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SPECIAL ISSUE ARTICLE

Was Brexit a Form of Secession?

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Abstract

As a form of legal separation taking place within a quasi-federal framework, Brexit displayed important conceptual similarities with secession, in that it was predicated upon notions of collective identity and aspirations of renewed self-government. This article examines the interrelationship between Brexit, secession as a legal concept, and secessionism as a political phenomenon. It advances two main arguments: at a first stage, it highlights that while Brexit ideologically aligns with secessionism, it could not have met any sustained international law definition of secession itself. However, the constitutional constraint to the European Union's formal status as an association of states (*Staatenverbund*) as opposed to a federation (*Staatsverband*) has rendered its withdrawal provision (Article 50 of the Treaty on European Union (TEU)) unduly impervious to the important practical parallels between the Brexit process and decisional, that is, negotiated, forms of secession. The article goes on to argue that an active recognition of aspects of decisional secession within the EU constitutional framework could have allowed for a more complex and dialogical resolution of Brexit than the conditions set up by the unilateral withdrawal clause allowed.

1 | INTRODUCTION

Reflecting upon the question of whether Brexit amounted to a form of secession quickly reveals one's natural predisposition regarding the constitutional identity of the European Union. To my mind, the intuitive answer was that Brexit *must be* seen a form of secession. Whereas withdrawal from the Union might not be a textbook example of secession from a nation state, the United Kingdom's decision to leave the EU carried precisely the narratives about self-determination that lie at the heart of secessionist movements, and was perceived as a schism or apostasy, in just the same way as secessions usually are. As Pohjankoski (2018, p. 850) has remarked, such an understanding of Brexit would indeed exemplify a constitutionalist vision of the EU, as 'the formalisation of the exit procedure in the EU Treaties reinforces, in itself, a more federal view' thereof. Upon closer inspection, though, is it possible to view Brexit as secession in constitutional terms, rather than in merely informal parlance? Does the idea of Brexit as secession represent the current constitutional functioning of the EU, or does it risk evoking too emotive an imagery about its federal future, which goes beyond what the current Treaty framework is capable of delivering?

This contribution argues that it is preferable to classify the constitutional pedigree of Brexit as one that stands uncomfortably 'between secession and Treaty withdrawal' yet squarely amounts to neither (Vidmar, 2018, p. 426). This better captures the fact that, while Brexit and secession share certain qualities, such as appeals to nationhood and the uniqueness of particular peoples, Brexit also represents constitutional

challenges of a *supranational* kind. First, rather than being an internationally meaningful claim to self-determination, it rested upon a political failure to respond to the sentiments of loss and discomfort that globalisation creates at the national level, as manifested in the narratives of national emancipation from Brussels that dominated the 2016 referendum. Second, Brexit also revealed that, while withdrawal from the Union was determined by and operated within the terms of Article 50 TEU, that provision can be contrasted to decisional secession clauses, which presuppose stronger counter-majoritarian guarantees.

2 | THE IMPOSSIBILITY OF BREXIT AS SECESSION IN INTERNATIONAL LAW

In the traditional lexicon of public international law, withdrawal would be the habitual way of referring to a decision to leave an international organisation, whereas secession suggests a process of unilateral separation of a subnational entity from its parent state. The latter concept, namely, that of secession, has a highly exceptional character, resting at the borders of national constitutional and international law (Martinico, 2017).

Constitutions have generally avoided any mention of secession because it is, in principle, a protoconstitutional concept premised on the *pouvoir constituant* of the seceding people, thus implying 'a break of the established order' (Martinico, 2017, p. 22). Equally, while there has been an increase in the use of the term 'secession' over 'self-determination' in recent years, the recognition of a right to secede under international law is still usually justified on the basis of self-determination (Margiotta, 2019). The doctrinal construction of self-determination remains narrow. It always rests upon a defence of distinct peoples' agency over their collective status and their ability to sever bonds with the state in which they are embedded, even though the key definitional elements of the right (what is a distinct people or group and what is a state) are contested (Bengoetxea, 2019). Some guidance is provided in the *Declaration on Friendly Relations*, where the UN General Assembly considered that the principle of self-determination enshrined in Article 1(2) of the United Nations Charter can give rise to a valid claim of secession insofar as the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights' (UN General Assembly, 1970). Instances of colonialism and oppression of a defined people can, therefore, give rise to an inherent right of self-determination qua right to statehood. In other circumstances, the right to self-determination should be guaranteed internally even though, as the Supreme Court of Canada noted in the Reference re Secession of Quebec (1998, 2 SCR 217, para. 134), there is a possibility that international law may also comprise a valid claim to secession 'as a last resort' in cases where the 'meaningful exercise' of the right to self-determination has not been so guaranteed.

