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# Brexit and Article 50 TEU: A Constitutionalist Reading

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## Executive Summary

This article considers the constitutional requirements and implications of Article 50 TEU for the European Union. Despite its rapid rise to fame in the aftermath of the 23 June 2016 referendum on British membership of the European Union, this sparsely worded provision raises more questions than it answers. While currently under intense scrutiny from the perspective of UK constitutional law, the key terms and aspects of Article 50 itself have received less attention. Yet once the withdrawal process commences, it will also, and crucially so, be governed by the law of the European Union.

The article's key argument is that the withdrawal needs to be compliant with EU constitutional law, if the EU is to preserve its character as a supranational order that creates rights and obligations for institutions, Member States and private persons. This will have significant implications for the negotiations themselves, and the future relationship between the UK and the EU.

The article commences (Section II) with a discussion of why an EU constitutional law based reading of Article 50 is the only justifiable interpretation, over and above an international law reading. As part of the Treaty of the European Union (TEU) and its inherently constitutionalist features, Article 50 is directly constitutive of what the EU is. Originally drafted in the context of the Convention on the Future of Europe, it deals with fundamental questions regarding the allocation of rights and responsibilities in the EU polity. The UK cannot deviate from the EU's reading of the Treaty by, for instance, insisting on an international law interpretation, without incurring liability problems further down the line.

The authors then discuss in more detail (Section III) what a constitutional reading of Article 50 entails and how it influences the negotiations and future relationship between the UK and the EU. It is crucial for this endeavour, they argue, that we understand the TEU as a whole and in light of its organisational significance within the constitutional landscape of the EU. This requires a) an assessment of the goals and nature of Article 50 in the integration process, b) respect for existing constitutional standards, and c) the establishment of a constitutional basis for the new UK-EU relationship.

As to the first, the article considers that the intentions of the drafters of Article 50 are significant and will likely play a role in how the provision is interpreted. These can be reconstructed from amendments proposed at the time and reveal that respect for the constitutional requirements of the withdrawing state is a key component of the process, and was deliberately included in the text of the provision.

The authors also highlight, secondly, the need to respect existing rights. The Great Repeal Bill may not immediately repeal EU legislation applicable in the UK, but it will remove rights from their parent legislation and the jurisdiction of the Court of Justice of the EU (CJEU), abolish the primacy of EU law over inconsistent UK legislation, and offer no safeguard against future repeal. The EU member states and institutions are constitutionally obliged to strive to maintain the application of the EU treaties over EU, and therefore also UK, citizens to the fullest possible extent. This obligation is also binding on the UK until its withdrawal from the EU is complete. For instance, any

attempt to expel EU citizens from the UK is likely to violate Article 8 of the European Convention on Human Rights (ECHR) and Articles 7 and 19(1) of the EU Charter of Fundamental Rights (EUCFR). The use of citizens on either side as ‘bargaining chips’ is prejudicial to both the Convention and the Charter, and as such the CJEU may, in light of existing case law, review the process.

The article then examines the implications of its constitutionalist reading for future relations between the UK and the EU. As the withdrawal agreement laid down in Article 50(2) TEU is subject to a qualified majority vote in the Council and the consent of the European Parliament, there is no individual role for the member states, and the withdrawal agreement does not need their approval. While the prevailing view is that the agreement will deal only with the terms of withdrawal, and not future UK-EU relations, this ignores the fact that agreements concluded by the EU may have as their legal basis more than one provision in the EU Treaties. There are no significant barriers to a withdrawal agreement that also regulates the future legal basis of UK-EU relations on a different basis from Article 50 TEU.

In light of this discussion, the article considers what impact the constitutional requirements of the Union have on the *Miller* litigation (Section IV). All parties to the *Miller* case accept the referendum result as advisory. The referendum outcome itself does not constitute the United Kingdom's "decision" to withdraw from the EU. With Cameron and May stating unequivocally that the result will be accepted, however, the focus has been on the power of notification, and whether government or the parliament wields it. This emphasis does not concord with the stipulations of Article 50 itself, which privileges the Member State's decision, taken “in accordance with its own constitutional requirements” – language not usually featured in international law – and makes reference to notification as a mere procedural provision.

The *Miller* judgment (Divisional Court) held that prerogative power lies outside the purview of the Courts only because the Crown cannot alter domestic law by making or unmaking a treaty. The judges held that the European Communities Act (ECA) is a constitutional statute and that the Crown does not possess the power to vary domestic law through the exercise of prerogative powers.

As per Article 50, withdrawal is also very different from accession to the EU or Treaty amendment. The decision itself is unilateral: there is no need for the EU or any other member state to agree to it. The EU Treaties will cease to apply after the two-year deadline, regardless of whether an agreement is reached. Even if the British parliament disagrees with the terms of any agreement, it will need to approve it, or there will be no agreement at all. It is therefore incorrect to suggest, the authors argue, that Parliament will be able to have its say at the end of the process. Because of the deadline, Article 50 provides that it is the *decision* to withdraw which needs to be taken in accordance with the Member State's own constitutional requirements. On the conditions of approval of a final deal, the provision is silent.

The article also examines the issue of rights conferred by EU Law. It argues that it is incorrect to suggest that ECA rights are not genuine statutory rights or that the ECA is rather a conduit for rights established at the international level. When the British Parliament enacted the ECA it was fully aware of both the direct effect and supremacy of EU law. Moreover, since the authority behind these rights comes from their being enacted by the (sovereign) British parliament, they must by definition be statutory rights. As such, Parliament has the authority to maintain the rights of EU citizens insofar as these rights apply within the UK, irrespective of whether free movement or single market access are retained in any UK-EU agreement. It cannot however maintain the rights of UK citizens in other Member States, as to do so would require it to act extra-territorially.

In addition to the effects of withdrawal, the role of parliament in it, and its impact on the rights conferred by EU law, all of which testify to the complexity of the endeavour, the article also sets out a broader, normative claim. Withdrawal from the EU, the authors argue, is not a zero-sum game with a single outcome subject to an easy cost-benefit analysis, but a complex political question of the highest order involving fundamental values. These conditions justify significant Parliamentary scrutiny of the Brexit process and would ideally warrant an Act of Parliament incorporating the withdrawal decision and any instructions for the Brexit terms considered appropriate by Parliament.

The last important question the article addresses also arises from *Miller*, and touches on the question whether a duly notified decision to withdraw may subsequently be revoked. The wording of Article 50 is not clear on the point of revocability. It would, however, be politically and constitutionally incongruous for the EU not to accept a *bona fide* revocation of notification within the two-year timeframe if it occurred. Provided that any new decision not to withdraw is taken in good faith, therefore, the Article 50 clock could technically be stopped.

The constitutional questions at stake in the process of withdrawing from the EU are of the utmost importance for the Union's construction. It is the commitment to constitutional values that distinguishes the EU from other international organisations. These values will be put to the test during Brexit. The associated questions raise complex matters of EU constitutional law that must be determined in order for the Article 50 process to be conducted in accordance with the joint UK and EU commitment to respect the rule of law.

## Abstract

This article considers the constitutional requirements and implications of Article 50 TEU for the European Union. It argues that it is essential to read Article 50 in light of the inherently constitutionalist 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 substantial constitutional constraints are in place in EU law, which can affect four of 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 of the withdrawal agreement. These debates raise complex matters of EU constitutional law that must be determined in order for the Article 50 process to be conducted in accordance with the joint UK and EU commitment to respect the rule of law.

## I. 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 should leave the EU. The "should" is important: in legal terms, the referendum was purely advisory. The outcome was unexpected, even by the Leave camp, and it is clear that the UK government (hereafter the Government) was wholly unprepared for the challenges that Brexit entails.<sup>1</sup>

Article 50 TEU is a sparsely worded provision, which raises more questions than it answers and which is of course wholly untested.<sup>2</sup> While litigation concerning the triggering of Article 50 from the perspective of UK constitutional law is on-going in the UK,<sup>3</sup> that litigation leaves to

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<sup>1</sup> See, for example: 'Labour Says UK Facing Brexit 'Unprepared and Ill-equipped'', Sky News 23/11/2016 <<http://news.sky.com/story/labour-says-uk-facing-brexite-unprepared-and-ill-equipped-10668913>> accessed 10/12/2016; 'Leaked Memo Says UK Government has no Plan for Brexit', Aljazeera 15/09/2016, <<http://www.aljazeera.com/news/2016/11/leaked-memo-uk-government-plan-brexite-161115081621073.html>> accessed 10/12/2016 ; 'EU's Schulz: UK Government was Unprepared for Brexit Vote', Associated Press 23/09/2016, <<http://www.businessinsider.com/ap-eus-schulz-uk-government-was-unprepared-for-brexite-vote-2016-9?IR=T>> accessed 10/12/2016.

<sup>2</sup> While some prior withdrawals from the Union have taken place (Algeria, Greenland) these are of a very different kind. They concerned the granting of independence and home rule, respectively, to territories that belonged to Member States that remained in the Union, rather than the withdrawal of a Member State itself. Furthermore, both of these partial withdrawals took place well before Article 50 was introduced and, indeed, even before a clearer aspiration for further political integration was set out in the 1992 Maastricht Treaty. Even though some lessons regarding institutional cooperation may be drawn from these instances, therefore, these are largely limited: A F Tatham, 'Don't Mention Divorce at the Wedding, Darling!': EU Accession and Withdrawal after Lisbon' in P Eeckhout, A Biondi, and S Ripley (eds), *EU Law After Lisbon* (OUP 2012) 148.

<sup>3</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin); currently pending appeal before the UK Supreme Court in *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)*, UKSC 2016/0196.

one side the meaning of key terms and aspects of Article 50 itself. Once the withdrawal process formally commences, though, it is clear that in addition to any concerns it may raise from the viewpoint of national law, it will be governed by the law of the European Union in a number of ways.

This paper aims to contribute to the debate on the interpretation of Article 50. Our overarching argument is that withdrawal requires compliance with EU constitutional law if the EU is to preserve its *sui generis* character as a supranational order that creates rights and obligations for its subjects (institutions, Member States and private persons).<sup>4</sup> In turn, the proposed constitutionalist reading has significant implications for the nature of the negotiations and the future relationship between the UK and the Union.

The paper is structured as follows. First, we explain why a constitutionalist reading of Article 50 is essential (Section II). We then discuss in more detail what such a reading entails and how it influences the negotiations and future relationship between the UK and the EU (Section III). In light of this discussion, we consider what impact the constitutional requirements of the Union have on the *Miller* litigation, and beyond *Miller*, on the question of revocability of a duly notified decision to withdraw (Section IV).

## II. The Need for a Constitutionalist Reading

It is often said that Article 50 was never intended to be used<sup>5</sup> and that it was hastily drafted; yet its drafting process shows that it was seriously considered and debated. Whereas it was the Lisbon Treaty that ultimately brought this provision into EU law, Article 50 (or, rather, Article 59, as it then was) was negotiated within the Convention on the Future of Europe and formed part of the Constitutional Treaty. The text of the provision was changed substantially from the first<sup>6</sup> to the final draft of the Constitution.<sup>7</sup> Notably, while the first draft did not contain any limitations on the withdrawing state's re-accession to the Union, two important provisos were

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<sup>4</sup> Case 26/72, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1,12

<sup>5</sup> 'Article 50 Was Designed 'NEVER to Be Used' - Says the Man who Wrote the EU Divorce Clause' Sunday Express 23/07/2016, <<http://www.express.co.uk/news/world/692065/Article-50-NEVER-to-be-used-Europe-Brexit-Italy-Prime-Minister>>, accessed 10/12/2016.

