

**BREXIT, DEMOCRACY, AND HUMAN RIGHTS:
THE LAW BETWEEN SECESSION AND TREATY
WITHDRAWAL**

JURE VIDMAR*

ABSTRACT

The United Kingdom (UK) has triggered the mechanism to exit the European Union (EU). Such a decision was taken at a referendum held in 2016. The referendum was, however, not legally binding, and only England and Wales, but not Scotland or Northern Ireland, endorsed the option to exit the EU. UK's EU exit can be seen as the UK's withdrawal from the Treaty on European Union (TEU) and the Treaty on the Functioning of European Union (TFEU) pursuant to Article 50 TEU. But the TEU and TFEU are not ordinary treaties of public international law. They are constitutional instruments of a complex supra-national polity—the EU. Brexit is thus in many respects more than just an ordinary treaty withdrawal; it can be seen as the UK's functional secession from the EU. This creates tensions between the rules of treaty withdrawal and tenets of democratic decision-making on territorial matters in a constitutional democracy. This article analyzes such tensions and contrasts Brexit with the reasoning of the Supreme Court of Canada in the *Quebec* case, holding that democracy was not a simple majority rule. Yet, it is questionable whether the treaty-law logic of Article 50 allows for accommodation of the *Quebec* principles. The article also demonstrates how the European Convention of Human Rights could step in to protect certain already-acquired rights of EU citizens after Brexit. Given the complexity and diversity of rights stemming from EU citizenship, however, there is no complete legal certainty without either an agreement between the EU and the UK to this effect, or further development of the existing case law on the matter.

Abstract.....	426
Introduction.....	427
I. The Complex Framework of EU law.....	430
A. Beyond a Mere International Treaty Law Regime	430

<i>Vol. 35, No. 2</i>	<i>Brexit, Democracy, and Human Rights</i>	427
	B. The European Economic Area and Switzerland	434
	C. EU Citizenship and Free Movement	435
II.	Article 50 and the Will of the People	437
	A. Ascertaining the Will of the People	439
	B. The Miller Case	442
	C. The Clash Between a Treaty Law Mechanism and Constitutional Principles	446
III.	Room for Compromise and Human Rights Law Safeguards	448
	A. The Safeguard of the European Convention of Human Rights	450
	B. Some Potential Complications Arising from the Kurić Analogy	452
IV.	Conclusion	455

INTRODUCTION

On March 29, 2017, the United Kingdom (UK) triggered the mechanism to exit the European Union (EU) pursuant to Article 50 of the Treaty on European Union (TEU).¹ In her letter to the President of the European Council, Donald Tusk, UK Prime Minister Theresa May stated that “[o]n 23 June last year [2016], the people of the United Kingdom voted to leave the European Union.”² The exact figures reveal that the choice to exit was supported by 52 percent of all votes cast, at a turnout of 71.8 percent.³ In absolute figures this means that Brexit was supported by 37.34 percent of all eligible to vote in the referendum. The exit choice was supported in England (53.4 percent in favor of exiting the EU) and Wales (52.5 percent in favor of exiting the EU); however, it was rejected in Scotland (62 percent in favor of staying in the EU) and Northern

* Professor of Public International Law, Faculty of Law, Maastricht University, The Netherlands. Since the term ‘Brexit’ is generally used in public debates, this article will also adopt it in order to avoid confusion. It should be noted, however, that the term ‘Brexit’ is imprecise. It is not only Great Britain, but the United Kingdom of Great Britain and Northern Ireland as a whole which is bound to exit the EU. The article does not analyze any preliminary results of the EU-UK Brexit negotiations, as these were neither final nor legally binding when the article went to press.

¹ See Letter from Theresa May, Prime Minister, U.K., to Donald Tusk, President, European Council (Mar. 29, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604079/Prime_Ministers_letter_to_European_Council_President_Donald_Tusk.pdf.

² *Id.* para. 1.

³ See *EU Referendum Results*, BBC NEWS (June 24, 2016), http://www.bbc.com/news/politics/eu_referendum/results.

