECHR has so far accommodated.[124] In particular, EU law has offered EU citizens the opportunity to reunite with their core family as well as other dependent family members both from within the EU and from third countries, provided they meet certain conditions, and has offered them the right of non-discrimination on grounds of nationality upon valid entry.[125] This is what the debate about the maintenance of private and family life should therefore focus on.

EU institutions and existing Member States will not be in a position to negotiate any reduction in the level of protection of private and family life for UK nationals living in the EU. While UK nationals will not necessarily continue to benefit from the Citizens' Directive if they are no longer EU citizens, they will nonetheless continue to benefit from the right to private and family life protected in Article 7 EUCFR and the Court's existing case law,[126] and not merely the case law of the ECtHR. Furthermore, UK nationals currently living in other Member States would have once been EU citizens, who have built their lives by relying on the Union's most basic freedom to move to and reside in another Member State. It would be deeply problematic if the impact on their lives of a sudden change of status were excluded from the assessment of the meaning of Article 7 EUCFR in the EU context. Even if it were not a breach of international human rights law for the EU not to recognize that the private and family life of UK nationals residing in the EU comprises rights to non-discrimination on grounds of nationality and family reunification (and, as we will go on to explain, in our assessment it would also amount to a breach of Art. 8 ECHR), it would still go against the Union's stated respect for values such as the dignity of the person and the rule of law, as listed in Article 2 TEU and further expressed in the Charter's Preamble and Article 1 thereof.

But it should also not be assumed that the ECHR standard of protection of the rights to private and family life will remain static or that it will not take into account the fact that the relationship between the UK and the EU so far has comprised family reunification and full protection against discrimination in seeking and finding work, and engaging in other activities that make private and family life meaningful, or

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[122] Case C-501/10, *Kamberaj*, EU:C:2012:233, paras. 62-63 and 80.

[123] Directive 2004/38/EC, cited *supra* note 35, Arts. 2-3.

[124] Hughes, cited *supra* note 120, paras. 27-31. See ECtHR, *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, Appl. Nos. 9214/80, 9473/81 and 9474/81, judgment of 28 May 1985; ECtHR, *Gül* v. *Switzerland*, Appl. No. 23218/94, judgment of 19 Feb.1996; ECtHR, *Ahmut* v. *Netherlands*, Appl. No. 21702/93, judgment of 28 Nov. 1996; ECtHR, *Sen* v. *Netherlands,* Appl. No. 31465/96, judgment of 21 Dec. 2001; ECtHR, *Senchishak* v. *Finland,* Appl. No. 5049/12, judgment of 18 Nov. 2014; ECtHR, *AS* v. *Switzerland*, Appl. No. 39350/13, judgment of 30 June 2015.

[125] Directive 2004/38/EC, cited *supra* note 35, Arts. 2, 3 and 7.

[126] See, by analogy Case C-413/99, *Baumbast*, EU:C:2002:493; Case C-200/02, *Zhu and Chen*, EU:C:2004:639; Case C-127/08, *Metock and Others*, EU:C:2008:449; Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124.

indeed, possible. As the ECtHR put the matter in *Chapman*, "if the home was lawfully established, this factor would self-evidently be something which would weigh against the legitimacy of requiring the individual to move".[127] This suggests, firstly, that the principle of non-regression of rights lawfully acquired will be significant for the ECtHR in its assessment of Article 8 ECHR, should it be raised in this connection. Secondly, in our view, a broad construction of that principle is likely to be employed. The Convention is a "living instrument" that develops in line with the context and needs of the time and place at which it is applied[128] and the ECtHR has over time become more receptive to broader conceptions of private life, and now considers work a central aspect thereof.[129] It has also referred to the Charter and EU case law to support decisions that heighten the standard in its interpretation of ECHR articles, including Article 8.[130] In our view, therefore, it would be very unlikely that expulsions, but indeed any reduction in the existing level of protection of the right to private and family life of EU citizens in the UK and UK nationals in the EU, would be allowed under the ECHR. Both the EU and the UK are under a constitutional obligation to ensure the maintenance of a high level of respect for the rights to private and family life, and to construe these rights broadly, after withdrawal.