Keeping in mind the intimate relationship between secession and self-determination is essential to understanding the distinctiveness of secession compared to other forms of separation, such as withdrawal from the European Union. Seen through the lens of self-determination, secession is a problematic way of framing Brexit, for three main reasons, which will be examined in turn: the first is international law's emphasis on defined territory in order for secession to acquire meaning; the second is the substantive participation and accommodation that the UK had enjoyed within the Union throughout its membership; and the third is the way in which Article 50 TEU envisages, and thus neutralises, unilateral secessionist conduct.

3 | SECESSION AND THE EUROPEAN UNION'S LACK OF TERRITORIAL INTEGRITY

Unlike the significance of territorial integrity for the operation of a right to secede in international law,[1.] the legal construction of the European Union is fundamentally unsuited to fixed notions of territoriality or existing constructions of statehood. This is so in both textual and in conceptual terms.

Textually, the EU is not just an entity with oft-changing borders, but one whose borders depend entirely on the territorial integrity of its member states. The Union's flux territoriality is written into the Treaties, insofar as the EU remains open to future accessions (and, since Lisbon, withdrawals), thus showing that it is still – at least in part – a supranational order of a contractarian character.This is highlighted by a series of former quasi withdrawals from the EU, which have followed political developments in the territory of the relevant member state – most notably, perhaps, the withdrawal of Greenland under the terms of home rule while Denmark, the parent state, still remained in the EU, as well as the independence of Algeria from France (Tatham, 2012).

In the former case, Denmark granted Greenland home rule in 1971, thus rendering it practically independent, albeit formally still territorially a part of Denmark. In a referendum held in 1985, the majority of Greenlanders voted to leave the European Economic Community (EEC). The agreement that Denmark reached on behalf of the island was that

Greenland would become part of the Overseas Countries and Territories (OCT), which enjoy significant trade privileges, without being part of the EU. The unique features of this partial withdrawal highlight that the sovereignty of member states to determine their territory through national constitutional accommodation of self-determination, such as through home rule, is not affected by EU law. In the latter case, Algeria's recognition as an independent state in 1962 significantly altered the Union's territorial makeup. This further illustrates that the EU's borders were always subject to contestation, as well as that the Treaties themselves can have an application by agreement of the parties beyond EU territory. Whereas this had not been the case for other colonies, France had insisted that Algeria, as an integral part of France unlike other parts of the French Union, be included in the Treaty of Rome (Brown, 2017). Under Article 227(2) EEC, the Treaties had indeed applied to Algeria, but France's view following Algeria's secession was that it would be 'obviously absurd' if Algeria were to become the seventh EEC member state (MAEF 21QO/1462: Ministère des Affaires étrangères, direction des Affaires économiques et financières, service de coopération économique, 'Note a/s Le Maghreb et la Communauté Économique Européenne,' 11 October 1962, cited in Brown, 1999, footnote 52). As there was broad agreement on the common interest of maintaining a close relationship, though, the terms of the EEC Treaty continued to apply (at Algeria's request) until the terms of a bilateral agreement were negotiated in 1976 (Tatham, 2012; Tavernier, 1972).[2.]

Beyond these examples of past territorial change, notions of territorial integrity would also be conceptually problematic projections of statelikeness onto the Union. From its inception, the EU represented a challenge to the sovereignty of member states over their own borders, but only 'within limited fields' (Van Gend en Loos v Nederlandse Administratie der Belastingen, 1963, Case 26/62). Indeed, not only in its seminal judgment in *Van Gend en Loos* but also more recently, in *Opinion 2/13*, the Court of Justice has emphasised that, in respect of international law, the EU remains a 'sui generis' legal order with 'specific characteristics' unlike nation-states (Opinion 2/13 on Accession of the European Union to the European Convention of Human Rights, 2014, paras. 160–162, 164). This echoes the German Constitutional Court's analysis of the compatibility of the Lisbon Treaty with the German Constitution a few years earlier. That court had also found that, at the present state of development of EU law, the Union remains a voluntary association of states where state sovereignty is 'clearly expressed in the explicit recognition of the respect of national identity pursuant to Article 4.2 TEU and in the right to withdraw from the Union pursuant to Article 50 TEU' (BVerfG 123 and 267 – Lisbon Decision ('Lissabon-Urteil'), 2009, para. 153).