Ireland (55.8 percent in favor of staying in the EU).⁴ Scotland and Northern Ireland were thus outvoted by England and Wales, which together represent nearly 90 percent of the UK's population.⁵

The referendum was not legally binding, but some comparative practice indicates that in a constitutional democracy the will of the people cannot be ignored.⁶ Yet, international practice of territorial referenda is inclined toward majoritarian decision-making for these purposes and favors the means of deliberative democracy.⁷ The UK is now following the majoritarian model, but, as this article demonstrates, it also seems that a different model would be difficult to accommodate within the European legal framework governing an EU withdrawal.⁸

Article 50 of the TEU gives every EU member state the right to give a notice of withdrawal and foresees a period of two years in which the withdrawing state and the EU need to negotiate their future relationship.⁹ Article 50, however, also foresees a guillotine at the end of the two-year period: should there be no agreement, the withdrawing state completely severs its relations with the EU.¹⁰ This regulation is highly problematic for two reasons: (i) it limits the negotiating power of the withdrawing state and thus also its ability to strike an acceptable

⁴ *Id.*

⁵ See *Population Estimates*, OFFICE FOR NAT'L STATISTICS (U.K.), <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates> (showing the most recent estimates are available for mid-year 2016). The overall population of the UK was 65.6 million, of that 55.3 million people living in England, 3.1 million in Wales, 5.4 million in Scotland and 1.9 million in Northern Ireland. England and Wales which predominantly voted for Brexit thus comprise roughly 89 percent of UK population. *Id.*

⁶ See, e.g., Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 88 (Can.).

The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

Id.

⁷ *Id.* (arguing that a democratic will of the people in favor of secession creates an obligation to negotiate rather than a self-executing right to secede).

⁸ See *infra* Section II.A.

⁹ Consolidated Version of the Treaty on European Union art. 50, 2010 O.J. (C 83) 1 [hereinafter TEU post-Lisbon].

¹⁰ *Id.* art. 50(3).

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

Id.

compromise for its citizens and those groups who oppose the withdrawal; and (ii) it may infringe the already acquired rights of non-UK EU citizens residing in the UK and UK citizens residing in other EU member states.

The consequences of Article 50 could be quite unpredictable had it not contained the guillotine. Without the guillotine the EU would potentially be in a permanent state of withdrawal negotiations with all its member states. Indeed, the member states could use Article 50 negotiations to improve their position in the EU. There would be no deterrence against triggering Article 50 on such tactical grounds if exiting the EU remained merely optional upon triggering the mechanism.

Article 50 is thus a mechanism of treaty withdrawal. But TEU is not an ordinary international treaty; it is a constitutional instrument of the EU. While Article 50 may be an ordinary treaty mechanism, it is rather odd as a constitutional mechanism.¹¹ Brexit is thus also a clash between the concepts of international treaty law and EU constitutional law.

This article seeks to define the exact legal meaning of Brexit and its consequences. It analyzes the challenges which Brexit poses to the constitutional concept of democratic decision-making and to human rights standards under UK domestic law, EU law, and under the European Convention of Human Rights (ECHR). Brexit is not a binary concept—it is not that the UK either exits or stays in the EU—there are several shades of Brexit that could be implemented by a set of public international law treaty regimes. Brexit is thus a complex nexus of overlapping legal regimes (EU law, public international law, and UK public law) and the outcome depends on political negotiations.¹² Given that, was it even clear what the voters were asked on June 23, 2016? How does the complex legal framework governing Brexit and the associated ambiguity interfere with democratic legitimacy of this process and human rights guarantees in Europe? After addressing these challenges, the article will demonstrate how the framework of the European Convention of Human Rights (ECHR) could provide a safety net and ensure that certain categories of EU citizens would retain some already-acquired rights stemming from EU citizenship.

¹¹ See DAVID RAIČ, STATEHOOD AND THE LAW OF SELF DETERMINATION 313–14 (2002) (giving examples of constitutional mechanisms of secession in the constitutions of Burma (1947), the Soviet Union (1977), Czechoslovakia (1968), Ethiopia (1984), Saint Christopher and Nevis (1984), Moldova (1994), and Yugoslavia (1974)).

¹² See TEU post-Lisbon, *supra* note 9, art. 50(2)–(3).