<sup>6</sup> European Convention, 'Document from the Praesidium: Preliminary Draft Constitutional Treaty', 28.10.02, CONV 369/02.

<sup>7</sup> European Convention, 'Draft Treaty establishing a Constitution for Europe' 18.07.2003, CONV 850/03.

added in the Constitution's final draft: first, that the two-year period for the negotiations could only be extended by unanimity (Article 59(3)); and second, that a state wishing to withdraw would need to make a new application for accession, should it wish to re-join in the future (Article 59(4)). The Constitution's withdrawal clause was adopted without any fundamental changes by the Lisbon Intergovernmental Conference, becoming Article 50 TEU.<sup>8</sup>

This historical context constitutes a first, immediate reason for adopting a constitutionalist reading. The fact that Article 50 enters the EU legal order at a constitutional moment is significant. It coincides with the point at which the Union attempted to draw up a constitutional framework of governance that went well beyond any other international treaty. Thus, its drafting context is not just one of Treaty change but of a distinctly constitutional change: in proclaiming common values, a binding Charter of Fundamental Rights, a commitment to the principles of democracy, and a system of checks and balances, the Constitutional Treaty gave rise to a form of what Wilkinson had called EU *political* constitutionalism.<sup>9</sup> In this sense, Article 50 has an 'inherently specific' constitutional context, which sheds light on its interpretation.<sup>10</sup>

Against this first, historical reason for an EU-focused, constitutionalist reading of Article 50, it could be argued that the British people have clearly rejected EU constitutionalism in their referendum vote. Prime Minister Cameron's achievement to find agreement on extricating the UK from "ever closer union" was considered inadequate. "Taking back control" was a predominant campaign theme, and it might be said to follow that Article 50 must be read in ways that accommodate that expression of popular will. One such way could be to emphasise the intergovernmental character of the withdrawal process, and to adopt an international-law-oriented reading thereof. The Vienna Convention on the Law of Treaties (VCLT) would then take centre stage, insofar as it codifies customary international law.<sup>11</sup> The differences with a

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<sup>8</sup> Unfortunately, the minutes of the Lisbon ICG are not in the public domain. The Presidency Conclusions of the Brussels European Council of 21/22 June 2007, in which the main reforms to the Constitutional Treaty are discussed, only discuss the withdrawal clause in passing: 'Title VI (former Title VIII of the existing TEU) will be amended as agreed in the 2004 IGC. There will in particular be an Article on the legal personality of the Union, an Article on voluntary withdrawal from the Union and Article 48 will be amended so as to bring together the procedures for revising the Treaties (the ordinary and the two simplified procedures)': Brussels European Council, 'Presidency Conclusions', 20.07.2007, 11177/1/07 REV 1, para 16, emphasis added.

<sup>9</sup> MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76:2 *MLR* 191, particularly at 207-210, 221-222.

<sup>10</sup> See MW Dowdle and MA Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity' (2015) NUS Law Working Paper 2015/009, <<http://ssrn.com/abstract=2686013>> accessed 10.12.2016, 6-7.

<sup>11</sup> On the procedural provisions that is not so clear: see F Capotorti, 'L'extinction et la suspension des traités, Académie de Droit International, Recueil des Cours, 1971 III, p 431 and p 562.

constitutionalist reading are arguably significant. For example, on the vexed question whether the Article 50 notification is revocable, Article 68 VCLT provides an affirmative answer.<sup>12</sup> On the question whether the Article 50 process is the only permissible Brexit route, on the other hand, Article 54 VCLT supplies a negative answer, in the sense that it juxtaposes withdrawal by consent of all the parties with withdrawal in conformity with the provisions of the treaty in issue.

But while there can be an argument about the right hermeneutics, it is incontrovertible that the Article 50 interpretation must be singular. There could be a constitutionalist reading, or an international-law one, or some mix. What there cannot be is a reading by the United Kingdom which diverges from, yet co-exists with, that of the European Union. Withdrawal from the EU necessitates negotiation and, hence, dialogue. Even if the UK considered itself untied from the European Union, failure to leave based on the terms of Article 50 *as mutually understood* would be highly problematic. The UK might choose to adopt an international-law reading that does not concord with EU law or indeed a reading flowing from the 'purely dualist' character of the UK legal order, whereby repeal of the European Communities Act 1972 would, from an internal perspective, remove its obligation to observe EU law. We shall not go into the multitude of reasons why to do so would be unwise from the viewpoint of UK constitutional law, as these have been meticulously explained elsewhere.<sup>13</sup> For our purposes, suffice it to say that neither of these two approaches to withdrawal would be legally practicable, because neither would be lawful from the perspective of the European Union *unless* they fully complied with its own constitution and values.<sup>14</sup> Unilateral withdrawal would eventually place the UK in breach of EU law, thus immediately raising concerns about further litigation. An international-law based interpretation of withdrawal would have to meet EU constitutional requirements in full in order to be compatible with EU law.<sup>15</sup>

Indeed, the reasons why the EU should resist any other interpretation are not only historical/political but also legal. Article 50 TEU is situated in a quintessentially constitutional

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<sup>12</sup> "A notification or instrument ... may be revoked at any time before it takes effect".

<sup>13</sup> See S Douglas-Scott, 'Brexit, Article 50 and the Contested British Constitution' (2016) 79:6 *MLR* 1019.

<sup>14</sup> Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission and Others v Kadi*, EU:C:2013:518, paras 67 and 97ff.

<sup>15</sup> Thus, it would need to be in practical terms the same as an EU constitutionalist interpretation, in order to be accepted by the EU under the principles set out in *Kadi II*, *ibid*, and para 131. See also Opinion of Opinion of AG Poiares Maduro, delivered on 16 January 2008, in Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, paras 44-46.

place within EU law: as the Court famously put it in *Les Verts*, the Treaties form part of the Union's 'constitutional charter'.<sup>16</sup> It must of course be noted that EU constitutional law does not always adequately reflect a distinct version of constitutionalism and has been criticised for its lack of direction and constitutional purpose. As Dieter Grimm has argued, EU law suffers from a problem of over-constitutionalisation,<sup>17</sup> in the sense that it labels as 'constitutional' provisions that do not fulfil the functions of constitutional law, namely to safeguard a proper process of government.<sup>18</sup> It is therefore important to highlight that Article 50 is of a constitutional character not only in formal but also in substantive terms. When considering – to paraphrase Bruce Ackerman – what the constitution of the European Union actually constitutes,<sup>19</sup> 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 makeup, objectives, membership, and withdrawal from the EU. In regulating the latter process, Article 50 is directly constitutive of what the Union is.

In turn, the interpretation of Article 50 affects the Union's very identity as a constitutional order with specific commitments to fundamental rights, common values, and the rule of law.<sup>20</sup> To adopt any interpretation thereof other than a constitutionalist one would amount to an implicit refutation of that identity – an identity that distinguishes the Union from other supranational organisations.<sup>21</sup>

The EU is expressly founded on constitutional values, enumerated as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."<sup>22</sup> It is obvious that a national decision, such as the UK's referendum vote and the process of withdrawal that it triggers, may raise concerns about the degree of respect for many of these values. The potential effect of withdrawal on those values is such that the provisions governing this process must be subject to a constitutionalist interpretation: it concerns key questions of public interest for both the EU and the UK. For the purpose of the argument, which this paper makes, there is no need to explore

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<sup>16</sup> Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339, para 23.

<sup>17</sup> D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21:4 *ELJ* 460, 469-471.

<sup>18</sup> M Loughlin, *The Idea of Public Law* (OUP 2003) 5-7.

<sup>19</sup> B Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale LJ* 1013, 1040.

<sup>20</sup> See Art 2 TEU.

<sup>21</sup> *Van Gend en Loos* (n 4); See also *Wilkinson* (n 9) 200ff.

<sup>22</sup> Article 2 TEU.

this at length. We can simply take as an example the rule of law and respect for human rights. It is plain that the process of extricating the United Kingdom from the *acquis communautaire* is a complex, wide-ranging and intrusive legal process, which raises questions of respect for constitutional guarantees relating to the separation of powers and acquired rights. One need look only at the debate about safeguarding current rights to work and rights of residence of EU citizens in the UK, or their use as ‘bargaining chips’ in the Brexit negotiations.<sup>23</sup>

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*.<sup>24</sup> Often, EU law creates directly effective rights, enforceable in national law, without even using a rights vocabulary. Rights may simply be created through the imposition of obligations – on the EU institutions,<sup>25</sup> the Member States,<sup>26</sup> or private actors.<sup>27</sup> Take a policy and 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 trade that trumps any inconsistent national law.<sup>28</sup> 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.<sup>29</sup> What follows is definitely incomplete, and strictly illustrative. There are rights to free trade, in goods and services;<sup>30</sup> rights to free movement of capital and free establishment;<sup>31</sup> rights to free movement of persons, accompanied by rights to work, to reside, to not be

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<sup>23</sup> See V Mantouvalou, ‘EU Citizens as Bargaining Chips’, UK Constitutional Law Blog 14/07/2016, <<https://ukconstitutionallaw.org/2016/07/14/virginia-mantouvalou-eu-citizens-as-bargaining-chips/>> accessed 10.12.2016.

<sup>24</sup> *Van Gend en Loos* (n 4) 12.

<sup>25</sup> Perhaps most illustratively, see the creation of rights in the *Kadi* litigation (n 15).

<sup>26</sup> *Van Gend en Loos* (n 4).

<sup>27</sup> Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielrenner Unie and Federación Española Ciclismo* [1974] ECR 1405; Case C-415/93, *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921; Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

<sup>28</sup> See Case 8/74, *Dassonville* [1974] ECR 837; Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV*, EU:C:2012:453.

<sup>29</sup> Andrew Duff notes that over 1200 regulations and directives currently apply to the United Kingdom: A Duff, ‘After Brexit: A New Association Agreement Between Britain AND Europe’, Policy Network Paper October 2016, <[www.policy-network.net/publications\\_download.aspx?ID=9435](http://www.policy-network.net/publications_download.aspx?ID=9435)> accessed 11/12/2016, 8.

<sup>30</sup> Respectively: Articles 34 and 56 TFEU.

<sup>31</sup> Respectively: Article 56 and 49 TFEU.

discriminated against.<sup>32</sup> There are political rights and rights to equality;<sup>33</sup> employment and social rights;<sup>34</sup> consumer rights;<sup>35</sup> environmental rights;<sup>36</sup> rights to agricultural subsidies;<sup>37</sup> rights to have foreign judgments enforced;<sup>38</sup> rights of immigration and family reunification;<sup>39</sup> rights to privacy and data protection.<sup>40</sup> Overarching all of these rights is the EU Charter of Fundamental Rights, which proclaims a number of them to be fundamental and ensures that EU law always respects human and fundamental rights.<sup>41</sup> 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.