4 | SECESSION AND THE SUBSTANCE OF CLAIMS TO SELF-DETERMINATION

Even if the absence of a fixed territory were no longer key to the concept of secession, it is worth considering whether Brexit could amount to secession qua the affirmation of self-determination in substantive, albeit looser terms (Milanovic, 2017).

As a decision taken in peacetime and relative prosperity, Brexit is of course very different to many instances of secession, such as those following the end of the USSR or decolonisation. But while fitting Brexit within the categories of severe oppression of minorities or of colonial subjugation would be far-fetched, the third possibility of an international claim to secession might have been theoretically entertained: that of the EU failing to accommodate the right to self-determination internally in a meaningful manner.[3.] The *Reference re Secession of Quebec* is instructive in this regard. In this case, the Supreme Court of Canada found that the relevant threshold for such a form of secession to ensue had not been met. The court's reasoning rested upon the fact that Quebecers could not plausibly be seen as being denied access to government, having in fact often held key roles in federal government, and that they were not subject to attacks on their existence or integrity, or otherwise to violations of their rights (Reference re Secession of Quebec, 1998, paras. 135–136). The court concluded that 'the continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination' (Reference re Secession of Quebec, 1998, para. 137).

Such reasoning would also apply to the EU's relationship with the United Kingdom. Not only is the Union founded upon the principles of conferral and subsidiarity but, as the passages from the German Constitutional Court's *Lisbon* judgment have already highlighted, the EU Treaty framework expressly mandates respect for national constitutional identity under Article 4.2 thereof (*Lissabon-Urteil*). Moreover, whereas narratives of domination or 'taking back control' were prevalent in the discourses around Brexit, in reality, the UK had effectively participated in EU institutions since joining the Union. Just like other member states, it was proportionally represented in the European Parliament, it had a seat at the table of negotiations in the Council and European Council, a Commissioner, and judges at the different levels of the Court of Justice of the European Union, where it enjoyed the further benefit of a permanent Advocate

General. It might, indeed, be added that the UK's special accommodation within the EU went beyond what is normally envisaged for other states, as shown in the social rights chapter at Maastricht, the creation of the euro and the Schengen zones, further integration in the fields of justice and home affairs, and the EU Charter of Fundamental Rights: each of these fields of EU law were accompanied by a UK opt-out – or, in the case of the Charter, a clarification (Eeckhout & Frantziou, 2017). Thus, while the UK disagreed with a vision of 'ever closer Union' based on greater non-economic cooperation and minimum protections of social rights (see Margaret Thatcher's Speech to the College of Europe ('Bruges Speech'), 20 September 1988), this disagreement could never have met the threshold required to amount to a breach of the principle of internal accommodation of self-determination. This is not just because secession from the EU is impossible in international law due to the Union's constitutional construction as a non-state, but because the UK could not have asserted that its integrity, existence, or the rights of its peoples were left unaccounted for.

Moreover, Brexit does not share some of the deeper qualities of secession. Understood as self-determination, secession is characterised by legitimacy even though it usually does not enjoy internal legality,[4] because it engenders the potential for new rules of recognition to be developed, through the rights and political movements that will, in time, come to define the newly born state. By contrast, the central narrative of Brexit was one of return ('taking back') and not of creation or natality. There was nothing inherently autonomy-inducing, democratic or undemocratic about Brexit in itself as separate from the process through which it came about (i.e. the 2016 referendum – a point I consider further below). On the contrary, we now know that withdrawal from the EU was not a decision legitimated by a great constitutional moment, despite the appeals to 'the people' and the referendum made in public. The UK Supreme Court's ruling in *Miller 1* made clear that, procedurally, Brexit was subject to review under the UK's 'own constitutional requirements' in accordance not just with Article 50(1) but also with the principle of parliamentary sovereignty. As the Supreme Court reasoned: 'where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation' (R (Miller) v Secretary of State for Exiting the European Union, 2017, para. 121). Whatever one's views on the substance of the Withdrawal Agreement and the recent EU-UK Trade and Cooperation Agreement, these instruments do not set out the parameters of a new legal order, but are directly attributable to a valid decision to leave the Union, which is reviewable on the basis of the UK's existing constitutional machinery. For these reasons, it is essential not to ascribe to withdrawal from the EU the mythical qualities of secession. To do so would be to acknowledge an element of sovereign emancipation in the Brexit process which, in domestic legal terms, would be tantamount to acknowledging the impossible: that one can regain what one has never lost.