But to what extent is that state of affairs to be determined in a withdrawal agreement? Our analysis implies that, absent any agreement, both the UK and the EU would be under separate obligations to respect the rights to private and family life to a comparable degree under, on the one hand the ECHR, and on the other hand the ECHR, EUCFR, and general principles of EU law. This observation nonetheless also highlights the constitutional duties of the Union in concluding a withdrawal agreement with the withdrawing State. The EU is under a clear obligation to conclude an agreement with the UK that protects fundamental rights. Two of the Union's objectives are to "uphold and promote" its values in its external relations[131] and to ensure the "well-being of its peoples".[132] Furthermore, Article 3(5) TEU provides that human rights must be ensured in the Union's relations with third countries. Guaranteeing the protection of the rights to private and family life is, therefore, crucial to the constitutionality of the agreement. Put simply, any agreement the EU negotiates must be based on continued respect by the UK for the rights to private and family life of EU citizens and, of course, an *unconditional guarantee,* in turn, of these rights for UK nationals. The introduction of any clauses seeking to limit these rights would not be concomitant with the Union's commitment to human rights. It is therefore in the interests of the parties to conclude an agreement that makes specific provision for - and is premised upon respect of - these rights as they are understood today under a commonly acceptable external standard (the ECHR).

4.3.2.2. Protection against uncertainty during the negotiations and the use of human beings as "bargaining chips"

The argument concerning the rights to private and family life can be taken further. As Mantouvalou has noted, the current position of EU citizens in the UK (and, likewise, of UK nationals in the EU) raises questions of compatibility with the ECHR.[133] The

[127] ECtHR, *Chapman* v. *the United Kingdom,* Appl. No. 27238/95, judgment of 18 Jan. 2001, para 102.
[128] ECtHR, *Tyrer* v. *the United Kingdom*, Appl. No. 5856/72, judgment of 25 Apr. 1978, para 31.
[129] ECtHR, *Sidabras and Dziautas* v. *Lithuania,* Appl. No. 55480/00, judgment of 27 July 2004; see further Mantouvalou, "Work and private life: *Sidabras and Dziautas* v. *Lithuania*" 30 EL Rev. (2005), 573; Mantouvalou, op. cit. *supra* note 18.
[130] ECtHR, *Goodwin* v. *the United Kingdom*, Appl. No. 28957/95, 27 Mar. 1996, para 100. See also, for a more detailed analysis, Dickson, "The EU Charter of Fundamental Rights in the case law of the European Court of Human Rights" (2015) *European Human Rights Law Review*, 40.
[131] Art. 3(5) TEU.
[132] Ibid., Art. 3(1).
[133] Mantouvalou, op. cit. *supra* note 18.

uncertainty and instability that these two groups face in the aftermath of the Brexit vote and the use of human beings as "bargaining chips" in the negotiations, which follows from the lack of specific guarantees about their status on both sides, is prejudicial to the rights to private and family life and can amount to a breach of Article 8 ECHR in conjunction with Article 14 ECHR.[134] These rights also have a life in EU constitutional law under Articles 7 and 21 of the Charter. Indeed, the case for protecting against the perseverance of uncertainty for both EU citizens in the UK and UK nationals in other EU Member States is even stronger under the Charter: Articles 1 and 3 thereof protect the right to human dignity and the integrity of the person, respectively. In a situation falling within the scope of EU law, which Brexit inevitably is, those rights require respect by all existing Member States (including the UK) and by the EU institutions.[135]

In its report on safeguarding acquired rights during Brexit, the House of Lords urged the Government to proceed with a unilateral guarantee of the rights of EU citizens in the UK.[136] Similar statements have been occasionally made by EU officials.[137] However, so far, neither side has adopted an official position on the matter, thus causing the two affected groups substantial uncertainty for almost a year following the referendum, as well as the possibility of at least two years of further uncertainty. On the one hand, the UK has not, in its letter of notification of withdrawal, made any unilateral guarantees regarding the status of EU citizens other than merely making known an intention to "strike early agreement" about these rights. On the other hand, in its response to the UK's notification, the European Council as well as its President, in his separate remarks, stated that the EU would strive to "minimize the uncertainty" created by the UK's notification for EU citizens, but also did not provide any formal guarantees of the status of UK nationals currently residing in the EU.[138] While the Council's Draft Guidelines on negotiating Brexit are to be welcomed insofar as they clarify that "enforceable guarantees" on the status of citizens who have moved will be a priority for the negotiations, they are clearly premised on the idea that these guarantees must be "reciprocal".[139] Political discourse on both sides is therefore still keeping the status of the two affected migrant groups on the negotiating table.