Brexit does not mean that all of these rights will be lost. The UK Government is proposing to put a Great Repeal Bill before Parliament<sup>42</sup> which, contrary to its label, would keep most EU law on the statute book as a post-Brexit starting-point. However, some rights *will* inevitably be lost, as the *Miller* litigation established – e.g. the right to vote for the European Parliament, and to stand as a candidate in EP elections.<sup>43</sup> 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 United Kingdom's dualist system, the rights that do survive will be rights under international law. They may be

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<sup>32</sup> Articles 45, 21, 18 TFEU; Regulation 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1.

<sup>33</sup> Respectively: Articles 20, 22 TFEU; Articles 21-26 EUCFR; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

<sup>34</sup> Community Charter of the Fundamental Social Rights of Workers [1989] OJ C120/52; Articles 27ff EUCFR.

<sup>35</sup> Article 12 TFEU; Article 38 EUCFR

<sup>36</sup> Article 191 TFEU; Article 37 EUCFR.

<sup>37</sup> Article 171 TFEU.

<sup>38</sup> Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1 (The 'Brussels Regulation').

<sup>39</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 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 [2004] OJ L229/35.

<sup>40</sup> Articles 7 and 8 EUCFR. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

<sup>41</sup> Article 51 EUCFR; Article 6 TEU.

<sup>42</sup> R Mason, 'Theresa May's 'great repeal bill': what's going to happen and when?' The Guardian, 2/10/2016, <<https://www.theguardian.com/politics/2016/oct/02/theresa-may-great-repeal-bill-eu-british-law>> accessed 11/12/2016. S Douglas-Scott, 'The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?' UK Constitutional Law Blog, 10/10/2016, <<https://ukconstitutionallaw.org/2016/10/10/sionaidh-douglas-scott-the-great-repeal-bill-constitutional-chaos-and-constitutional-crisis/>> accessed 11/12/2016.

<sup>43</sup> Miller (n 3) para 61.

incorporated into domestic law, but will no longer benefit from the direct effect and primacy of EU law.<sup>44</sup>

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 that cannot be maintained in the absence of their recognition by all Member States – e.g. 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.<sup>45</sup> Even rights which merely result from EU secondary legislation may be more difficult to amend than rights conferred by domestic legislation.<sup>46</sup>

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 globalisation's elites, they do constitute a minority in fundamental rights terms. The Brexit referendum campaign, vote, and subsequent developments clearly constitute a threat to their rights, including their human rights, in a variety of ways. The impact of withdrawal on rights, particularly of those people living in the United Kingdom, but also of UK citizens in other Member States, commands an understanding of Article 50 that takes into account the role of rights in the EU legal order. The rights that EU law confers are a central feature of the EU's "constitution" and its construction over the years.<sup>47</sup> It has in turn been a key aspect of membership of that Union.

A reading of Article 50 that complies with EU constitutional requirements is, therefore, the only justifiable reading. Even if constituting the most fundamental form of rejection of EU law, the process of withdrawal must take place in accordance with the relevant EU law provisions, rules and principles. It would be flawed to assess the operation of Article 50 without paying due regard to its constitutional content and context, within the EU framework.

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<sup>44</sup> For a detailed analysis of the legal effects of withdrawal on different types of EU law rights in the UK see A Łazowski, 'EU Withdrawal: Good Business for British Business?' (2016) 21:1 *EPL* 115, 121-126.

<sup>45</sup> Article 48 TEU.

<sup>46</sup> R McCrea, 'Ever closer union', forthcoming (2017) *ELJ*.

<sup>47</sup> JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale LJ* 2403, esp pp 2417-19. See also A Stone Sweet, *The Judicial Construction Of Europe* (OUP 2004) 53.

### III. The Parameters of a Constitutionalist Reading: Interpreting the Legality of the Negotiations and Agreement from the EU perspective

A constitutionalist interpretation of Article 50 requires that we go beyond an instrumental, textual or functional understanding thereof, and that we consider it as a whole and in the light of its organisational significance in the EU constitutional landscape. To do so requires: firstly, an assessment of the goals and nature of Article 50 in the EU integration process, which can be gleaned from its *travaux préparatoires* and, secondly, respect for existing constitutional standards, as highlighted in the Court's case law. The latter emphasises respect for the rule of law; democratic standards of decision-making; and the protection of fundamental rights and the principle of equality.<sup>48</sup> Last but not least, it requires an understanding of the constitutional bases for the new relationship between the UK and the EU. These issues are discussed in turn.

#### A. Article 50 and its travaux: shedding light on Article 50(1)

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. These 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. Indeed, the *travaux* are particularly useful in shedding light on the meaning of one of the most debated questions in the context of 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 should the Union care about it? At the same time, they further highlight that issues concerning rights, legal bases, and institutional balance were also considered important.

The right of voluntary withdrawal from the Union was initially envisaged as Article 46 in Chapter X of the first part of the Constitution, entitled 'Membership of the Union.' The withdrawal clause was inserted into the Constitutional Treaty in light of the fact that the UK disagreed with the political aspiration of closer union that the Constitution set in motion.<sup>49</sup> In turn, Member States that supported the constitutionalising project at the time, such as Germany (represented in the negotiations by then Foreign Minister Joschka Fischer), had actively opposed its insertion.<sup>50</sup> That opposition was shared by most of the other founding states, as well as by the EU

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<sup>48</sup> See Weiler, *ibid.*

<sup>49</sup> See List of Proposed Amendments to the Text of the Articles of the Treaty Establishing a Constitution for Europe, 'Part I of the Constitution: Article 59', <<http://european-convention.europa.eu/docs/Treaty/pdf/46/global46.pdf>> accessed 19/12/2016, 39.

<sup>50</sup> *Ibid.*, 18.

institutions.<sup>51</sup> Notably, a group of representatives from the European Parliament had proposed that, if the provision were maintained, further safeguards should be added to ensure that it does not privilege the withdrawing state.<sup>52</sup> They had suggested, for example, that the article should balance the ability of a Member State to leave with a power for the Union to expel a Member State.<sup>53</sup> 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.’<sup>54</sup>

A series of other amendments intended to render withdrawal more cumbersome had been proposed by Dominique de Villepin, who represented France.<sup>55</sup> He had suggested that withdrawal be made conditional on a form of ‘irreconcilable differences’ between the withdrawing state and the EU after 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.<sup>56</sup> 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.<sup>57</sup> Instead, of the initial accounts of Article 50, most delegates seemed to favour Robert Badinter’s proposal. As Tatham notes, this was one of the most pragmatic views on withdrawal expressed in the drafting process and was closest to its final text.<sup>58</sup> Nonetheless, 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 adopted.<sup>59</sup>

Furthermore, the *travaux* confirm that to say that a Member State can withdraw in accordance with its own constitutional requirements is not to leave it up to that Member State to do as it pleases – the inclusion of that requirement in Article 50(1) suggests that *only* a decision to withdraw in accordance with a state’s constitutional requirements is valid. During the negotiations of Article 50, the question of what should amount to a decision to withdraw was

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<sup>51</sup> See *ibid.* For example, the Dutch, Portuguese, Luxembourgish, German, Greek, and Austrian representatives had sought its deletion.

<sup>52</sup> *Ibid.*, 5.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 7.

<sup>55</sup> *Ibid.*, 4.

<sup>56</sup> *Ibid.*

<sup>57</sup> European Convention, ‘Contribution by Mr Lamassoure, member of the Convention “The European Union: Four Possible Models”’ 3.09.2002, CONV 235/02.

<sup>58</sup> Tatham (n 2) 148.

<sup>59</sup> European Convention, ‘Contribution from M. Robert Badinter, alternate member of the Convention “A European Constitution”’, 30.09.2002, CONV 317/02.

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, as discussed above. 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, as it entrusted it with the oversight of national constitutional requirements.<sup>60</sup> Its retention 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 and more costly for the Union. That position is further supported by the inclusion of a clause of respect for national constitutional identities in Article 4(2) TEU, which in turn renders that respect part of its own constitution.

Other important concerns had been the maintenance of individual rights, the protection of Union values and respect for international law.<sup>61</sup> One of the most interesting suggestions made 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, which was 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 ever closer union in other fields.<sup>62</sup> However, none of these amendments were adopted.

From a constitutional perspective, the intentions of the drafters are significant and are likely to play a role in the interpretation of this provision, should it come before the Court of Justice. In the past, the Court made use of a teleological methodology that did not make reference to the drafters’ actual intentions. As Lenaerts has explained, this was largely the case because the *travaux* of the Treaties were not available.<sup>63</sup> However, 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 justified and constitutionally welcome.<sup>64</sup> A reading informed by the *travaux* contributes to ensuring that the subjects of law meaningfully

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<sup>60</sup> Proposed amendments (n 49) 60.

<sup>61</sup> *Ibid*, 24; 20.

<sup>62</sup> *Ibid*, 8.

<sup>63</sup> K Lenaerts and JA 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. Opinion of AG Kokott, delivered on 17 January 2013, in Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:21, para 32.

<sup>64</sup> *Ibid*.

identify as its authors through the representative process.<sup>65</sup> Indeed, in light of the fact that many provisions of the Constitutional Treaty were copied into the Lisbon Treaty, the Court of Justice has become more receptive to interpretations arising from preparatory documents and these are likely to play an important role in the future.<sup>66</sup> Thus, particularly 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.

The latter reveals that the insertion of a unilateral right to voluntary withdrawal was far from uncontroversial. It is interesting that, while a series of very cumbersome clauses were not inserted into the provision, they had been voiced in the negotiations and enjoyed some support. As such, it is only to some extent true that Article 50 privileges the EU and its remaining members, as opposed to the withdrawing state. In fact, the version of the withdrawal clause that was retained was one of the most lenient (no limitation clause) but also the most vague. The vagueness that characterises Article 50 today was clearly 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, which can be attributed to very different perspectives on the goals and nature of the Constitutional Treaty. Still, as we have highlighted, the *travaux* of the Convention clarify two important issues: firstly, that respect for the constitutional requirements of the withdrawing state is a key component of an EU-constitutional-law-compliant reading of Article 50. Secondly, the broad discretion allowed in respect of Article 50(1) was intended to be counterbalanced by stricter conditions under Article 50(3) in order to prevent the withdrawing state holding the Union hostage in the negotiations.

#### *B. Article 50 and the Need to Respect Existing Rights: Substantive Constitutional Requirements for the Negotiations and Future Agreement*

In addition to the information that can be gleaned from the *travaux*, a constitutional interpretation of Article 50 requires engagement with the settled features of the EU constitutional order, the most relevant of which relate to respect for individual rights, as

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<sup>65</sup> See J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 89; 321.

<sup>66</sup> *Ibid*, 24.

highlighted earlier.<sup>67</sup> That is so particularly insofar as agreement on the status of existing rights<sup>68</sup> was not reached during the drafting process.

The withdrawal of a Member State from the European Union creates significant possibilities of regression in terms of fundamental rights, 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,<sup>69</sup> a) these rights will be removed from their parent legislation and the jurisdiction of the CJEU, resulting in reduced possibilities of judicial review; b) they will lose the primacy of EU law over inconsistent UK legislation; and c) there is no safeguard against future repeal. Arguably, this has implications not only for the UK but also for the Union, whose commitment to these rights and freedoms remains in place.

As noted earlier, during the Constitutional Convention, a number of delegates had proposed amendments that safeguarded existing rights, which were not adopted.<sup>70</sup> Furthermore, insofar 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 such exit, it is reasonable to assume that withdrawal can entail the loss of rights attached to membership. In turn, Article 50 does not provide any necessity of guarantees of the status of EU citizens in the withdrawing state and vice versa. However, none of this means that the Union's institutions are constitutionally unconstrained in their actions during the negotiations in respect of these vulnerable populations.