Nevertheless, the above arguments do not necessarily strike at the heart of my overarching question, rather than restating fairly obvious observations about the nature of the relationship between EU, international, and domestic public law. Perhaps the more pertinent question to ask is whether, following the elaboration of a complex constitutional apparatus that contains specific conditions for accession, expanded Union competences, and the establishment of postnational legislative institutions, these reasons can still be seen as sufficient to distinguish secession properly-so-called from withdrawal from the Union, in practical terms. If the European Union, albeit that it is *sui generis*, now amounts to a federal-type postnational constitution of limited reach, is a view of Brexit as a form of secession imaginable, even if this cannot be so within the jargon of the Friendly Relations Declaration?

5 | SECESSION AND THE UNEQUIVOCAL CHARACTER OF ARTICLE 50

As suggested earlier, to think of secession only in its positive instances of self-determination from an oppressive parent would be misleading. Brexit could perhaps be seen as a potential candidate for decisional/consensual, rather than internationally protected secession, insofar as it gives effect to a *prima facie* democratically expressed view of the British people to leave the EU, recognised in Article 50 TEU. However, the wording and operation of the EU withdrawal clause militate against understanding it as a provision that recognises secession at all. Indeed, whereas Article 50 TEU offers the withdrawing state a right of exit, the unequivocal character of this provision is, somewhat paradoxically, to be contrasted both with the unilateralism of secession in international terms and with the negotiated character of secessions recognised in the national constitutional laws of some federations, such as Canada.

As Thürer and Burri (2009) note, what distinguishes secession from other forms of separation, such as withdrawal, is the 'unilateral' nature of secession, seen as the parent state's objection to the separation. Of course, this does not mean that secession shall remain contested in perpetuity. While the process of recognition of seceding entities as states is deeply fraught and can last for decades, as the examples of Kosovo and Northern Cyprus continue to teach us, eventual admissions to

the UN have usually been made with the consent of the parent state (Crawford, 2007; Thürer & Burri, 2009). Still, even in cases of decisional secession, such as the Canadian example, which most clearly tests the boundary between secession and withdrawal, the Supreme Court of Canada distinguished the unilateralism of an international right to secede from a right to leave the Confederation based on 'principled negotiations' and after the 'unambiguous expression of a clear majority of Quebecers' (Reference re Secession of Quebec, 1998, para. 104). In short, even where secession stems from internal rather than external recognition, there is an expectation that a degree of resistance or, at least, a requirement to negotiate will be asserted by the parent state.

The same cannot be said of Article 50 TEU, which offers a nearly absolute right to a member state to 'withdraw based on a decision made on its own responsibility' (*Lissabon-Urteil*, para 329). Of course, this provision is a *lex specialis* to Article 54 VCLT and can be read as being more than an intergovernmental process. It sets up a step-by-step procedure for withdrawal to be followed within the institutional framework of the EU and lays down the legal provisions on the basis of which a further relationship *may* be negotiated. However, the only requirement it sets out – that of compliance with national constitutional requirements – suggests that it is for the member state concerned to find a 'Union-conform' way of taking the relevant decision to withdraw (Tatham, 2012, p. 149). The rationale of the Article 50 process is further elaborated by the *travaux* on the Constitutional Treaty, on which Article 50 TEU is based. On the one hand, during that process, the UK had advocated a truly absolute right of exit that would not have required the involvement of EU institutions at all, which was rejected (Conv 345/1/02 REV 1; Hain, 2002). On the other hand, both a federalist approach proposed by Lamassoure, which entailed strict deterrent conditions against exit (Conv 235/02; Badinter, 2002) and the 'federal control model' proposed by Badinter and echoed in several French amendments (Conv 317/02; Lamassoure, 2002), whereby member states would retain the right to withdraw subject to a detailed and mutually negotiated procedure, were rejected, too. Crucially, these amendments would have included an effort to secure EU values and the protection of fundamental rights and EU citizenship in any upcoming withdrawal. It is thus impossible to ignore that, after significant debate during the drafting of what ultimately became Article 50 TEU, only the need for the withdrawing member state's 'own constitutional requirements' is essential for withdrawal to take place.