I. THE COMPLEX FRAMEWORK OF EU LAW

A. BEYOND A MERE INTERNATIONAL TREATY LAW REGIME

The legal foundations of the EU are the TEU¹³ and the Treaty on the Functioning of the European Union (TFEU).¹⁴ In the language of international treaty law, there are twenty-eight states party to TEU and TFEU.¹⁵ Yet, it would be an understatement to say that the EU is a mere regime on international treaty law. There are three main characteristics of the EU which make the EU a self-contained legal regime: (i) the decision-making organs, including a centralized judiciary with the Court of Justice of the European Union (CJEU) at its apex; (ii) direct effect of the TEU which confers rights and obligations to individuals; and (iii) a constitutionalized hierarchy of the sources of law. These are all amongst the missing elements of public international law which makes the latter a somewhat underdeveloped and a much more basic legal system.¹⁶

It is well known that public international law lacks a centralized judiciary with compulsory jurisdiction on general matters.¹⁷ Adjudication in this system depends on state consent.¹⁸ For procedural reasons, remedies with compulsory jurisdiction may only be available within the fragmented subfields of international legal regulation (e.g., the World Trade Organisation or the European Court of Human Rights).¹⁹ This is

¹³ See TEU post-Lisbon, *supra* note 9, art. 1.

¹⁴ Consolidated Version of the Treaty on the Functioning of the European Union art. 1, 2008 O.J. (C 115) 47 [hereinafter TFEU].

¹⁵ Vienna Convention on the Law of Treaties, art. 1(g), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980 [hereinafter VCLT] (stating that “‘party’ means a State which has consented to be bound by the treaty and for which the treaty is in force”).

¹⁶ See H.L.A. HART, *THE CONCEPT OF LAW* 213–37 (3d ed. 2012) (arguing that international law is a simple set of primary rules without any systemic coherence significant for municipal legal orders).

¹⁷ See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1031, 1060, U.N.T.S. 993 (entered into force Oct. 24, 1945) [hereinafter ICJ Statute] (regulating jurisdiction of the ‘World Court’ whereas state consent in some form is always required for the Court to have jurisdiction).

¹⁸ *Id.*

¹⁹ See Marrakesh Agreement Establishing the World Trade Organization, annex 2, art. 1(1) Apr. 15, 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (note that unlike the ICJ Statute, the rules and procedures of the WTO dispute settlement mechanism do not foresee any additional modes of consent to jurisdiction other than that the state is a party to this agreement); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (as amended by Protocols No. 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively) (note art. 32(1): “The jurisdiction of the [European] Court [of

different in EU law where the CJEU effectively acts as the constitutional court of the EU.²⁰ It was the CJEU, in the 1963 case *Van Gend en Loos*, that pronounced that the EU was not only an international treaty regime, but “constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.”²¹ The court further argued that what is now the TEU was “more than an agreement which merely creates mutual obligations between the contracting states [and that] independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”²²

The *Van Gend en Loos* decision severed EU law from the rules of ordinary international treaty law and made EU treaties applicable not only between EU member states but also internally (i.e., within the EU member states). As affirmed by the CJEU in *Costa v. ENEL*, “by contrast with ordinary international treaties, the EEC [the European Economic Community as it then was] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.”²³ It is not only states but also individuals and legal entities who hold rights and duties under EU law *directly*, not via attribution to the state as is the case in public international law.²⁴ Importantly, this crucial distinction between EU law and public international law was not introduced by agreement between EU member states, but came from the CJEU’s case law.

Human Rights] shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.”). Just like the WTO dispute settlement mechanism, but unlike the ICJ Statute, the rules regulating jurisdiction of the European Court of Human Rights do not foresee any forms of consent other than being a state party to the Convention.

²⁰ See generally Bo Vesterdorf, *A Constitutional Court for the EU?*, 4 INT’L J. CONST. L. 607 (2006).

²¹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 1.

²² *Id.* at 12.

²³ Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585, 593.

²⁴ See G.A. Res. 56/83, Annex art. 2, Responsibility of States for Intentionally Wrongful Acts (Dec. 12, 2001) [hereinafter ILC Articles on Responsibility] (“There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) [i]s attributable to the State under international law; and (b) [c]onstitutes a breach of an international obligation of the State.”).

Unlike EU law, public international law remains a horizontal system of rules with no hierarchy between its sources.²⁵ The formal sources of international law contain conflict rules, such as Article 103 of the UN Charter²⁶ or the principles of *lex posterior* and *lex specialis*, as contained in the Vienna Convention on the Law of Treaties.²⁷ But it is wrong to conflate these conflict rules with a constitutional hierarchy of sources.²⁸ The formal sources of international law are spelled out in Article 38(1) of the Statute of the International Court of Justice (I.C.J.).²⁹ This provision defines judicial decisions and academic writings as merely subsidiary sources,³⁰ and as such they can be used as interpretative means of the primary ones. However, international treaties, customary international law, and general principles of law are all as equally authoritative as primary sources, without any hierarchy between them.³¹ This was affirmed in the *Nicaragua* case where the I.C.J. established that a treaty does not extinguish a pre-existing customary rule of international law where these two separate sources regulate the same subject matter.³² The same rule can be simultaneously grounded in two different sources of law without any hierarchy between them.