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<sup>67</sup> *Opinion 2/13*, ECLI:EU:C:2014:2454; Joined Cases C-402/05 and P and C 415/05P, *Kadi and Al Barakat v Council of the European Union and Commission of the European Communities* [2008] ECR I- 6351.

<sup>68</sup> We note, for the avoidance of doubt, that our concept of 'existing rights under EU law' does not pertain merely to the doctrine of 'acquired rights' under international law and, particularly Article 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 PA Lalive, 'The Doctrine of Acquired Rights' in *Rights and Duties of Private Investors Abroad* (M Bender 1965) 145ff ; S Douglas-Scott, 'What Happens to 'Acquired Rights' in the Event of a Brexit ?' UK Constitutional Law Blog 16/05/2016, <<https://ukconstitutionallaw.org/2016/05/16/sionaidh-douglas-scott-what-happens-to-acquired-rights-in-the-event-of-a-brexite/>> accessed 19/12/2016 ; J-C Piris, 'Should the UK Withdraw from the EU : Legal Aspects and Possible Options' Fondation Robert Schuman Policy Paper No 355, May 2015, available at <<http://www.robert-schuman.eu/en/doc/questions-d-europe/ge-355-en.pdf>> accessed 19/12/2016, 10. Instead, our concern is with the fate of the obligations that arise from EU law itself.

<sup>69</sup> Łazowski (n 44). See also A Łazowski, 'Unilateral Withdrawal from the EU: Realistic Scenario or a Folly?' (2016) *Journal of European Public Policy*, DOI: 10.1080/13501763.2016.1174529, accessed 1/12/2016, 5-7.

<sup>70</sup> E.g. see Danish amendment, Proposed amendments (n 49) 20.

Indeed, two of the Union's objectives are to 'uphold and promote' its values in its external relations<sup>71</sup> and to ensure the 'well-being of its peoples'.<sup>72</sup> Furthermore, Article 3(5) TEU provides that human rights must be ensured in the Union's relations with third countries. The question of what level of protection for existing rights must be guaranteed is, therefore, crucial to the constitutionality of the negotiations and agreement, from the perspective of the EU. The main issues at stake concern the rights of EU citizens in the UK and UK citizens in the EU as well as the EU citizenship status of UK nationals.

Insofar as the rights of EU citizens in the UK are concerned, EU institutions are of course likely to strive to maintain the application of the EU Treaties to them to the fullest possible extent. However, it is necessary to examine whether there is a constitutional obligation to do so, beyond political intentions. In our view, there clearly is: Union institutions and remaining Member States will be bound by the Treaties and the Court's case law<sup>73</sup> both during the negotiations and after the UK's withdrawal. This raises a series of questions.

Regression in the level of protection of human rights is a key issue. Respect for human rights, particularly as enshrined in the European Convention on Human Rights, has underpinned the Court's case law from its early years.<sup>74</sup> From the EU perspective, therefore, any negotiation or agreement that does not guarantee, at a minimum, existing Convention rights will be inherently problematic. In addition, the relevant interpretation of human rights will often be not just that of the Convention, but that of the Treaties and Charter.<sup>75</sup> EU institutions must look to the latter during, as well as after the negotiations – it forms the basis on which they will be held to account.<sup>76</sup> In respect of many of the rights involved, the EU level of protection is particularly high.

In her evidence on the human rights implications of Brexit, Kirsty Hughes rightly notes that Article 8 ECHR will be engaged, should the UK wish to expel EU citizens.<sup>77</sup> The Convention

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<sup>71</sup> Article 3(5) TEU.

<sup>72</sup> Article 3(1) TEU.

<sup>73</sup> That case law guarantees a high level of respect for internationally recognised human rights: *Kadi I*, (n 67) para 291, as these rights are interpreted in light of the ECHR and EU law: *Kadi II* (n 14).

<sup>74</sup> See Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- Und Vorratsstelle Getreide* [1970] ECR I-1125, para 4; See also: Case 4/73, *Nold v Commission* [1974] ECR 491, para 13; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 15–17.

<sup>75</sup> Case C-501/10, *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233, paras 62-63, 80.

<sup>76</sup> *Ibid.*

<sup>77</sup> Human Rights Committee, 'The Human Rights Implications of Brexit: Written Evidence from Dr Kirsty Hughes', HRB0009,

protects the right to reside and the right to family life of those who have made meaningful ties in the host Member State<sup>78</sup> and construes these concepts broadly.<sup>79</sup> In turn, 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 specifically protects against collective expulsions. Pursuant to Article 52 EUCFR, the level of protection offered by the Charter must meet the Convention standard – but it can also go beyond it.

EU law is indeed more extensive than the Convention in its protection of the rights of citizens, so that the process of the negotiations and any potential agreement are likely to engage a heightened degree of constitutional scrutiny on the EU side. In particular, when considered together, Article 7 EUCFR and Articles 20-21 TFEU, in conjunction with secondary legislation,<sup>80</sup> create a much stronger right to family reunification for EU citizens and their family members to enter the UK than the Convention has so far accommodated, having been fairly limited and inconsistently rendered.<sup>81</sup> On this point, EU law has offered EU citizens the opportunity to reunite with their core family<sup>82</sup> as well as other dependent family members,<sup>83</sup> provided that they meet certain conditions.<sup>84</sup> In negotiating the future relationship between the EU and the UK, EU institutions and existing Member States can be held to account for failing to ensure, to the extent possible, compliance with these rights *as understood in the EU legal order*. Reaching an agreement without paying due regard thereto – not to mention one that breaches them outright – will be reviewable by the CJEU. Similarly, EU institutions and existing

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[http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/written/38477.html#\\_ftn12](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/written/38477.html#_ftn12) accessed 11/12/2016, paras 5-25.

<sup>78</sup> Ibid. See *Al-Nashif v Bulgaria* (App. No. 50963/99) (2003) 36 EHRR 655, para 114; *Samsonnikov v Estonia* (App. No. 52178/10), judgment of 3<sup>rd</sup> July 2012; *Slivenko v Latvia* (App. No. 48321/99) (2004) 39 EHRR 24; *Anam v United Kingdom* (App. No. 21783/08), judgment of 7<sup>th</sup> June 2011; *AA v United Kingdom* (App. No. 8000/08), judgment of 20<sup>th</sup> September 2011.

<sup>79</sup> *Niemietz v Germany* (1992) 16 EHRR 97, para 29; *Onur v United Kingdom* (App. No. 27319/07) (2009) 49 EHRR 38, para 46; *Samsonnikov v Estonia*, *ibid*, para 81.

<sup>80</sup> Articles 2 and 3 of Directive 2004/38

<sup>81</sup> Hughes (n 77) paras 27-31. See *Abdulaziz, Cabales and Balkandali v United Kingdom* (Apps. 9214/80, 9473/81, and 9474/81) (1985) 7 EHRR 471; *Gül v Switzerland* (App. No. 23218/94) (1996) 22 EHRR 93; *Ahmut v Netherlands* (App. No. 21702/93) (1997) 24 EHRR 62, *Sen v Netherlands* (App. No. 31465/96); *Senchishak v Finland* (App. No. 5049/12), judgment of 18<sup>th</sup> November 2014; *AS v Switzerland* (App. No. 39350/13), judgment of 30 June 2015.

<sup>82</sup> Article 2 of Directive 2004/38.

<sup>83</sup> Article 3 of Directive 2004/38.

<sup>84</sup> Article 7 of Directive 2004/38.

Member States will not be in a position to negotiate a reduction in the level of protection of private and family life for UK nationals living in the EU.<sup>85</sup>

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 not just their position following withdrawal, raises questions of compatibility with the Convention.<sup>86</sup> The uncertainty and instability that EU citizens in the UK – and, similarly, UK citizens residing in other EU Member States – face in the aftermath of the Brexit vote and, more specifically, the use of human beings as ‘bargaining chips’ in the negotiations, (i.e. refusing to guarantee their rights so as to extract a better deal), can be prejudicial to Article 8 ECHR in conjunction with Article 14 ECHR.<sup>87</sup> These rights have a life in EU constitutional law under Articles 7 and 21 of the Charter as well. But the case for protecting against the perseverance of uncertainty for EU citizens 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.<sup>88</sup>

Until its official withdrawal from the Union on the terms of Article 50,<sup>89</sup> the obligation to respect the aforementioned rights applies to the United Kingdom as well. To that effect, in its recent report on the safeguard of acquired rights during Brexit, the House of Lords has urged the Government to proceed with a unilateral guarantee of the rights of EU citizens in the UK.<sup>90</sup> At the same time, though, it must be pointed out that EU institutions have a constitutional obligation to respect these rights in their negotiations with the UK, too. This raises significant questions about the lack of official guarantees of the status not only of EU nationals in the UK but also of UK nationals in the EU.

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<sup>85</sup> This is not to say that UK nationals will continue to benefit from the Citizens’ Directive if they are no longer EU citizens. They will continue, however, to benefit from the right to private and family life protected in Article 7 EUCFR and the Court’s existing case law.

<sup>86</sup> Mantouvalou (n 23).

<sup>87</sup> Ibid; D Lock and O Patel, ‘Brexit: Constitutional and Legal Requirements’, UCL Public Policy Research Insights, July 2016 <<https://www.ucl.ac.uk/public-policy/for-policy-professionals/research-insights/brexit-constitutional-and-legal-requirements.pdf>> accessed 11/12/2016. See also EU Committee, *Brexit: acquired rights*, 10th Report of Session 2016-17, <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/82.pdf>, accessed 15/12/2016, paras 88-92.

<sup>88</sup> Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, para 19.

<sup>89</sup> I.e. upon the entry into force of a withdrawal agreement or, failing that, two years after the decision to withdraw has been notified.

<sup>90</sup> European Union Committee, ‘Brexit: Acquired Rights’, HL Paper 82, 10th Report of Session 2016-17, 14.12.2016, <[http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/8213.htm#\\_idTextAnchor105](http://www.publications.parliament.uk/pa/ld201617/ldselect/ldcom/82/8213.htm#_idTextAnchor105)> accessed 19/12/2016, paras 147-148.

Moreover, even where human rights issues are not at stake, arbitrary forms of regression of any vested rights (e.g. the free movement of persons or even the free movement of goods) can be constitutionally destabilising, to the extent that they are prejudicial to the principles of legal certainty and legitimate expectations – essential elements of a well-functioning constitutional polity.<sup>91</sup> These principles form part of the EU constitutional order.<sup>92</sup> While it is difficult to envisage particular outcomes of the negotiations that would be struck out on the basis of those principles alone in EU law, safeguards such as the promulgation of the results of the negotiations and adequate notice periods to those benefitting from EU freedoms, and who may be affected by changes to their status, may well be required.

The final concern we wish to take up 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*'<sup>93</sup> and the rights that come with that status. It is settled EU law that citizenship of the Union is the 'fundamental status' of nationals of the Member States.<sup>94</sup> On the one hand, since the Treaties provide for voluntary withdrawal from the Union, it would be difficult to argue that the status of citizenship *must* be retained for UK citizens. On the other hand, 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 put it, 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'.<sup>95</sup> Can, then, all UK citizens be stripped of their EU citizenship, even if they have not voluntarily renounced it?