The above analysis should not be taken to mean that withdrawal from the Union is free of due process. The Court of Justice has found that withdrawal should be interpreted in the light of the values and rights that make up the broader constitutional environment of the Union, rather than being based on the text of Article 50 alone (Andy Wightman & others v Secretary of State for Exiting the European Union, 2018 [hereinafter: *Wightman*]). However, the content of national constitutional requirements is not something that the EU will stipulate. While in its judgment in *Wightman* the Court of Justice confirmed that, since it is written into EU law through Article 50, compliance with 'national constitutional requirements' may be subject to legality review at the EU level in addition to the national level (*Wightman*, 2018, para. 37), the decision to leave remains solely a 'sovereign choice' (*Wightman*, 2018, para. 50). In so finding, the Court specifically took note of the fact that, while 'amendments had been proposed to allow the expulsion of a member state, to avoid the risk of abuse during the withdrawal procedure or to make the withdrawal decision more difficult, those amendments were all rejected on the ground, expressly set out in the comments on the draft [of the Constitutional Treaty], that the voluntary and unilateral nature of the withdrawal decision should be ensured' (*Wightman*, 2018, para. 68).

Article 50 thus expresses merely one substantive condition of constitutionality (compliance with national constitutional requirements), which the withdrawing state itself is best placed to determine (*Lissabon-Urteil*, 2009). Otherwise, it envisages and permits any type of withdrawal, be it negotiated, soft and orderly, or indeed one that is isolationist, hard and capricious. The text and interpretation of Article 50 confirm that there has been extensive concern with the constitutionalisation of withdrawal, but not with the recognition of a negotiated right to secede, subject to constitutional guarantees. In stark contrast to the Canadian example, the constitutional spirit of this provision is one of mutual cooperation and not of obligation. Thus, as the German Constitutional Court had put it, Article 50 does not create a mechanism of 'secession from a state union (*Staatsverband*) […] but merely the withdrawal from an association of sovereign states (*Staatenverbund*) which is founded on the principle of the reversible self-commitment' (*Lissabon-Urteil*, 2009, para. 233).

6 | FINDING COUNTER-MAJORITARIAN INSPIRATION IN DECISIONAL SECESSION

Having argued that Brexit is not a form of secession within the traditional vocabulary of international law or, even, the framework of decisional secession from federal states, there remains some scope for some observations on the *secessionist rationale* of Brexit. Indeed, while one might question the amenability of Brexit to the terminology of secession properly-so-called, it cannot be overlooked that 'the issues arising from Brexit are reminiscent of those arising out of state succession' (Vidmar, 2018, p. 444) and that Brexit 'bears some

similarity with secessionist constitutional processes around the globe' (Skoutaris, 2019, p. 210). This is true both in terms of the domestic regulatory apparatus that followed the referendum through the European Union (Withdrawal) Act 2018, which aims to ensure legal continuity in a manner that is characteristic of secession (Douglas-Scott, 2016), as well as in aspects of the political discourse that gave ammunition to Brexit. As Weiler has put it, 'the deep structure of both discourses draws from the same well: the turn, or return, to national identity as a potent mobilising and coalescing factor in social and political life' (Weiler, 2017, pp. 12–13).

The final question that might arise, then, is whether we should think of Brexit as a secession-like process and, if so, what lessons this may offer for understanding and critiquing the efficacy of the withdrawal provision set out in the Treaties. To my mind, a twofold set of remarks can be made in this respect. First, withdrawal from the Union showcases a simplified vision of direct democracy as founded upon contestable claims to national identity (Section 1). It thus shares with other secessionist movements a problematic tendency, to which the Canadian Supreme Court has already drawn our attention, which is to equate democracy with '"sovereign will" or majority rule alone, to the exclusion of other constitutional values' (Reference re Secession of Quebec, 1998, para. 67). In this way, just like secession, Brexit calls into question a mutual presupposition between the rule of law and democratic government (Habermas, 1995). Second, this failure is not only of a national kind but one that raises an EU constitutional paradox, in that the intergovernmentalism of Article 50 can be contrasted to the close cooperation between the national and supranational levels otherwise embedded into the Lisbon Treaty (Section 2).

7 | BREXIT, SECESSION, AND THE 'ONION PROBLEM' OF NATIONALISM

Rather than appealing to subjugation of a specified group (the British), Brexit expressed a dissatisfaction with European supranationalism and the lack of popular authorship that is perceived to characterise it (Koskenniemi, 1994), whereby a Brussels bureaucracy and not the people themselves, directly or via their elected governments, is seen to shape EU legislation. Such concerns have been similarly voiced – though so far not followed through by withdrawal or concerted public endorsement – in numerous other EU member states: Marine Le Pen's presidential candidacy in France, Viktor Orbán's discourse on Hungarian values and border policing, and the constitutional overhaul in Poland are perhaps the most striking recent examples. They reveal one aspect of withdrawal, that of nationhood or national sovereignty, as intimately related to the key characteristics of secession, despite the absence of justified claims to inequality or subjugation.