Not only does the position of both parties on the subject of EU citizens in the UK and UK nationals in the EU place these groups in a position of uncertainty. The assessment of the human rights implications of the negotiations and agreement cannot be made in a vacuum. It is clear that, in the UK context in particular, the withdrawal cannot be disassociated from rhetoric that, as Paul Craig has put it, "bordered on the

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[134] Ibid.; Lock and Patel, "Brexit: Constitutional and legal requirements", *UCL Public Policy Research Insights*, July 2016, <www.ucl.ac.uk/public-policy/for-policy-professionals/research-insights/brexit-constitutional-and-legal-requirements.pdf> (last visited 11 Dec. 2016). See also House of Lord European Union Committee, *Brexit: Acquired rights*, 10th Report of Session 2016-17, HL Paper 82, paras. 88-92, <www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/82/82.pdf> (last visited 15 Dec. 2016).

[135] Case C-617/10, *Åkerberg Fransson*, EU:C:2013:105, para 19.

[136] House of Lord European Union Committee, *Brexit: Acquired rights*, cited *supra* note 134, paras. 147-148.

[137] See e.g. Ross and Rankin, "European Parliament Brexit chief: 'Let Britons keep freedom of movement'", *The Guardian*, 10 Mar. 2017, <www.theguardian.com/politics/2017/mar/10/let-britons-keep-freedom-of-movement-says-eus-brexit-negotiator> (last visited 11 Mar. 2017).

[138] European Council Press Releases and Statements, "Statement by the European Council (Art. 50) on the UK notification", cited *supra* note 1; European Council Press Releases and Statements, "Remarks by President Donald Tusk following the UK notification", No. 160/17, 29 Mar. 2017, <www.consilium.europa.eu/en/press/press-releases/2017/03/29-tusk-remarks-uk-notification/> (last visited 29 Mar. 2017).

[139] Draft guidelines, cited *supra* note 71 at 5, para 8.

xenophobic, and in some instances crossed that line".[140] Furthermore, in the aftermath of the "Leave" vote, there are increasing reports about the use of this uncertainty of status to intimidate, limit access to facilities that EU citizens in the UK previously enjoyed, and/or collect additional personal data through resources lawfully enjoyed to date, such as schooling or healthcare.[141] While no reports of the same nature in respect of UK nationals in the EU have come to our attention, as a matter of principle, the argument applies to them just as much.

It is in line with settled case law of both the ECtHR and the ECJ that the failure to take adequate measures to protect the rights derived, respectively, from the ECHR and from EU law, can itself amount to a breach thereof.[142] The failure to take measures to guarantee that status can in itself amount to a breach of both ECHR and EU law and can form the subject of litigation before national courts, the ECtHR, and the ECJ, as it creates significant distress and deeply destabilizzes private lives lawfully established in the host State.[143] That claim becomes increasingly stronger, the longer the period of uncertainty is maintained as we embark on the formal negotiations.

It follows that, based on a constitutionalist reading of Article 50 TEU, the guarantee of the rights to private and family life as assessed in section 4.3.2.1. above must not only be the object of any eventual agreement, but the very starting point of any negotiations so as to preclude the dehumanization ensuing from the use of rights as bargaining chips.

4.3.2.3. Regression in the level of protection of other acquired rights

In addition to the rights to private and family life, the withdrawal of a Member State from the EU creates significant scope for regression in terms of fundamental rights not protected independently in the Convention, and of a panoply of other rights of persons and companies. While the Great Repeal Bill may not immediately repeal UK legislation implementing EU directives and framework decisions,[144] these rights will be removed from their parent legislation and the jurisdiction of the ECJ, resulting in reduced possibilities of judicial review; they will lose the primacy of EU law over inconsistent UK legislation; and there is no safeguard against future repeal. While there is scope for discussing these issues in detail in the context of the future relationship between the UK and the EU, this is largely subject to political negotiations. Of course, the EU cannot compel the UK to apply EU law after withdrawal. But that does not mean that the suspension of EU rights exercised before Brexit would be constitutionally unproblematic, either for the EU or for the UK.