The matter is not quite so clear. It is also not merely a question of UK law or of inter-state politics. It builds on case law of the Court of Justice that requires a degree of respect for EU citizenship.<sup>96</sup> That case law provides that 'by reason of its nature and consequences' the loss

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<sup>91</sup> Habermas (n 65) 198.

<sup>92</sup> See Case C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278, paras 38ff; Case 74/74 *CNTA* [1975] ECR 533.

<sup>93</sup> Opinion of Advocate General Jacobs, delivered on 9 December 1992, *Konstantinidis v Stadt Altensteig* [1993] ECR I-01191, para 46.

<sup>94</sup> Case C-184/99, *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31; See also: Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-34/09, *Ruiz Zambrano v Office national de l'emploi* [2011] I-01177.

<sup>95</sup> H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> edn, Harcourt 1958) 296.

<sup>96</sup> Case C-135/08, *Rottman v Freistaat Bayern* [2010] ECR I-01449.

of EU citizenship can fall within the jurisdiction of the CJEU.<sup>97</sup> Despite being a necessary consequence of withdrawal from the EU, which is envisaged in the Treaties and hence would likely not (nor should it) be reviewed, the legality of the *process* of losing 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 the rule of law',<sup>98</sup> then its removal presupposes close consultation with those it affects. It necessitates, in particular, compliance with common EU and UK values and general principles, including the rule of law, legitimate expectations, proportionality, and principles of democratic governance, such as *consistent* consultation with civil society. In other words, while the case law on this point is not unlimited, the loss of any form of citizenship – certainly one that has been enjoyed consistently, in its current form, for almost twenty-five years – merits a measured response by the parties to the negotiations and, ultimately, oversight by domestic courts and the Court of Justice alike, so as to meet existing safeguards of the EU constitutional order.

It must be added that the current political discourse on the withdrawal process, particularly in the United Kingdom, 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 terms of economic outcomes.<sup>99</sup> 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. Indeed, even though the Article 50 process is one by which a Member State seeks to remove itself from EU law, that does not in itself render the human rights that apply within EU law nugatory *during* that process.<sup>100</sup>

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

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<sup>97</sup> Ibid, 42.

<sup>98</sup> Opinion of Advocate General Sharpston, delivered on 30 September 2010, in Case C-34/09, *Ruiz Zambrano v Office National de l'Emploi* [2011] I-01177, para 3.

<sup>99</sup> See, for example: 'Getting best Brexit deal for banks "absolute priority" - UK minister' Reuters, 11.10.2016, <<http://uk.reuters.com/article/uk-britain-eu-banks-idUKKCN12B0VM>>, accessed 11/12/2016.

<sup>100</sup> See, by analogy, Case C-260/89, *Elliniki Radiofonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1993] ECR I-2925.

than following the constitutional processes and ideals of integration that characterised the drafting context of Article 50. The stance of prominent EU figures has been one of efficiency and expedience, even if it results in a 'hard Brexit'.<sup>101</sup> 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 in place through the EU Treaties and case law, as highlighted above.

Ultimately, what makes a constitutionalist rather than a purely intergovernmental approach to Article 50 most appealing is not so much that it is essential for EU institutions or that, technically, it is also required for Member States as it is within the scope of EU law but, rather, that the constitutional orders of the UK and the EU converge on many of the most crucial constitutional issues. Indeed, legislation not only in the EU but also in the UK protects against the use of nationality as a discriminatory premise.<sup>102</sup> Furthermore, the UK constitution itself is not just about parliamentary sovereignty – the *prima facie* concern of the *Miller* case. It also stands for the safeguard of individual rights and freedoms,<sup>103</sup> checks and balances, and proper representation. The very reason for parliamentary sovereignty is the limitation of possible absolutism in the will of the Crown.<sup>104</sup> Any removal of existing rights, from this perspective, entails clear dangers of which UK courts have been very mindful.<sup>105</sup> As Lord Kerr has persuasively put it, if the government has 'committed itself to a standard of human rights protection...it should be held to account in the courts as to its actual compliance with that standard.'<sup>106</sup>

<sup>101</sup> "You can't have one foot in and one foot out": Juncker says EU must be firm over UK's Brexit manoeuvring', The Telegraph, 7.10.2016 <<http://www.telegraph.co.uk/news/2016/10/07/juncker-says-eu-must-be-firm-over-uks-brexite-manoeuvring/>> accessed 11/12/2016; 'Juncker tells EU leaders to be 'intransigent' with Britain', Financial Times, 7.10.2016 <<https://www.ft.com/content/1ba02b24-8c8a-11e6-8cb7-e7ada1d123b1>> accessed 11/12/2016; "Hard Brexit" or 'no Brexit' for Britain – Tusk', BBC News, 13.10.2016, <<http://www.bbc.co.uk/news/world-europe-37650077>> accessed 11/12/2016.

<sup>102</sup> Equality Act 2010, s9(1)b. This provision includes 'nationality' in the definition of race, a protected characteristic under s4 of this Act.

<sup>103</sup> On the convergence and incorporation of European and international human rights law in the common law see, most notably, the speech of Lord Bingham in *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56, paras 10-45; as well as the dissenting speech of Lord Hoffman in this case, paras 82-97.

<sup>104</sup> See AW Bradley and KD Ewing, *Constitutional and Administrative Law* (Pearson 2007) 52.

<sup>105</sup> See in particular *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508; *Laker Airways v Department of Trade* [1977] QB 463. See also *Walker v Baird* [1892] AC 491; *Miller* (n 3) para 101. 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.

<sup>106</sup> *33R (SG & Ors) v Secretary of State for Work and Pensions* [2015] UKSC 16 [235]. Sandra Fredman and others, 'The Human Rights Implications of Brexit' Oxford Human Rights Hub Submission to the Joint Committee on Human Rights on Brexit, 12 October 2016,

After all, the constitutional order of the European Union 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 Convention, the constitutions of the Member States and the goals that these have entrusted the EU with safeguarding.<sup>107</sup> Failure to respect it at any point during the withdrawal process raises immediate concerns not only for EU constitutional law but also for UK constitutional law itself.

C. *Implications of a Constitutionalist Reading for the Legal Basis of the Agreement Detailing Future Relations*

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 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, which is open to a range of different interpretations.

At the time of writing, the prevailing view 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 United Kingdom will have become a third country.<sup>108</sup> There is also speculation about a transitional period, 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.<sup>109</sup>

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<<https://www.law.ox.ac.uk/news/2016-10-12-oxhrh-submission-joint-committee-human-rights-brexit>> 51-16.

<sup>107</sup> P Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66:1 *CLP* 169, 171-172.

<sup>108</sup> For a useful summary of this view, see: H Flavier and S Platon, 'Brexit: A Tale of Two Agreements?' *European Law Blog*, 30/08/2016, <<http://europeanlawblog.eu/?p=3324>> accessed 11/12/2016.

<sup>109</sup> See, e.g. M Maresceau, 'A Typology of Mixed Bilateral Agreements' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010) 17.

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.<sup>110</sup> 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 suggestions. 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 United Kingdom 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 do not 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 organisation of the future relationship. That would appear to involve substantially more than "setting out the arrangements for ... withdrawal."

It must however 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 United Kingdom 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 Court of Justice has determined that an association agreement empowers the EU to guarantee commitments towards non-member countries in all the fields covered by the Treaties.<sup>111</sup> The competence to

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<sup>110</sup> See, e.g. P Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) chapters 2-5.

<sup>111</sup> Case 12/86, *Demirel* [1987] ECR 3719, 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).

conclude association agreements is, in substantive terms, the broadest external competence for which the EU Treaties provide. There would therefore seem to be no compelling legal reasons for requiring the United Kingdom to withdraw from the EU first, before negotiating a new agreement on its future relationship.

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 their powers to regulate their relationship with the United Kingdom to 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 strictly limited, leaving the substance of immigration policies to national competence. However, as far as UK citizens are concerned, there is no such national competence, because UK citizens are EU citizens benefitting from free movement. If anything, any future agreement limiting free movement would effectively return competences to the Member States, rather than interfering with the exercise of an existing competence. Surely, it is fully within the EU's competence to act so as to *return* national competences. Perhaps this is also the implicit reason why Article 50 does not subject the withdrawal agreement to approval by the individual Member States.<sup>112</sup>

#### **IV. The *Miller* litigation: Government or Parliament? A Perspective from EU Constitutional Law**

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, the decision to withdraw is clearly a unilateral one, on which Article 50 places no conditions other than that it has to be taken in accordance with the withdrawing state's own constitutional requirements. This qualification calls for some immediate comments. First, it is

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<sup>112</sup> See, generally, the 'implied powers' doctrine: *Case 22/70, Commission of the European Communities v Council of the European Communities* [1971] ECR 263.

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 which contain withdrawal clauses do not make such reference.<sup>113</sup> They are based on a classical international-law paradigm which treats states, in legal terms, as unitary actors whose domestic constitutional arrangements are not a matter of international law. Second, the reference to constitutional requirements replicates such references in other Treaty provisions, for example those on Treaty amendments (Article 48 TEU), on accessions (Article 49 TEU), and on the EU's accession to the ECHR (Article 218(8) TFEU). In the United Kingdom, amendments and accessions require parliamentary legislation;<sup>114</sup> the former may in addition require a referendum.<sup>115</sup> Third, as noted above, the reference to the withdrawing state's constitutional requirements is in the TEU, and is therefore an EU law norm. Obviously, the precise nature of this requirement as well as its enforceability are open to debate.<sup>116</sup> As noted above, a series of amendments were proposed to codify what the 'constitutional requirements' might be. But given that the matter is at present intensely litigated in the UK, up to the highest level, it seems clear that the United Kingdom will have clearly determined what those requirements are, and one assumes will respect them.

The other point to note, before analysing the issues in *Miller*, is that Article 50 clearly distinguishes between the decision to withdraw (paragraph 1), and its notification (paragraph 2). The litigation in the United Kingdom is focused on whether the Government has the power to notify, without first going to Parliament, or whether instead Parliament needs to authorise this notification. The Divisional Court stated that, for the purposes of the litigation, it was not useful to distinguish between the decision and the notification.<sup>117</sup> This framing of the issue is a function of the particular chain of political and legal events before and after the Brexit referendum. The EU Referendum Act (2015) did not spell out the legal consequences of the referendum, and the parties in *Miller* agree that it was merely advisory - in contrast of course

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<sup>113</sup> R L Helfer, 'Terminating Treaties' in *The Oxford Guide to Treaties* (OUP 2012) 634, 641-3: Approximately 60 per cent 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.

<sup>114</sup> See, for example, the EU Act 2008 amending the ECA 1972 by incorporating the Lisbon Treaty into UK Law.

<sup>115</sup> European Union Act 2011, s.6.

<sup>116</sup> See, on this point, A Von Bogdandy and S Schill, 'Overcoming absolute primacy: respect for national identity under the Lisbon Treaty' (2011) 48 *CMLRev* 1417; François-Xavier Millet, 'The Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism' in L Azoulai (ed), *The Question of Competence in the European Union* (OUP 2014).