There is no denying that political narratives of this kind *may* demonstrate a disconnect between the holders of constituent power and the exercise of legislative functions in the EU and that this is a matter of existential disquietude for a Union that appeals, inter alia, to democracy as one of its foundations, listed in Article 2 TEU. After all, 'the consent of the governed is a value that is basic to our understanding of a free and democratic society' (Reference re Secession of Quebec, 1998, para. 67). However, it would be overly simplistic to blame Brexit on the 'democratic deficit' or the EU's failure to mobilise a European public.

Rather than being means of changing a lack of accountability in the political structures of the European Union, the dissatisfaction from which withdrawal ensues, not to mention the decision and process of withdrawal themselves, come precisely at a time when the EU acquires greater democratic accountability, when participation in EU elections continues to rise, and when matters of common concern such as climate change and fundamental rights have squarely become part of the EU agenda (Weiler, 2017). Indeed, the character of the Union may be one that disperses constituent power amongst the member states and between national and postnational institutions (Bengoetxea, 2019), but this does not necessarily reduce the possibility of a dislocation (rather than altogether a loss) of that power in the 'limited fields' in which states have elected to restrict their sovereign rights in the interests of participation in the EU. That is not to underplay the important question of whether the EU's public sphere is integrated (Eeckhout, 2013), radically pluralistic (Krisch, 2010), or *demoicratic* (Nicolaidis, 2012) – an issue that continues to be a matter of intense debate in the EU. It is to say that these conceptual differences between the EU and its member states do not prevent us imagining an eventual coming together into some form of European public sphere where the conundrums of EU integration might eventually be debated of 'the peoples' (plural) of 'Europe' (singular) made in the Preamble to its Treaties and Charter – even if such a public sphere is still in the making (Habermas & Derrida, 2003).

Further, as is clear in respect of the devolved constituencies in the Brexit scenario, a state-wide referendum does not necessarily represent a plausible claim to a nation-wide, homogenous demos that can justify a right to secede in any one way.[5] On the contrary, in its appeal to *the people* as a 'monolithic entity' through the referendum outcome, Brexit is suspicious because, just like secession, it presents only 'part of the people as the people' (Canovan, 2005: Martinico, 2019). It thus conjures up imagery of a singular and united people of Britain as a courageous David fighting off an immoral and simpleminded Goliath, which can easily resist rational questioning in the public realm. There,

the referendum outcome as an unchallengeable *fait accompli* normalises disdain for and discredits voices of disagreement which can then easily be labelled as the irrational 'cry of rage' of the judicial and professional 'elites' thought to have been the main beneficiaries of the EU project, provided the referendum continues to resonate with the views of the majority group (Ekins & Gee, 2018). In other words, the core narrative of Brexit within the United Kingdom was built upon a vision of democracy justified through the clarity of numbers. Such a narrative, however, underplays the qualities of the referendum as a constitutionally valuable indicator of popular will only when it operates as an instrument 'of deliberative democracy and not of majority rule' (Reference re Secession of Quebec, 1998, para. 76). In this sense, while remaining compliant with the UK's own constitutional requirements in the strict sense envisaged by Article 50 TEU, the Brexit process failed to account for deeper – but perhaps more difficult to delimit – constitutional considerations and conditions of the UK constitutional settlement (an issue addressed in more detail in Roger Masterman's contribution to this special issue). But as the final section of my contribution goes on to argue, the presupposition of democratic guarantees for public deliberation was also too thinly guaranteed by the EU, thus representing a broader, supranational democratic failure.

8 | HOW BREXIT COULD HAVE BEEN (BUT IS NOT) AN EXAMPLE OF DECISIONAL SECESSION

Masterfully addressing the relationship between the rule of law and democracy in its *Reference re Secession of Quebec*, the Canadian Supreme Court noted that 'democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation' (Reference re Secession of Quebec, 1998, para. 67). Whereas, in the context of Brexit, that foundation was juridically present in Article 50(1) and its reference to national constitutional requirements, this did not – and could not – succeed in guarding against the 'politics of immediacy' that a secessionist discourse entails (Corrias, 2016, p. 12). In turn, in not building more confidently into this provision the democratic conditions that a thoughtfully negotiated decisional secession might have called for, EU law failed to protect those finding themselves vulnerable to majoritarian tendencies at the national level, whether these be minorities defined by nationality of other EU member states or groups othered for their political disagreement with the core message of national emancipation that Brexit entailed. In other words, rather than representing the difficult process of undoing membership of the Union, Article 50 allowed a problematic separation of the objective of withdrawal from its important practical details.