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[140] Craig, op. cit. *supra* note 92 at 455.

[141] In the UK, these concerns are severe: the UK Government itself has sought to collect data relating to EU status in the latest school census (Department for Education, "National statistics: Schools, pupils and their characteristics", Jan. 2016, <www.gov.uk/government/statistics/schools-pupils-and-their-characteristics-january-2016>), for which it has been deeply criticized; Adams and Belam, "Why parents are refusing to reveal their child's nationality', *The Guardian*, 8 Oct. 2016, <www.theguardian.com/education/2016/oct/08/boycottschoolcensus-why-parents-are-refusing-to-reveal-their-childs-nationality> (last visited 29 Mar. 2017). Access to healthcare has been another key issue in the UK, raising a series of questions about entitlement to reside and the government's failure to communicate the relevant rules clearly: Herbeć, "The scandal of CSI, the little-known loophole used to deny EU citizens permanent residency", *LSE Brexit Blog*, 17 Mar. 2017, <www.blogs.lse.ac.uk/brexit/2017/03/17/disheartened-and-disappointed-the-government-and-universities-have-failed-eu-citizens-over-comprehensive-sickness-insurance/> (last visited 29 Mar. 2017).

[142] Respectively: ECtHR, *Plattform "Ärzte für das Leben"* v. *Austria*, Appl. No. 10126/82, judgment of 21 June 1988, para 34; Case C-265/95, *Commission* v. *France* (Spanish Strawberries), EU:C:1997:346; see also Case C-112/00, *Schmidberger* v. Austria, EU:C:2002:437.

[143] See ECtHR, *Chapman* v. *UK*, Appl. No. 27238/95, para 102.

[144] See Łazowski, op. cit. *supra* note 40. See also Łazowski, "Unilateral withdrawal from the EU: Realistic scenario or a folly?" (2016) *Journal of European Public Policy*, 5-7.

Regression in the level of protection of any acquired rights (e.g. the free movement of persons or even the free movement of goods) can be constitutionally destabilizing to the extent that it is prejudicial to the principles of legal certainty and legitimate expectations - essential elements of a well-functioning constitutional polity.[145] These principles form part of the constitutional orders of both the EU and the UK.[146]

The argument is strongest as regards the rights of UK nationals in the EU that amount to EU fundamental rights applicable to residents,[147] as enshrined in the Charter and the general principles of EU law, regardless of whether they are ultimately also comprised in the right to private and family life under Article 8 ECHR or not. Firstly, in light of the EU's continuing constitutional commitment to these sources of rights protection, UK nationals in the EU are in a greatly advantageous position, in the sense that, even if the negotiations for an agreement failed, the EU would still be under an internal obligation to protect the fundamental rights of all those residing in its territory. In turn, this makes the case for trying to reach agreement on the same basis for EU citizens in the UK even clearer from a pragmatic point of view: since these rights will remain in place across the Union, UK nationals residing therein will continue to enjoy them in full. EU institutions must therefore strive to reach an agreement in which acquired rights derived from EU law continue to be protected in the UK in respect of EU citizens and other EU legal persons in the UK, in the form and level that they were understood at the time of withdrawal.[148] The claim here may not be binding as to result, as it is clear that, by virtue of the existence of Article 50 TEU, there is no legitimate expectation of a Member State always remaining in the Union. There is, however, a legitimate expectation on the part of EU citizens that EU institutions will seek to protect them in case of a withdrawal, by making provision for the continued application of EU law for as long as EU citizens are present in the UK (and *vice versa*), including the ability to build up permanent residence entitlement, to work, and not to be discriminated against in accordance with the provisions of the Charter and secondary legislation.

Furthermore, safeguards such as the promulgation of the results of the negotiations and adequate notice periods to those benefitting from EU freedoms, who may be affected by changes to their status, may also be required under UK law, at least insofar as the rights of natural persons are required. The choice of moving to the UK has been embedded in a system of rights protection that allowed for the same rights in key aspects of life in the host State and provided for complete protection from discrimination on grounds of nationality. And as Lord Kerr has put it, particularly when the government has previously committed to a certain level of protection of

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[145] Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, 1996), p. 198.