<sup>117</sup> *Miller* (n 3) paras 10-11.

with the prevailing political discourse throughout and after the campaign. It is therefore accepted that the referendum outcome itself does not constitute the United Kingdom's "decision" to withdraw from the EU. However, both the outgoing and incoming Prime Ministers, Cameron and May, have immediately confirmed that the referendum result needs to be respected, and that the United Kingdom must withdraw.<sup>118</sup> This has put the focus on the power of notification, with a blog post by Barber, Hickman and King arguing, within days of the referendum result, that Parliament must be involved.<sup>119</sup> The subsequent debate has squarely focused on notification of the decision to withdraw. It may be added that, at the time of writing, there is still no formal United Kingdom decision to withdraw from the EU - lest it be a secret one. In *Miller*, the Government argues that the decision has been taken, but does not point to a formal act.<sup>120</sup> One assumes that this refers to political statements such as "Brexit means Brexit".<sup>121</sup>

However, this emphasis on notification does not concord with the stipulations of Article 50 itself. The starting-point, and key, is clearly the Member State's decision, taken in accordance with its own constitutional requirements, to withdraw from the EU. This is language not found in other international treaties and conventions, which usually speak about termination, rather than withdrawal, and as mentioned do not require respect for the terminating state's own constitutional requirements. It is language which reflects the contested and intrusive nature of withdrawal, as shown by the *travaux*.

The reference to notification in Article 50(2), by contrast, can be read as a mere procedural provision, the opening phrase to the process of negotiating a withdrawal agreement. The Member State shall notify the European Council, which will subsequently draw up negotiating guidelines. There is nevertheless a clear and stark effect of notification: it starts the two-year clock ticking, after which effective withdrawal ensues (Article 50(3)).

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<sup>118</sup> 'David Cameron Announces his Resignation – Full Statement', The Telegraph 24/06/2016, <<http://www.telegraph.co.uk/news/2016/06/24/david-cameron-announces-his-resignation---full-statement/>>, accessed 19/12/2016; 'Theresa May says 'Brexit means Brexit' and there will be no attempt to remain inside EU', The Independent 11/07/2016,

<<http://www.independent.co.uk/news/uk/politics/theresa-may-brexit-means-brexit-conservative-leadership-no-attempt-remain-inside-eu-leave-europe-a7130596.html>>, accessed 19/12/2016.

<sup>119</sup> N Barber, T Hickman, and J King, 'Pulling the Article 50 'Trigger': Parliament's Indispensable Role' UK Constitutional Law Blog, 27/06/2016, <<https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/>> accessed 11/12/2016.

<sup>120</sup> *Miller* (n 3), Appellant's Case, para 62(d).

<sup>121</sup> See (n 118).

The distinction between the withdrawal decision and its notification is significant for a number of interpretative issues posed by Article 50, as is shown below. For example, the question whether the *notification* is revocable looks different from the question whether the withdrawing Member State is able to revoke its *decision* to withdraw.

In what follows we do not propose to enter fully into the UK constitutional law debate that the Barber/Hickman/King blog and the *Miller* litigation have set off. Instead, we stand back a little from that debate, and look at it through an EU law lens. We consider that to be a useful exercise because the nature and effect of EU law deserve more consideration, for reasons we will explore. We start with a short summary of the Divisional Court's judgment in *Miller*, followed by three broad observations: on the effects of the withdrawal decision and its notification; on the rights conferred by EU law; and on broader normative questions associated with the respective roles of parliaments and governments in international treaty-making. We then move on to a discussion of the revocability of the notification of a duly notified decision to withdraw and consider the significance of this question from the EU perspective, independently of the *Miller* judgment.

#### A. *The Miller Judgment (Divisional Court)*

In *Miller*, the Divisional Court premised its analysis on the sovereignty of the UK Parliament, and regarded the Royal Prerogative as the "residue" of legal authority left in the hands of the Crown.<sup>122</sup> It nevertheless recognised that the prerogative power is wide in international affairs, and outside the purview of the Courts, but found that that was precisely so because the Crown cannot alter domestic law by making or unmaking a treaty. The Crown "cannot without the intervention of Parliament confer rights on individuals or deprive individuals of rights".<sup>123</sup> The Divisional Court then turned to the direct link which existed between rights under EU law, and UK domestic law, through the combination of the direct effect and primacy of EU law, on the one hand, and the European Communities Act (1972) on the other. The ECA was required to give domestic effect to EU law rights; is considered a constitutional statute; and has been amended whenever the EU Treaties have been amended.<sup>124</sup> The Divisional Court distinguished three categories of EU law rights which are given domestic effect: (i) rights capable of replication in the law of the United Kingdom; (ii) rights enjoyed in other EU Member States; and (iii) rights that, upon withdrawal, could not be replicated in UK law.<sup>125</sup> The Court

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<sup>122</sup> *Miller* (n 3), paras 20-29.

<sup>123</sup> *Ibid*, para 32.

<sup>124</sup> *Ibid*, paras 34-46.

<sup>125</sup> *Ibid*, paras 58-61.

found that withdrawal would affect each of those categories of rights. It is worth highlighting that, even as regards the first category, the Court found that it was no answer to the claimants' case to say that Parliament could always re-enact those rights, after withdrawal: "The objection remains that the Crown, through exercise of its prerogative powers, would have deprived domestic law rights created by the ECA 1972 of effect".<sup>126</sup>

The Divisional Court then firmly rejected the Secretary of State's case, which was to say that the prerogative power to withdraw from the EU had been left intact by Parliament. The Court considered that this interpretation disregarded the relevant constitutional background, which is that the ECA is a constitutional statute, and that the Crown does not have the power to vary the law of the land by the exercise of its prerogative powers.<sup>127</sup> The Crown's prerogative power operated only on the international plane.<sup>128</sup> A careful analysis of the ECA led the Court to the conclusion that Parliament intended EU law rights to have effect in UK law, "and that this effect should not be capable of being undone or overridden by action taken by the Crown in exercise of its prerogative powers".<sup>129</sup> In the last part of its judgment, the Court established that its findings were not contradicted by the existing judicial authorities.

#### *B. The Effects of the Withdrawal Decision and its Notification on the Role of Parliament*

Part of the debate on *Miller* focuses on the nature and scope of the Government's treaty-making powers, which include the making of treaties and the withdrawal from them. Critics of *Miller* generally argue that there is nothing remarkable, in the United Kingdom's dualist system, about the power of the Government to terminate EU membership. Some commentators even treat withdrawal from the EU as completely analogous to the termination of double-taxation treaties.<sup>130</sup> Those criticisms are difficult to sustain in the face of the legal character (let alone the breadth) of the rights which EU law confers, which we have already examined. However, there is also the peculiar way in which Article 50 sets up the withdrawal process, which shows that, in terms of any parliamentary role, withdrawal is very different from accession to the EU or Treaty amendment. These differences have not been sufficiently articulated. In particular, there seems to be a widespread misconception that, at the end of the Brexit negotiations,

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<sup>126</sup> Ibid, para 64.

<sup>127</sup> Ibid, paras 77-88.

<sup>128</sup> Ibid, paras 89-91.

<sup>129</sup> Ibid, para 94.

<sup>130</sup> J Finnis, 'Terminating Treaty-based UK Rights', UK Constitutional Law Blog, 26/10/2016, <<https://ukconstitutionallaw.org/2016/10/26/john-finnis-terminating-treaty-based-uk-rights/>> accessed 11/12/2016.

Parliament will at any rate have a chance to confirm or reject the results, and that there is therefore no need for it to have a say in the triggering of Article 50.<sup>131</sup>

That is not how Article 50 structures the withdrawal process. In contrast with Treaty amendments or accessions, withdrawal is unilateral. There is no need at all for the EU as such, or the other Member States, to agree to it, in any shape or form. That is the effect of the two-year deadline in Article 50(3): whatever the EU and the other Member States undertake, the State which has notified its intention to withdraw can let the two-year period expire, and that means that "the Treaties shall cease to apply to the Member State in question." Treaty amendments and accessions work in the opposite way. They require, first, agreement among all Member States, and second, approval in accordance with each Member State's constitutional requirements.<sup>132</sup> It is only when the last Member State has completed those requirements that the amendments can enter into force or the accession take place. We know this all too well, as both the Maastricht and Lisbon Treaties have been held up because of an initial failure of approval in some Member States; and the Constitutional Treaty was abandoned as a result of such a failure.

Because of this two-year deadline, Article 50(1) provides that it is the *decision* to withdraw which needs to be taken in accordance with the Member State's own constitutional requirements. On the conditions for the approval of the subsequent withdrawal agreement by the withdrawing Member State, Article 50 is silent, and for good reason, as constitutionality has been ensured at the outset.

With this in mind, it is important to think through the various ways in which the Brexit withdrawal process may play out, in terms of Parliament's powers. First, the withdrawal negotiations may fail, leading to the United Kingdom effectively leaving the EU at the end of the two-year period. Parliament of course cannot force the EU to accept any negotiated withdrawal agreement. Second, if the negotiations are successful, Parliament could approve or reject the withdrawal agreement. But if it rejects, that does not stop Brexit from happening. Article 50 is clear in that regard: "failing [a withdrawal agreement]" the Treaties cease to apply after two years. Effectively, therefore, whether or not Parliament likes the Brexit terms, it had better approve the withdrawal agreement, for else there are no terms at all. In theory, the withdrawal

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<sup>131</sup> Miller (n 3), Appellant's Case, para 81.

<sup>132</sup> Note that even the European Council's decision to extend majority voting, in accordance with a simplified revision procedure, allows any parliament to make known its opposition, and to block the decision (Art 48(7), third subparagraph, TEU).

agreement could itself provide that it requires approval by Parliament, and that if Parliament rejects it, the withdrawal negotiations need to be resumed. The two-year period can be extended. But that option requires the EU's agreement, and a unanimous European Council decision. Again, this is not something within Parliament's control, even if it were to instruct the Government to negotiate such an agreement.

In other words, it is incorrect to assume that, at any rate, Parliament will be able to have its say at the end of the withdrawal process. Even in formal terms, that is not *inevitably* the case, and if there is a withdrawal agreement, in substance Parliament will be faced with either approving it, or mandating the hardest of Brexits.

All this is distinct from the question whether notification is revocable. As we argue further below, that is a question which applies, not so much to notification, but to the actual constitutional decision to withdraw. The distinction is clear enough. Assuming that "Brexit means Brexit", what is the role of Parliament, and at what point does it need to get involved? The above analysis speaks to that question. It is an altogether different question whether the Brexit decision itself can be revoked, unilaterally, by the United Kingdom.

### *C. The Rights Conferred by EU Law*

It is generally accepted that use of the Royal Prerogative does not allow the Government to interfere with rights under UK law, and in particular with statutory rights. The Divisional Court took the effect of the withdrawal decision/notification on EU law rights as critical to its analysis. It established that there are three categories of EU law rights.<sup>133</sup> First, those rights which Parliament could maintain or replicate post-Brexit, for example employment and equality rights. Second, rights which UK citizens and residents have in other Member States. Those rights could be maintained in the post-Brexit relationship between the UK and the EU, but that depends on the terms of the withdrawal agreement and any further agreements. Third, rights which will inevitably be lost, because they are conditional on membership - the prime example being the political rights to vote for the European Parliament, and to stand as a candidate in EP elections.

*Miller's* critics argue that the rights conferred under EU law are not genuine statutory rights.<sup>134</sup> They say that the ECA is a mere conduit for rights which are located on the international plane.

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<sup>133</sup> *Miller* (n 3) paras 57-61.