While, in *Wightman*, the Court of Justice movingly discussed the loss of the 'fundamental status' of EU citizenship and its commitment to protecting it throughout the withdrawal process (*Wightman*, 2018, para. 64), the Court also found itself bound by the wording of the provision to conclude, unlike its counterpart in the Canadian example, that the UK alone defines the outcome of the withdrawal process in that it could, should it have wished to do so, lawfully leave without an agreement. In turn, by allowing an unequivocal right of exit 'in accordance with a member state's "own constitutional requirements"', Article 50 outsources to the member state seeking to withdraw the duty to account for the democratic questions. Ultimately, this only appears to undermine the credibility of the Union's duty to protect its own special, post-national constitutional character and, particularly, its values of dignity, equality, and the protection of human rights including the rights of those belonging to minorities, proclaimed as foundational in Article 2 TEU. To be more precise, the existing parallelism between the sovereign character of accession to and withdrawal from the Union is logical and perhaps desirable, to the extent that it affirms the voluntary character of membership and the mutual respect and cooperation that underpins all aspects of the relationship between member states and the Union, in line with Article 4 TEU (Craig, 2020). However, the absence of built-in guarantees on *common* constitutional values and on EU citizenship within the text of Article 50 is disconcerting, in that it absolves the Union of responsibility over citizens that it, too, claimed as 'own' throughout the withdrawal process.

What might a withdrawal from the EU look like, if its constitutional construction had rested upon negotiation rather than upon sovereign choice? The literature on decisional secession and, particularly, the Canadian Supreme Court's response to the question of secession of Quebec, discussed earlier, can again provide some inspiration in this regard. In analysing what the constitution would have entailed for a lawful secession to ensue, that court found that the constitution 'would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights' (Reference re Secession of Quebec, 1998, para. 104). The process of secession, including the decision, negotiations, and final agreement, would have to respect the four core values of the Canadian Constitution, namely those of federalism, democracy, constitutionalism and the protection of the rights of minorities. More specifically, while federalism and respect for democracy required that a decision to withdraw by any confederate

part should be taken seriously, the expression of democratic will 'must be free of ambiguity both in terms of the question asked and in terms of the support it achieves' (Reference re Secession of Quebec, 1998, para. 87). Indeed, the Supreme Court of Canada had referred to a 'clear repudiation' of the existing order by a 'clear majority' (Reference re Secession of Quebec, 1998, para. 68). As Beaulac points out, this is instructive of its intention to stipulate refinements, should the question of secession come before it in concrete terms (Beaulac, 2019). These refinements could, for example, take the form of minimum turnouts, threshold rules, constitutional oversight of the question asked, and rules on minority participation in any referendum seeking to ascertain public support for secession (Beaulac, 2019).

Similar conditions can be imagined as part of the Article 50 process. For example, it may have been welcome if the details of an exit referendum had been commonly defined as part of the exit clause as the foundation of a decision to withdraw, as opposed to the vaguer formulation of 'national constitutional requirements' currently found in Article 50(1). In the context of Brexit, it was that problematic formulation which allowed the enactment by the Westminster Parliament of the European Union (Notification of Withdrawal) Act 2018 to constitute in formal terms the decision to leave, even though the 2016 referendum was de facto treated as the relevant decision in public discourse and, indeed, in the preamble to the aforementioned Act. In turn, this permitted the terms of the 2016 referendum to escape EU scrutiny, despite the relevance of EU law to its operation. By contrast, if a referendum had been stipulated as part of the constitutional requirements for taking a decision to leave the Union, this would have allowed for EU judicial review of matters such as voting rights for EU citizens, in both a thin and a thick sense. In a thin sense, which would have been immediately reviewable if the referendum had amounted to the relevant decision in legal terms, it would have been essential to ensure the observance of the principle of nondiscrimination on grounds of nationality (Articles 18 TFEU and 21 EUCFR), unless otherwise stipulated in the withdrawal provision. In a thicker sense, the withdrawal provision might have positively provided for voting rights and sufficient informational guarantees for all citizens having exercised EU/UK free movement rights, as a necessary consequence of Article 21 TFEU.