[146] In the EU see e.g. Case C-441/14, *Dansk Industri*, EU:C:2016:278, paras. 38 et seq.; Joined Cases C-177, *Ampafrance* & 181/99, *Sanofi*, EU:C:2000:470, para 67; Case C-74/74, *CNTA*, EU:C:1975:59; Joined Cases C-7/56 & 3-7/57, *Algera and Others* v. *Common Assembly*, EU:C:1957:7. In the UK see *Laker Airways* v. *Department of Trade* [1977] QB 463. See also the application of the principle of legality, which requires that statutory authority for the removal of rights should be plain. *Ex p Witham* [1988] QB 575, 581; *Ex p Simms* [2000] 2 AC 115, para 131; *HM Treasury* v. *Ahmed* [2010] 2 AC 534, para 61. For a comparative overview see Schonberg, "Legal certainty and revocation of administrative decisions: A comparative study of English, French, and EC Law", 19 YEL (1999), 257.

[147] We consider rights *expressly* reserved to citizens of the Union rather than residents, such as voting rights, under a separate heading, in section 4.3.2.4.

[148] As Schonberg points out, a distinction can be made between prospective revocation of rights and retrospective revocation, in the sense that the latter has far more profound implications for the right-holders: op. cit. *supra* note 146 at 258-259.

human rights, "it should be held to account in the courts as to its actual compliance with that standard".[149]

4.3.2.4. The loss of EU citizenship for UK nationals

Our last point on the question of acquired rights relates to the status of UK citizens post-Brexit and the loss of their EU citizenship. Not only EU citizens in the UK and UK citizens in the EU, but indeed all UK citizens have so far been entitled to claim "*civis europaeus sum*"[150] and the rights that come with that status. It is settled EU law that citizenship of the Union is destined to become the "fundamental status" of nationals of the Member States.[151] On the one hand, since the Treaties provide for voluntary withdrawal from the Union, it is impossible to argue that the status of citizenship *must* be retained for UK citizens. On the other hand, though, it is important to refer back to the discussion of Article 50(1) in the *travaux* and to highlight the crucial nature of respect for constitutional requirements in doing so. To remove citizenship is not something that should be done lightly. As Hannah Arendt had argued, the loss of the ability to belong and to claim rights within a political community amounts to the loss of the very "right to have rights".[152] Can all UK citizens be stripped of their EU citizenship at once, even if they have not voluntarily renounced it? This is not merely a question of UK law or of inter-State politics, but connects with case law of the ECJ that requires a degree of respect for EU citizenship.[153] That case law provides that "by reason of its nature and consequences" the loss of EU citizenship is subject to EU law principles.[154]

It is noteworthy in this regard that, while the Commission has rejected a petition entitled "Stop Brexit", since it would contravene the possibility of withdrawal under Article 50 TEU, it has registered two European Citizens' Initiatives regarding the maintenance of citizenship rights after Brexit. It remains to be seen how these will be dealt with, but the Commission has highlighted that while it "cannot propose secondary legislation aiming at granting EU citizenship to natural persons who do not hold the nationality of a Member State of the Union, the rights of EU citizens in the UK and the rights of UK citizens in the EU after the withdrawal of the UK will be at the core of the upcoming Article 50 negotiations".[155] Furthermore, these initiatives highlight the precarious nature of any assumptions being made about EU citizenship having been voluntary renounced by UK nationals, on the basis of the referendum result alone. That is also supported, as Paul Craig notes, by the demographics of the referendum itself and the clear preference of younger voters for remaining in the EU.[156]

It follows that, despite being a necessary consequence of withdrawal from the EU, which is envisaged in the Treaties and hence cannot be reviewed, the legality of the loss of EU citizenship does trigger EU constitutional guarantees. If EU citizenship has, as Advocate General Sharpston put it in *Zambrano*, come to mean more than just cross-border movement but a "uniform set of rights and obligations in a Union under

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[149] *33R (SG & Ors)* v. *Secretary of State for Work and Pensions* [2015] UKSC 16, para 235; Fredman et al., "The human rights implications of Brexit", Oxford Human Rights Hub Submission to the Joint Committee on Human Rights on Brexit, 12 Oct. 2016, 15-16, <ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/08/The-Human-Rights-Implications-of-Brexit.pdf> (last visited 13 Apr. 2017).