<sup>134</sup> *Miller* (n 3), Appellant's Case, paras 46-53.

This is a consequence of the dualist nature of the UK constitution. One may call this 'the dualism critique'. Notwithstanding *Van Gend en Loos* and *Costa v Enel*,<sup>135</sup> directly effective EU law rights have force of law in the United Kingdom on the sole basis that Parliament has given them that force in the ECA. The fact that the rights are international in nature is evidenced by the reference in Section 2(1) ECA to those rights as they exist "from time to time". It is for the Government to vary these rights, the critics argue, through its participation in EU law-making. Indeed, the rights are also contingent on action by other Member States (e.g. another Member State could withdraw, and thereby terminate the rights of UK citizens in that state). Likewise, the Government can decide to withdraw from the EU, which effectively will put an end to at least some of these rights. That is simply a function of the Royal Prerogative in terms of negotiating international treaties. The ECA is there to give domestic effect to the EU Treaties, and the rights which those Treaties (and EU legislation) confer. Without the ECA, there could be no domestic effect. That does not mean that the Government is incapable of using the Royal Prerogative in such a way that membership comes to an end.

A first reply to this dualism critique would revolve around the need to recognise that, when Parliament enacted the ECA, it was fully aware of the direct effect and primacy of EU law, and therefore of the concept that EU law is, of its own force, domestic law. Article 2(1) ECA provides that all

"rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly."

This provision surely recognises that EU law conceives of the rights which it confers as fully integrated into domestic law. Parliament did not qualify the direct effect and supremacy of EU law; it confirmed it, and ensured that it could work in accordance with EU law principle.

However, there is a more significant reply to the dualism critique. It is inherently contradictory, and one could say that it is post-truth, or involves having one's cake and eating it. If indeed the United Kingdom has remained completely dualist, notwithstanding EU membership, then the

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<sup>135</sup> *Van Gend en Loos* (n 4); Case 6/64, *Costa v ENEL* [1964] ECR 585.

only conceivable basis for EU law rights in UK law is the ECA. The rights, as they exist in UK law, cannot be anything but a product of Parliament's enactment of the ECA. They are pure statutory rights. Parliament itself has not listed those rights. Instead, it has chosen to "outsource" their definition, amendment, even creation to this international organization called the EU, of which the United Kingdom is a member and in the institutional framework of which the Government (and occasionally Parliament itself)<sup>136</sup> have a role to play. This is something Parliament can do as it is fully sovereign. But the only reason for giving effect to those rights in UK law is the ECA. What else are they then but statutory rights? The more one emphasises an absolute form of dualism, the more incontrovertible it is that EU law rights are, in the United Kingdom, statutory rights.

The contingent nature of the rights that EU law confers is also inadequate for criticising *Miller*. It is not clear whether this criticism is different from the claim that the rights are ambulatory, in the sense that they change "from time to time". Of course, many rights under EU law are contingent on the legislation which the EU adopts. It is the Government which participates in the adoption of such legislation, through its membership of the Council of Ministers. But the Council does not act alone, and UK citizens are represented in the European Parliament, which is the co-legislator. At any rate, the UK Government cannot adopt EU legislation on its own, whereas the Government's claim in *Miller* is that it can, singlehandedly, trigger withdrawal.

More important, however, is that the fundamental rights which EU law confers (understood in a neutral sense) are provided for by the EU Treaties and by the Charter of Fundamental Rights. Those rights can only be amended by way of Treaty change, and this requires amendment of the ECA, and thus Parliament's legislative approval (Section 1(1)). This means that the reference in Section 2(1) to rights provided "from time to time" does *not* include those Treaty and Charter rights, which are therefore not contingent or ambulatory: they are provided for in the EU Treaties, each of which Parliament has incorporated by amending the ECA.

A further criticism of *Miller* concerns the category (ii) rights: those which UK citizens and residents have in other Member States. The criticism appears aimed at limiting the number of rights which are necessarily affected by withdrawal. Category (i) rights can be replicated by the UK Parliament, acting alone. If category (ii) rights are not rights under UK law - as the

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<sup>136</sup> See, e.g. Article 12 TEU. This provision envisages a variety of ways in which national parliaments contribute to the good functioning of the EU. For example, they are duly notified of legislative proposals, review the observance of subsidiarity and proportionality and can oppose the adoption of legislation under the passerelle clauses of Articles 81 TFEU and 48(7) TEU.

argument goes - then only category (iii) rights are left (such as political rights concerning elections for the European Parliament), as rights which cannot be autonomously replicated. It is not clear how far the argument stretches as the Claimants are rightly saying that this leaves intact the claim that at least *some* rights are affected.

At any rate, the attack on category (ii) rights misses its target. The Divisional Court called it "divorced from reality".<sup>137</sup> It found that Parliament "knew and intended that enactment of the ECA 1972 would provide the foundation for the acquisition by British citizens of rights under EU law which they could enforce in the courts of other Member States".<sup>138</sup> That must definitely be the case, but in fact there is more to the category (ii) rights than that. It is by no means excluded that they are enforced under UK law, before the domestic courts, as practice shows. A clear example is *Viking Line*.<sup>139</sup> This was a reference from the Court of Appeal (England and Wales) on the exercise of the right of establishment by a Finnish company in Estonia. The fact that the International Transport Workers Federation, which was allegedly interfering with Viking Line's right of establishment in another Member State, is based in London, led to the English courts having jurisdiction, pursuant to the Brussels Regulation.<sup>140</sup> That jurisdiction was not disputed, and *Viking Line* was ultimately successful in part of its freedom-of-establishment claim. The case shows that internal-market and free-movement cases may come before the courts of a Member State, even if they are concerned with restrictions imposed by a different Member State. The category (ii) rights are therefore just as much part of the rights protected by the ECA as the other categories.

This is important because it answers the claim that, even if the internal market and free movement were not part of the post-Brexit arrangements, Parliament could nevertheless maintain the relevant rights insofar as they apply within the United Kingdom. For example, Parliament could allow EU citizens to continue to establish themselves in the UK. However, it could not maintain the rights of UK citizens and residents in other Member States, because it would then need to act extra-territorially. Those rights will be lost unless they are part of the post-Brexit arrangements with the EU, which Parliament does not control.

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<sup>137</sup> *Miller* (n 3) para 66.

<sup>138</sup> *ibid.*

<sup>139</sup> Case C-438/05 *International Transport Workers' Federation (ITWF) and Finnish Seamen's Union v Viking Line*, EU:C:2007:772.

<sup>140</sup> *Viking Line v ITWF and FSU* [2005] EWHC 1222 (Comm), para 70.

The conclusion must be that the rights conferred by EU law are statutory rights, some of which (the "fundamental" ones) are not contingent or ambulatory in the sense that Parliament has expressly enacted them in the ECA. In fact, as Laws LJ put it in *Thoburn v Sunderland City Council*: 'It may be there has never been a statute having such profound effects on so many dimensions of our daily lives.'<sup>141</sup> Withdrawal from the EU means that Parliament cannot re-enact a substantial number of those rights in the absence of new arrangements with the EU, which Parliament does not control. Some of the rights will inevitably be lost, because they are dependent on full membership.

#### *D. A Normative Approach*

Our third comment on the *Miller* litigation focuses on the wider normative questions associated with the role of Government and Parliament in the Article 50 process. Most of the academic debate on *Miller* obscures such questions rather than attempting to answer them. The picture painted is one of a series of legal technicalities, embedded in judicial precedent and complex legislative language. However, the question about constitutional authority to *withdraw* from (as opposed to acceding to) a supranational organisation with the kind of dimensions the EU has, is wholly unprecedented. The Royal Prerogative is clearly strongest in foreign affairs, but for the United Kingdom there can hardly be a bigger question of foreign affairs than EU withdrawal. Indeed, it is in very large measure not a question of "foreign" affairs at all, for reasons which are obvious and which we have attempted to articulate, at least to some extent, above. In most other Member States, this would be plainly a constitutional question, and not one of foreign affairs, because the constitution enshrines EU membership.<sup>142</sup> If the final outcome of the *Miller* litigation were that the Government can, without involving Parliament, decide to withdraw the United Kingdom from the EU, an external observer would be justified in wondering what is left of parliamentary sovereignty in the UK.

Other jurisdictions are also struggling with the tension between the traditional and standard mechanism of acting on the international plane, and the fact that so much international action today is not merely about international relations, but aims to coordinate or even command domestic policies. The EU is one of them, as the CETA and TTIP trade negotiations show. The lack of transparency of those negotiations, and of democratic (parliamentary) scrutiny has

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<sup>141</sup> [2003] QB 151 (DC); para 62. See also: *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; *Miller* (n 3) paras 92ff.

<sup>142</sup> See, for example, Article 23 of the German Constitution.

been heavily criticised, leading to some positive, though still inadequate change.<sup>143</sup> The TTIP negotiating mandate was published; the European Parliament is now given at least some level of access to the negotiation documents; and the Commission conceded that CETA is a mixed agreement, requiring domestic parliamentary approval in the Member States, with the Wallonia crisis as a consequence. Even the French Government, traditionally a strong proponent of executive dominance in foreign affairs, is advocating fundamental change of EU trade policy in terms of transparency and democratic scrutiny.<sup>144</sup> In a different, but equally relevant respect, the Lisbon changes in the processes for EU Treaty amendment also reflect the shift away from executive dominance: the ordinary revision procedure involves a Convention which includes representatives of national parliaments and of the European Parliament (Article 48(3) TEU). A further example of the shifts in the conduct of foreign affairs is the extent to which the German Parliament has claimed a role in EU affairs, particularly as regards EMU.<sup>145</sup>

Luebbe-Wolff, former judge at the German Constitutional Court, has neatly framed the fundamental constitutional question with which our liberal democracies are currently faced: international negotiations such as CETA and TTIP are in substance "about" legislation.<sup>146</sup> They concern a wide range of matters which, in domestic law, are legislative in nature. It is therefore unsustainable, from a democracy perspective, to leave those negotiations exclusively in executive hands. Indeed, the Leave campaign's slogan about taking back control, arguably the principal driver of the referendum outcome, reflects the level of general unease with the growing transfer of law-making to the international plane.

It is beyond the scope of this paper to offer a full critique of the single major defence of executive dominance in foreign affairs: that such affairs are about reciprocal bargaining for which executives are best equipped, and which cannot be conducted in parliamentary chambers.<sup>147</sup> It is a defence which dominates the current political discourse. Prime Minister May will not give a running commentary on the Brexit negotiations in Parliament, because it

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<sup>143</sup> G Luebbe Wolff, 'Democracy, Separation of Powers and International Treaty-Making' forthcoming (2017) CLP.

<sup>144</sup> See Ministère des Affaires Etrangères et du Développement International, 'Propositions Françaises du Réforme de la Politique Commerciale Européenne, 11/2016, <<http://borderlex.eu/wp-content/uploads/2016/11/2016-11-Propositions-françaises-de-réforme-de-la-politique-commerciale-européenne.pdf>> accessed 16/12/2016.

<sup>145</sup> German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (OMT).

<sup>146</sup> Luebbe Wolff (n 143).