Unlike EU law, international law is a legal system which operates on the basis of (or at least attempts at) systemic integration of its rules without any predetermined hierarchy of norms.³³ Furthermore, without the *Van Gend en Loos* effect in public international law, no direct link is established between the source of law and the individual.

²⁵ See Jure Vidmar, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System* in HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS 13, 13–14 (Erika de Wet & Jure Vidmar eds., 2012). See generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L LAW 291 (2006).

²⁶ Charter of the United Nations, art. 103, June 26, 1945, 59 Stat. 1031, 1035, U.N.T.S. 993 (entered into force Oct. 24, 1945) [hereinafter U.N. Charter].

²⁷ See VCLT, *supra* note 15, art. 30.

²⁸ See Shelton, *supra* note 25, at 292–93; see also Vidmar, *supra* note 25, at 19.

²⁹ ICJ Statute, *supra* note 17, art. 38(1).

³⁰ *Id.* art. 38(1)(d).

³¹ See CHRISTOPHER GREENWOOD, SOURCES OF INTERNATIONAL LAW: AN INTRODUCTION 5 (2008), http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf.

³² Military and Paramilitary Activities Against Nicaragua (Nicar. v. U.S.), Judgement, 1986 I.C.J. Rep. 14, ¶ 190 (June 27) (arguing that “[i]t will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content”).

³³ See NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 199–200 (2011).

There is always the state between them.³⁴ Public international law is therefore in its essence—somewhat paradoxically—a system of private legal obligations applicable between states. The vertical element is absent in two ways: there is no hierarchy between sources and legal norms, and there is no direct effect for non-state entities. This is quite different in EU law which is a genuine system of public law.

TEU and TFEU are international treaties, but at the same time they are also constitutional documents of the EU.³⁵ The idea of a single document called *Constitution for Europe*, which was also envisaged as an international treaty,³⁶ has been rejected at referenda in France and the Netherlands.³⁷ Constitutionalism can, however, exist even without a single document bearing that title, and it can be grounded in several sources, written and unwritten.³⁸ The TEU and TFEU regulate the relationship between the EU and EU citizens, between the EU and its member states, between the EU and third states, between member states, and between EU institutions.

The TEU and TFEU go much further than ordinary treaties of public international law which create contractual and tort-like obligations between states. The EU Treaties constitute public law proper. Furthermore, Article 288 of the TFEU provides that “[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.”³⁹ This provision gives EU institutions direct powers to create law which is hierarchically subordinated to the (constitutional) treaties and also creates a hierarchy between sources. EU constitutionalism is thus a generally accepted fact,⁴⁰

³⁴ Cf. ILC Articles on Responsibility, *supra* note 24, art. 2 (noting that attribution to a state is needed for an internationally wrongful act).

³⁵ For an overview, see ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* 3–42 (2d ed. 2015).

³⁶ See Treaty on Establishing a Constitution for Europe, Official Journal of the European Union, Dec. 16, 2004, 2004 O.J. (C 310) 1 (treaty not in force).

³⁷ See Lionel Beehner, *European Union: The French & Dutch Referendums*, COUNCIL ON FOREIGN RELATIONS (June 1, 2005), <https://www.cfr.org/background/european-union-french-dutch-referendums>.

³⁸ A very good example is the United Kingdom. See MARK ELLIOTT & ROBERT THOMAS, *PUBLIC LAW* 3 (2d ed. 2014) (“People often say that the United Kingdom does not have a constitution. They are wrong. It may not have a written constitution, in the sense of a single document entitled ‘The Constitution’. Nonetheless, the UK undoubtedly has a constitution.”).

³⁹ TFEU, *supra* note 14, art. 288.