Moreover, as Tatham (2012, p. 149) rightly notes, the exit of a member state from the Union should call for 'sufficient domestic consensus between government, parliament and electorate before negotiating with the Union to ensure a continuing relationship post-withdrawal. In such circumstances, "sufficient" would probably need more than a mere simple majority of votes since some level of weighted or qualified majority vote would render the outcome of the vote more legitimate and binding, and therefore less open to any subsequent challenge'. This was not the case in the Brexit negotiations which, as highlighted earlier, radically underplayed the significance of different regions in the UK constitutional settlement and the problematic manner in which a simple majority referendum operated in the UK (see further Raible & Trueblood, 2017). Similarly, minimum European Convention on Human Rights (ECHR) guarantees – which already follow from national constitutional requirements – may have been outlined in the provision (Vidmar, 2018). None of these possibilities found expression within Article 50 TEU.

9 | CONCLUSION

By arguing that Brexit is not a form of secession, my purpose has been neither to question the pervasive consequences of withdrawal from the EU for the daily interaction between the two sides of the Channel, nor to deny that Brexit falls within a broader trend towards secessionism, which can conceptually meet with secession in terms of its political dynamics (Closa, 2017) and its potential to lead to further secessions within the United Kingdom (see Skoutaris, 2017). But that secession and Brexit present similarities does not mean that they ought to be understood as facets of the same coin from a constitutional point of view. On the contrary, carefully separating Brexit from secession by keeping a view of it as a contestable political decision, rather than ascribing to it the qualities of a meaningful right to self-determine or those of an uncontested democratic choice, is symbolically significant. While the EU may not be *like any other* aspect of international law, it is not possible to transplant to it discourses of secession that forge a better link between the EU and successful federations, at one end of the spectrum, or with more classical international law narratives of self-determination, at the other end.

It is the Janus-faced status of the EU as a *sui generis* legal order unlike both international law and national constitutions which is clearly – and perhaps somewhat tragically – manifested in the text of its withdrawal provision. In its current form, the construction of Article 50 does not permit constitutionally treating Brexit as the decisional form of secession that it so obviously resembles in practical terms. Rather, to call Brexit a form of secession today would run the risk of attributing to it the meta-constitutional legitimacy of its counterpart, thus ignoring that, despite legally complying with the terms of the unequivocal right to withdraw that Article 50 creates, Brexit has lacked the substantive democratic safeguards that constitutionally envisaged forms of decisional secession could have provided. Hindsight perhaps allows the observation that it would have been a far better constitutional response if, rather than merely laying down a withdrawal provision with a 'contractual logic', as Vidmar has pointed out (Vidmar,

2019, p. 371), the Treaties had set up the possibility of a more thoughtful, negotiated, and countermajoritarian decisional secession. It is to be hoped that, in another Treaty framework, one with a more substantive constitutional mandate, the drafters might opt for that possibility.

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ENDNOTES

1. Article 1(b) of the Montevideo Convention (1933) 165 LNTS 19; 49 Stat 3097; see also the difficult relationship between the inherent right of self-determination enshrined in the *Friendly Relations Declaration* (cross-ref) and the immediate contradiction of this right in paragraph (d) of that declaration, which states that 'the territorial integrity and political independence of the State are inviolable'; as well as the overarching goal of the UN to assist in the 'suppression of acts of aggression or other breaches of the peace' in Article 1(1) UNC and the centrality of 'territorial integrity' in Article 2(4) thereof, which partly contradict or limit the right to self-determination enshrined in Article 1(2) UNC. *See* further Brilmayer (1991).
2. The Co-operation Agreement between the EEC and Algeria and the Interim Agreement on the advance implementation of certain provisions of the Cooperation Agreement were signed on 26 April 1976: [1976] OJ L141/2.
3. It should be noted that the possibility of secession for reasons of internal non-accommodation remains contested (see further on this Closa, 2019; Tomuschat, 1993).
4. In constitutional orders that allow secession, most notably in the Canadian example, legality is effectively defined as legitimacy, through appeal to an overwhelming majority of voters in the province of Quebec: *Reference re Secession of Quebec*, paras 102–108.
5. This is what Koskenniemi (1994, p. 260) calls the 'onion problem' of nationalism, insofar as smaller sub-groups usually exist within a seceding entity.

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