[150] Opinion of A.G. Jacobs in Case C-168/91, *Konstantinidis*, EU:C:1992:504, para 46.

[151] Case C-184/99, *Grzelczyk*, EU:C:2001:458, para 31; see also Case C-413/99, *Baumbast*; Case C-34/09, *Ruiz Zambrano*.

[152] Arendt, *The Origins of Totalitarianism*, 2nd ed. (Harcourt, 1958), p. 296.

[153] Case C-135/08, *Rottman* v. *Freistaat Bayern*, EU:C:2010:104.

[154] Ibid., para 42.

[155] European Commission Press Release, "European Commission registers two European Citizens' Initiatives on the rights of Union citizens after Brexit and rejects one on preventing Brexit", IP/17/649, 22 Mar. 2017, <www.europa.eu/rapid/press-release_IP-17-649_en.htm> (last visited 29 Mar. 2017).

[156] See Craig, op. cit. *supra* note 92 at 470.

the rule of law",[157] then its removal must also be made in accordance therewith. It necessitates, in particular, compliance with common EU and UK values and general principles, including proportionality and principles of democratic governance, such as consistent consultation with civil society. As the Supreme Court confirmed (and the parties had already agreed) in *Miller*, the UK referendum on withdrawal was consultative in nature.[158] The vote of a subset of the UK public to leave the EU, and therefore to alienate itself from EU citizenship, is not sufficient to undo the requirement of parliamentary approval. Under UK law, only Parliament - not government or the people voting by referendum - can remove rights that individuals currently hold.[159] In turn, meaningful respect for EU citizenship further highlights the need for the UK Parliament - the only body constitutionally empowered with divesting UK nationals of their EU rights - to be able to vote on the agreement once the reduction in the level of protection of the rights of UK citizens has become known, rather than assuming that it has done so in advance by authorizing the government to notify.[160]

If the Parliament does not have a final say on the matter, then under Article 50(1) and the aforementioned case law, the removal of EU citizenship that may follow from withdrawal will be reviewable by the ECJ, should it be asked to assess the terms and process of the agreement in an Opinion.

4.3.3. Approval of the withdrawal agreement

The final question that a constitutionalist reading of Article 50 must address is what happens once an agreement is reached. What is the role of parliaments in approving that agreement (both at the national and at the EU level)? At first glance, Article 50(3) offers easy enough answers to the questions of when withdrawal shall occur if an agreement is reached, signed, and ratified, as well as if no agreement is reached at all: "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 notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period." But does that mean that, if the UK Parliament comes back with amendments, all of this needs to take place within the two-year time-frame? And what if the European Parliament refuses its consent, and asks for re-negotiation?

When assessed from a constitutionalist viewpoint, and considered in light of the discussions and concerns voiced during its drafting, it is clear that Article 50 was intended to privilege the reaching of an agreement. The ticking clock in the provision is preceded by a "failing that" which suggests that it is a fall-back option. The introduction of a timeframe was intended to act as a safeguard for both sides: it ensures that the withdrawing State does not stall the negotiations to gain time and, secondly, that the withdrawing State can still, if it so wishes, leave the Union even if no agreement is reached. However, neither of these concerns bite once an agreement has been negotiated and is put before the national and EU parliaments and the provision itself does not clearly stipulate what should happen in case the agreement duly negotiated within the two-year timeframe is not consented to. In our view, in such a case, the priority must be the reaching of a solid agreement that addresses key constitutional issues and enjoys the requisite support from the institutions involved in the process, and not a mere falling back on the "no-deal" approach.

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[157] Opinion of A.G. Sharpston in Case C-34/09, *Ruiz Zambrano*, EU:C:2010:560, para 3.
[158] *Miller* Supreme Court, para 171.
[159] See *JH Rayner (Mincing Lane Ltd)* v. *DTI* [1990] 2 AC 418, 500.
[160] See Phillipson, op. cit. *supra* note 96, 1073; Birkinshaw, "Brexit Editorial" 23 EPL (2017), 1, at 8 et seq.