⁴⁰ Cf. SCHÜTZE, *supra* note 35.

while international (or global) constitutionalism remains an academic project.⁴¹

B. THE EUROPEAN ECONOMIC AREA AND SWITZERLAND

Besides the constitutional treaties, the EU and its member states have also concluded a number of other treaties which are of an ordinary public international law nature. The Agreement on the European Economic Area (EEA) extends the single market regime from EU member states to Iceland, Liechtenstein, and Norway.⁴² Switzerland also has access to the European single market, yet the legal basis for this is not the EEA Agreement but a nexus of international treaties concluded between Switzerland and the EU member states.⁴³ These separate international treaty regimes give the four non-EU member states access to the single market and thus the rights and duties of the economic component of European integration.

The applicable rules are those governing the four economic freedoms: free movement of goods, free movement of services, free movement of capital, and free movement of persons.⁴⁴ The four non-EU states are not free riders in this arrangement—they contribute to the EU budget for their single market deal.⁴⁵ At the same time, they are not represented in EU institutions or involved in the lawmaking and decision-making processes.⁴⁶ In other words, they need to pay and obey, but they are excluded from making decisions. The single market regime is a functional regime of international treaty law—a marriage of convenience. In the end, Brexit could mean leaving the EU and staying

⁴¹ JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 204 (2009); AOIFE O'DONOGHUE, *CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION* 34 (2014); Erika de Wet, *The International Constitutional Order*, 55 *INT'L & COMP. L.Q.* 51 (2006).

⁴² See Agreement on the European Economic Area, art. 126, Jan. 3, 1994, 1994 O.J. (L 1) 3 (entry into force Jan. 3, 1994, Liechtenstein joining on May 1, 1995) [hereinafter *The EEA Agreement*].

⁴³ For a comprehensive list of bilateral agreements between the EU and Switzerland, see Directorate for European Affairs, *Switzerland's European Policy*, SWISS CONFEDERATION (Nov. 27, 2017), <https://www.eda.admin.ch/dea/en/home/bilaterale-abkommen/inkrafttreten.html>.

⁴⁴ See *The EEA Agreement*, *supra* note 42.

⁴⁵ *Id.* art. 82.

⁴⁶ See TFEU, *supra* note 14, art. 2–8 (note that these provisions do not accommodate Iceland, Liechtenstein, Norway, and Switzerland in the decision-making organs of the EU).

in the single market.⁴⁷ This would mean the UK moving from the constitutionalized legal order of EU law to a simple international treaty regime.

C. EU CITIZENSHIP AND FREE MOVEMENT

Article 20(1) of the TFEU provides: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”⁴⁸ The Union citizenship thus depends on citizenship of a member state. After Brexit, UK citizenship would no longer carry EU citizenship and the rights stemming from EU citizenship would thus be lost to UK nationals. This would mean, *inter alia*, that UK nationals could no longer exercise the free movement rights in the EU, and vice versa, EU citizenship would no longer generate any rights in the UK.

There have been some speculations, however, that given the importance of EU citizenship in the EU legal order, an individual cannot be simply deprived of the rights stemming from EU citizenship.⁴⁹ Such arguments are, however, generally based on an extended reading of the CJEU’s *Rottmann* case where the court pronounced:

Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.⁵⁰

⁴⁷ See Jure Vidmar & Craig Eggett, *Brexit: Is Everything Going to Change in Law, So That Very Little Would Change in Fact?* EJIL: TALK! (June 27, 2016), <https://www.ejiltalk.org/brexit-is-everything-going-to-change-in-law-so-that-very-little-would-change-in-fact>.

⁴⁸ TFEU, *supra* note 14, art. 20(1).

⁴⁹ See Sam Blewett, *Britons Should Keep EU Citizenship Rights after Brexit, Europe’s Chief Negotiator Guy Verhofstadt Says*, INDEPENDENT (Mar. 10, 2017, 8:08 AM), <http://www.independent.co.uk/news/uk/politics/brexit-guy-verhofstadt-british-eu-citizenship-rights-europe-chief-negotiator-latest-a7621896.html>; Steve Peers, *Want to Keep Your EU and British Citizenship? Don’t Get Your Hopes Up*, LSE BLOG: BRITISH POLITICS & POLICY (Dec. 16, 2016), <http://blogs.lse.ac.uk/politicsandpolicy/want-to-keep-your-eu-and-british-citizenship-dont-get-your-hopes-up/>.

⁵⁰ Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-01449, para. 56, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d52a6e1a4d500a427f8d7fce83973c61fa.e34KaxiLc3eQc40LaxqMbN4PaNuKe0?text=&docid=75336&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=302774>.