<sup>147</sup> Ibid; See also T Endicott, 'This Ancient, Secretive Royal Prerogative' UK Constitutional Law Blog, 11/11/2016, <<https://ukconstitutionallaw.org/2016/11/11/timothy-endicott-this-ancient-secretive-royal-prerogative/>> accessed 11/12/2016.

would wholly undermine the Government's ability to conclude the best possible deal for Britain.<sup>148</sup> However, even the most superficial analysis of what is at stake in the Brexit negotiations reveals the defects of such a conception.

Withdrawal and the determination of the future relationship between the United Kingdom and the EU are not a zero-sum game, which can be subjected to an overall cost-benefit analysis. They involve a series of deeply political decisions on a range of incommensurables. For example, whether the United Kingdom keeps free movement, or some degree of it, has nothing in common with the question whether it wishes to continue to cooperate in the field of counter-terrorism; the acceptance of some form of jurisdiction of the EU Court of Justice has no connection with the choice between a customs union and a free-trade-area; payments into the EU budget are completely distinct from keeping the European Arrest Warrant. Each of those policy choices is distinct and different, and deserves proper democratic deliberation. Just imagine that all of these choices, with all of their consequences for domestic legislation in the relevant field, and for the rights and obligations of citizens, non-citizens, and companies, can simply be made by the Government, with no Parliamentary involvement other than the final decision, once a withdrawal agreement has been negotiated, to accept the "deal", or to reject it and risk the hardest of Brexits.

Those considerations justify significant Parliamentary scrutiny of the Brexit process. They warrant an Act of Parliament which incorporates the withdrawal decision as provided for in Article 50(1), and any instructions Parliament considers appropriate for the negotiation of the Brexit terms. It is to be hoped that the Supreme Court will endorse the principled Divisional Court judgment which, although it did not construe the case as normatively novel and unprecedented, was nevertheless attuned to the deep constitutional significance of this litigation.

*E. Revocability of the Decision to Withdraw, beyond Miller: Is Article 50 Forever or Can the UK Really Change its Mind?*

The last important question that has arisen in respect of Article 50 from the *Miller* litigation relates to the revocability of a notification under Article 50(2). Before the Divisional Court, the parties to the *Miller* case had accepted that the notification is irrevocable. As noted elsewhere, though, the question of revocability is largely irrelevant to the outcome of the case, which turns on the question of whether parliamentary sovereignty is prejudiced – and as we have already

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<sup>148</sup> HC Deb 23 November 2016, vol 617, col 894.

suggested, that may be so even if the decision is revocable.<sup>149</sup> The case for the involvement of Parliament in the UK withdrawal process is strong, regardless of whether the notification can be revoked at a later stage or not. Nevertheless, the question remains alive, and of critical legal and political importance. To what extent is a duly notified decision to withdraw revocable insofar as EU constitutional law is concerned – or, to use Lord Pannick’s now famous analogy in *Miller*, must the bullet, once fired, necessarily reach its target?<sup>150</sup>

The wording of Article 50 is not clear on the point of revocability. While, as Jean-Claude Piris has put it, ‘intentions’ can change,<sup>151</sup> Article 50(2) does not concern the notification of a mere political intention, but of a *decision* to withdraw taken in accordance with a Member State’s constitutional requirements. In turn, an intention of this kind has a clear legal meaning and constitutional implications for the European Union, as laid down in Article 50(3), namely the commencement of a two-year process for exit.

The possibility of a withdrawing state changing its mind about leaving can be read into this provision in two ways: instead of an agreement to leave the EU, an agreement not to leave the EU can be reached amongst the parties. The future relationship with the EU of the state-no-longer-wishing-to-withdraw following the negotiations would then be merely a reaffirmation of the application of the Treaties to that state. This would be a legally intricate solution but nonetheless imaginable. Alternatively, the state-no-longer-wishing-to-withdraw and its counterparts could unanimously agree to extend the negotiations indefinitely and, eventually, to insert a protocol into the Treaties to the effect that the notification of withdrawal under Article 50 has been revoked. As such, even on a strict reading of Article 50, there are some possibilities for changing the course of action during the process.

However, neither of these options amounts to a possibility for a state *unilaterally* to revoke its notification. 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 European Union – and indeed for other Member States – to force it to withdraw based on the assumed irrevocability of Article 50.<sup>152</sup>

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<sup>149</sup> P Eeckhout, ‘Miller and the Art 50 notification: revocability is irrelevant’ London-Brussels One-Way or Return, 14/11/2016, <<https://londonbrussels.wordpress.com/2016/11/14/miller-and-the-art-50-notification-revocability-is-irrelevant/>> accessed 11/12/2016.

<sup>150</sup> Transcript of *Miller* hearing (n 3), <<https://www.judiciary.gov.uk/wp-content/uploads/2016/10/20161013-all-day.pdf>>, accessed 1/12/2016, 19.

<sup>151</sup> J-C Piris, ‘Article 50 is not for ever and the UK could change its mind’ Financial Times, 1/09/2016, <<https://www.ft.com/content/b9fc30c8-6edb-11e6-a0c9-1365ce54b926>> accessed 11/12/2016.

<sup>152</sup> P Craig, ‘Brexit: A Drama in Six Acts’ (2016) *ELRev* 447, 464.

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.<sup>153</sup> Article 50 can certainly be stopped if everyone believes that that would be in their common interest. The problem is that it becomes far less straightforward if that is not the case. Indeed, it is only meaningful to discuss revocability of a duly notified decision to leave the Union if the withdrawing state can legally compel everyone else to accept the revocation.

In our view, the distinction between the decision to withdraw and its notification 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, it would not only be absurd but also unconstitutional for the Union not to accept a *bona fide* revocation of the notification.<sup>154</sup> The reference to constitutional requirements in Art 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.<sup>155</sup> Depending on what the constitutional requirements are, that could mean the rejection of the decision to withdraw by Parliament only, by Parliament and referendum, or by the Government following a referendum, as the case may be.<sup>156</sup> A vote in the Commons or a second referendum may therefore be required.<sup>157</sup> It must be emphasised, 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 about the rejection of a specific agreement.

There is of course a need to avoid abuse of the Article 50 process. The overall structure of Article 50 could be conceived of in the following way. As noted above, it is clear from the *travaux* that the provision should retain the withdrawing state’s right of unilateral exit from the Union. While a series of amendments had been proposed that were intended to make the conditions of withdrawal stricter (e.g. making withdrawal conditional on Treaty change<sup>158</sup> and inserting an explicit requirement of compatibility with international law<sup>159</sup>), these were not

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<sup>153</sup> D Sarmiento, ‘Miller, Brexit and the (maybe not to so evil) Court of Justice’ *Verfassungsblog* 8/11/2016, <<http://verfassungsblog.de/miller-brexit-and-the-maybe-not-to-so-evil-court-of-justice/>> accessed 11/12/2016.

<sup>154</sup> See Craig (n 152) 464.

<sup>155</sup> *Ibid.*

<sup>156</sup> That depends entirely on the outcome of the *Miller* appeal: see (n 3).

<sup>157</sup> Duff (n 29) 9.

<sup>158</sup> Proposed amendments (n 49) 4.

<sup>159</sup> *Ibid.*, 26.

adopted. Article 50(1) entitles the withdrawing state to take a decision to leave simply 'in accordance with its own constitutional requirements.' The other Member States and the Union itself have no say in the taking of that decision or in its notification under Article 50(2). Additionally, Article 50 does not make the withdrawal conditional on an agreement. The two-year negotiation period mentioned in Article 50(3) simply enables the EU and the withdrawing state to reach an agreement. At the same time, if they do not wish to, or find themselves unable to do so, it provides a safety valve for both parties. The withdrawing state is at liberty not to have any further association with the Union. In turn, the remaining Member States hold the cards as to whether the negotiations will be extended.

To some extent, therefore, the structure of Article 50 tilts the scales in favour of the EU at the negotiation stage. 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 affords the withdrawing state, it is logical that the provision then balances that discretion with stricter conditions upon notification. If the decision to withdraw could be revoked unilaterally after a valid notification had been communicated to the European Council, the withdrawing state could simply stall the negotiations by using that possibility to its benefit if it found it difficult to negotiate the agreement it was hoping for. 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.

At the same time, though, the constitutional case for *forcing* a Member State to withdraw from the Union if it *bona fide* wished to remain is weak. 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 is 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<sup>160</sup> and has never encountered that question in similar

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<sup>160</sup> See A Saydé, 'Defining the Concept of Abuse of Union Law' (2014) 33:1 YEL 138 – and, more generally, A 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 v Jobcenter Leipzig*, 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, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking*

circumstances, the matter may need to be litigated before the Court of Justice. Still, provided it is in good faith, a unilateral revocation of the decision to withdraw should be possible. If a Member State could not remove its notification after changing its mind, and was thus forced to leave upon the conclusion of a two-year period under Article 50(3), that would effectively amount to an expulsion from the Union – a possibility that was considered and rejected during the *travaux*.<sup>161</sup> It would also be contrary to the principles of good faith, loyal cooperation,<sup>162</sup> the Union's values<sup>163</sup>, and its commitment to respect the Member States' constitutional identities.<sup>164</sup>

Thus, overall, provided that there is a *new decision not to withdraw* that is taken in good faith, the Article 50 clock can be stopped. After all, 'the goal of the Union is integration, not disintegration'.<sup>165</sup>

## V. Conclusion

The constitutional questions at stake in the process of withdrawing from the EU are of the utmost importance for the Union's construction. It is the commitment to constitutional values that distinguishes the European Union from other international organisations. These values are put to the test during Brexit. As we have sought to demonstrate, it is essential to read Article 50 from a constitutionalist viewpoint: its context is one of constitutionalisation and its implications will mark national constitutions and the postnational constitutional structure of the European Union 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 and safeguards them through accountable institutions, rather than being merely an international treaty signed by states. A constitutionalist reading of Article 50 brings into sharper relief the fact that the withdrawal process cannot be one that is entirely at the mercy of politics. It is governed by specific constitutional stipulations on the EU side as well.

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*Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779. Its scope in such a context is, therefore, open to debate.

<sup>161</sup> Proposed amendments (n 49) 5.

<sup>162</sup> Article 4(3) TEU.

<sup>163</sup> Article 2 TEU.

<sup>164</sup> Article 4(2) TEU.

<sup>165</sup> Duff (n 29) 9.

They necessitate respect for the UK's constitutional decision to withdraw; but, at the same time, due respect for rights as foundational pillars of the Union and, and for other EU constitutional values such as the rule of law and democratic governance.

In turn, it would be flawed to assume that constitutional questions pertaining to withdrawal from the perspective of the United Kingdom can really be addressed by excluding the constitutional dimensions of these questions from the EU side, except partially and temporarily. In light of the integrated nature of the EU and the UK, the EU constitution is both shaped by – and greatly affects – many crucial constitutional features of the UK's own legal order, as important as human rights, legitimate expectations and constraints on public power.

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. Indeed, the relationship between respect for constitutional guarantees and meaningful deliberative action in the public sphere is inherent.<sup>166</sup> It is one on which both the UK and the EU constitutional orders are premised. It is important that constitutional oversight of the withdrawal negotiations is ensured on both sides before those negotiations are concluded.

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<sup>166</sup> J Habermas, *The Theory of Communicative Action, Vol 1 – Reason and the Rationalization of Society* (reprint edn, T McCarthy tr, Polity Press 1984) 285-8; Habermas, *Between Facts and Norms* (n 65) 166; J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 258-262; JS Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (OUP 2000) 48.

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