This reading of Article 50 does not conflict with its terms. Indeed, "failing that" can be read as referring to the complete *failure to negotiate* (and thus conclude) a withdrawal agreement in the first place. Where there is an agreement, and either the national or EU parliament demands further negotiation, the two-year period ought to be regarded as suspended until the agreement is concluded and enters into force. It is only in case of a complete breakdown in the negotiations that exit without a withdrawal agreement ensues. As noted above, the reason the two-year timeframe was inserted into Article 50 was to clarify that the withdrawing State is under no *obligation* of further association with the Union, as well as to ensure that neither party is able to stall the negotiations. But it cannot be read as entailing the brushing aside of any effective parliamentary scrutiny once an agreement is found, or be used as a means of compelling the legislature to accept whatever agreement is put on the table. To read Article 50 in a way that requires the UK Parliament and the European Parliament to approve it within the two-year period would have this effect. Neither of these parliamentary bodies would have an interest in rejecting the agreement outright at that point: if they did, they would be putting their citizens in a highly prejudicial transitional period with no agreement at all. But if they also had no opportunity of proposing amendments to such an agreement because that could result in the agreement not being approved on time, their role in the process would become merely accessorial.[161]

The "argument from democracy", as Phillipson calls it, is particularly strong when the need for meaningful parliamentary approval is considered in the context of the UK constitution: the limitation of the will of the Crown by the UK Parliament is in the UK's very constitutional history.[162] It may be that Article 50(3) provides for a two-year clock, but in constitutional moments of this gravity, it is essential to read that provision with regard to the antecedent requirement in Article 50(1). Furthermore, a constitutionalist reading of Article 50 includes respect for democracy, a core EU value, and the role of parliaments in the withdrawal process must therefore be taken seriously.

In turn, as far as the EU is concerned, it is not enough merely to affirm, informally, that "representatives of the European Parliament will be invited" to attend preparatory meetings in the withdrawal negotiations.[163] Nor is it enough to say, in general terms, that "the Union negotiator *will be invited* to keep the European Parliament closely and regularly informed throughout the negotiation", that "the Presidency of the Council will be prepared to inform and exchange views with the European Parliament before and after each meeting of the General Affairs Council", and that "the President of the European Parliament will be invited to be heard at the beginning of meetings of the European Council".[164] Ultimately, such statements suggest that the role of the European Parliament in the process depends on the goodwill of the Union negotiator. In itself, that does not contravene the explicit terms of Article 50. But if, then, the only formal, institutional role that is envisaged for the European Parliament in Article 50 is its possibility to veto the agreement, that power could not be exercised freely, absent a suspensive effect.

Indeed, it must be emphasized that withdrawal is a special case, from a constitutional vantage point: there is no parallelism between this process and other agreements in which the Parliament might exercise its veto power after informal consultations in similar fashion, for the result of leaving without any agreement at all on this occasion could have far greater consequences for a significant number of EU

[161] See Edward at al., op. cit. *supra* note 80, paras. 22 et seq.
[162] Phillipson, op. cit. *supra* note 96 at 1087; *R* v. *Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513, 552, per Lord Browne-Wilkinson.
[163] Statement after the informal meeting of the 27 Heads of State or Government, 15 Dec. 2016, para 6.
[164] Ibid., para 7 (emphasis added).

citizens directly affected by the agreement detailing the future relationship. Moreover, an exit from the EU without a withdrawal agreement changes the law in the most fundamental of ways: the Treaties simply no longer apply. By contrast, a refusal by the European Parliament to give its consent to any other agreement which requires this (see Art. 218(6) TFEU), does *not* change the law. No new international commitments are entered into in the absence of such consent.

For the same reasons, we also consider that the withdrawal agreement may itself regulate the date at which the UK leaves the EU, and could therefore provide for a transition beyond the two-year period. Moreover, if the ECJ were to be asked for its opinion on the compatibility of the withdrawal agreement with the Treaties (Art. 218(11) TFEU), respect for the rule of law would require that the withdrawal process is suspended, again if necessary beyond the two-year period.