The combined number of non-UK EU citizens in the UK and UK citizens in other EU member states is over four million.⁵¹ This figure does not include those non-EU citizens who are family members of EU citizens presently exercising their free movement rights to whom such benefits of EU citizenship are also extended. The loss of EU citizenship could thus have adverse effects for a great number of people and it may also affect their right to family life under the ECHR.⁵² While the ECHR may well protect certain *existing* rights stemming from EU citizenship, it is an exaggeration to claim that EU citizenship cannot be lost even if the state or a territory exits the EU. The factual circumstances in the *Rottmann* case were indeed quite different than Brexit, and the significance of the *Rottmann* doctrine should not be exaggerated.

Mr. Rottmann was originally an Austrian national who had subsequently obtained German nationality.⁵³ In accordance with Austrian nationality laws, he lost his Austrian citizenship on becoming a naturalized German citizen.⁵⁴ However, German authorities later discovered that his German citizenship had been obtained fraudulently and revoked it as a consequence.⁵⁵ No longer an Austrian or German national, Mr. Rottmann became stateless and as a consequence also lost his residual EU citizenship.⁵⁶ These factual circumstances are much different than the challenges posed by Brexit, and at no point did the CJEU imply—either in *Rottmann* or elsewhere—that an EU citizen must remain an EU citizen forever.

The CJEU citizenship case law deals with the extent of rights of an individual who is a national of an EU member state.⁵⁷ What is

⁵¹ See Alan Travis, *Fewer Britons Living in EU than Previously Thought, Study Finds*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/politics/2017/jan/27/fewer-britons-in-rest-of-europe-than-previously-thought-ons-research>.

⁵² *Id.*

⁵³ See *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-01449, para. 22.

⁵⁴ *Id.* para. 26.

⁵⁵ *Id.* paras. 27–28.

⁵⁶ *Id.* para. 32.

⁵⁷ See, e.g., Case C-34/09, *Zambrano v. ONEm*, 2011 E.C.R. I-01177, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305567>; Case C-200/02, *Zhu v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-09925, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=305252>; Case C-184/99, *Grzelczyk v. CPAS*, 2001 E.C.R. I-06193, <http://curia.europa.eu/juris/showPdf.jsf?docid=46599&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=304649>.

different in the situation of Brexit is that nationality of one state would no longer carry the residual EU citizenship and EU citizenship would no longer generate any rights in that state. Claiming that EU citizenship can exist even in the absence of citizenship of an EU member state⁵⁸ is in direct conflict with Article 20(1) of the TFEU which explicitly derives EU citizenship from citizenship of a member state, and does not create EU citizenship as an independent or self-standing concept.⁵⁹

What is peculiar in the case of the UK is that EU citizenship may still be available to a number of UK nationals via their double UK/Irish nationality.⁶⁰ The Good Friday Agreement concluded between the UK and the Republic of Ireland explicitly allows dual nationality and makes eligible for Irish nationality everyone born on the Irish Isle, which includes Northern Ireland.⁶¹ Since the Republic of Ireland remains an EU member state, a great number of people in the UK could retain the benefits of EU citizenship via their Irish nationality.

II. ARTICLE 50 AND THE WILL OF THE PEOPLE

Since 2009, the TEU gives EU member states the specific right to exit the EU.⁶² Article 50 of the TEU specifies this right in rather general terms. It refers to a member state which decides to exit but does not specify how such a decision is to be made domestically.⁶³ Article 50 of the TEU further stipulates for a period of time in which the exact modalities and the future relationship are to be negotiated between the

⁵⁸ TFEU, *supra* note 14.

⁵⁹ *See id.*

⁶⁰ See Simon Maybin, *How Many Britons Are Entitled to an Irish Passport?*, BBC NEWS (Sept. 2, 2016), <http://www.bbc.com/news/magazine-37246769> (arguing that up to 6.7 million UK nationals could be eligible also for Irish nationality).

⁶¹ The Northern Ireland Peace Agreement: The Agreement reached in the multi-party negotiations, U.K.–Ir., Apr. 10, 1998, http://peacemaker.un.org/sites/peacemaker.un.org/files/IE%20GB_980410_Northern%20Ireland%20Agreement.pdf [hereinafter *The Good Friday Agreement*]. Art. 1(vi) provides that both Governments:

(vi) recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.

Id. art. 1(vi).

⁶² TEU post-Lisbon, *supra* note 9, art. 50.

⁶³ *Id.* art. 50(1) (specifying that member states may decide to withdraw in accordance with their own constitutional requirements).