5. Conclusion

The constitutional questions at stake in the process of withdrawing from the EU are of the utmost importance for the Union's construction. As we have sought to demonstrate, it is essential to read Article 50 from a constitutionalist viewpoint: its context is one of constitutionalization and its implications will mark national constitutions and the post-national constitutional structure of the EU at the most basic level, irrespective of whether one considers it a radically pluralist, unifying federal, or more mildly integrationist one. Article 50 raises important constitutional concerns not only for the withdrawing State - an issue that thrives in the UK blogosphere - but also from the perspective of the EU and its identity as a new legal order that creates rights and duties for individuals, and safeguards them through accountable institutions, rather than being merely an international treaty signed by States.

It must be added that the current political discourse on withdrawal, particularly in the UK, stands in stark contrast with a constitutionalist approach to Article 50. The process is spoken of in purely intergovernmental terms, with the overriding aim of reaching the "best deal for Britain", particularly in respect of economic implications.[165] Such a discourse completely disregards the fact that Brexit involves this seismic shock to individual rights - a shock whose severity depends on the outcome of the Article 50 process. That process, in turn, is by definition concerned not with the best deal for Britain, but with respect for the EU constitutional order - an order that, up until withdrawal, still includes the UK. Similarly, while on the EU side politics has taken charge in the aftermath of the referendum, that is happening mainly in the intergovernmental structure of the European Council rather than following the constitutional processes and ideals of integration that characterized the drafting context of Article 50. The position of prominent EU figures has occasionally been one of efficiency and expedience, even if it results in a "hard Brexit".[166] Yet, how hard Brexit can be does not just depend on political power in the negotiations and a drive to maintain the Union's stability, but also on the legal constraints resulting from the EU Treaties and case law, as analysed above.

A constitutionalist reading of Article 50 thus brings into sharper relief the fact that the withdrawal process cannot be one that is entirely at the mercy of politics. It is

[165] See e.g. James and Jones, "Getting best Brexit deal for banks 'absolute priority' - UK minister", *Reuters*, 11 Oct. 2016, <www.uk.reuters.com/article/uk-britain-eu-banks-idUKKCN12B0VM> (last visited 11 Dec. 2016).

[166] Chassany, "Juncker tells EU leaders to be 'intransigent' with Britain", *Financial Times*, 7 Oct. 2016, <www.ft.com/content/1ba02b24-8c8a-11e6-8cb7-e7ada1d123b1> (last visited 11 Dec. 2016); "'Hard Brexit'' or 'no Brexit' for Britain – Tusk", *BBC News*, 13 Oct. 2016, <www.bbc.co.uk/news/world-europe-37650077> (last visited 11 Dec. 2016).

governed by specific constitutional constraints on the EU side as well. Ultimately, what makes a constitutionalist rather than a purely intergovernmental approach to Article 50 most appealing is that the constitutional orders of the UK and the EU converge on many of the most crucial constitutional issues. Legislation not only in the EU but also in the UK protects against the use of nationality as a discriminatory premise.[167] Furthermore, UK courts have so far been deeply mindful of the need to respect acquired rights and legal certainty.[168]

It would be flawed to assume that the UK's withdrawal from the EU can be carried out in the absence of consideration of the constitutional dimensions of the EU, except only partially and temporarily. After all, the constitutional order of the EU stems from the common traditions of its Member States: it is neither autonomous nor created in a contextual vacuum. It is premised on respect for national constitutions, fundamental rights, and democratic values. It is indeed the product of years of integration between the ECHR, the constitutions of the Member States and the goals that these have over time entrusted the EU with safeguarding[169] Our suggestions are therefore far from revolutionary. They entail, rather, respect for basic and highly convergent constitutional structures that have underpinned the relationship between the UK and the EU so far. They can be subsumed under the rubric of the rule of law and commitment to the democratic process. Failure to respect them at any point during the withdrawal process raises serious concerns for both EU and UK constitutional law.

[167] Equality Act 2010, s9(1)b. This provision includes "nationality" in the definition of race, a protected characteristic under s4 of this Act.
[168] See *supra* note 146.
[169] Eeckhout, "Human rights and the autonomy of EU Law: Pluralism or integration?", 66 *Current Legal Problems* (2013), 171-172.