EU and the exiting state.⁶⁴ In this context, Article 50(3) of the TEU provides that the treaties shall cease to apply to the state in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.⁶⁵

In other words, Article 50 provides for legal automaticity and a withdrawal cannot be prevented by a failure of negotiations. EU law, however, does not specify any procedural requirements for a legitimate exit decision, nor does it regulate the legal consequences of an exit for certain categories of EU citizens.⁶⁶ Nevertheless, EU law does not operate in isolation of other international legal regimes. Furthermore, the only precedent for an EU exit is that of Greenland.⁶⁷ Yet, this episode differed crucially from the UK, as Greenland is not an independent state but a Danish territory. It was thus only a self-governing territory within an EU member state which left the Union, not a member state as a whole. Moreover, Greenland remains a constitutive unit of an EU member state.⁶⁸ Brexit is thus uncharted territory and a complicated nexus of EU law, European human rights law, public international law, and UK public law.

The Brexit referendum held on June 23, 2016, was not legally binding and does not have any self-executing effects.⁶⁹ It was a political choice rather than a legal obligation that the UK triggered Article 50 TEU. Some difficult questions nevertheless arise out of this situation. Should the concept of the people of the UK be understood as a unitary concept? Was the triggering of Article 50 of the TEU legitimate in light of disapproval in Northern Ireland and Scotland? Did the Parliaments of these units have a say in this matter?

⁶⁴ *Id.* art. 50(3).

⁶⁵ *Id.* art. 50(2).

⁶⁶ *See id.* art. 50.

⁶⁷ Phedon Nicolaides, *Withdrawal from the European Union: A Typology of Effects*, 20 MAASTRICHT J. EUR. & COMP. L. 209, 212 (2013).

⁶⁸ Dimitry Kochenov, *EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Right?*, LSE 'EUROPE IN QUESTION' DISCUSSION PAPER SERIES, June 2016, at 1, 20, <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper111.pdf>.

⁶⁹ *See R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union* [2017] UKSC 5, [125] (appeal taken from N. Ir.), (recalling that due to sovereignty of the Parliament, referendums in the UK cannot be legally binding).

A. ASCERTAINING THE WILL OF THE PEOPLE

International procedural standards for popular consultations are underdeveloped. They are expressed in some non-legally-binding documents, most notably in the Venice Commission's Resolution 235.⁷⁰ Apart from formally lacking legally-binding authority, this document refers to referendums in general, not specifically to those on territorial status. Academic studies, especially in political science, have examined the practice of referendums, but did not make a systematic distinction between territorial referendums and those consulting on much more mundane daily aspects of social life.⁷¹ Indeed, in some legal systems, nationwide referendums can be held on quite trivial matters.⁷² Is it adequate to simply transplant the rules governing referendums on general matters to those situations where fundamental issues of the legal status of a territory are at stake? Should independence referendums adopt the same rules of procedure and enfranchisement as are applicable at general or local elections and ordinary referendums? Comparative practice on these questions remains divergent and there are no clear international rules on the matter.

By way of comparison, at the 2014 independence referendum in Scotland, resident non-UK EU citizens were enfranchised, while UK nationals living outside of Scotland on the critical date were disenfranchised, regardless of how strong the ties they (previously) had with Scotland.⁷³ At the Brexit referendum, the franchise was extended to the citizens of the Republic of Ireland and the British Commonwealth in residence in the UK, while the rules disenfranchised UK citizens who had lived abroad for fifteen years or longer.⁷⁴ Arguably, such a franchise excluded a number of voters who were directly affected by the vote (such as UK citizens with a long-term residence in other EU member states).

⁷⁰ See Congress of Local and Regional Authorities Res. 235 (May 30, 2007), <https://rm.coe.int/1680719d4d>.

⁷¹ See generally YVES BEIGHBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994).

⁷² Switzerland is a good example where referendums are very common. See Chronologie Volksabstimmungen (Chronology of Popular Vote) 2011–2018, SWISS CONFEDERATION, https://www.admin.ch/ch/d/pore/va/vab_2_2_4_1_2011_2020.html (last visited Mar. 3, 2018).

⁷³ See Stephen Tierney, *Legal Issues Surrounding the Referendum on Independence for Scotland*, 9 EUR. CONST. L. REV. 359, 363–64 (2013); see also Benard Ryan, *The Scottish Referendum Franchise: Residence or Citizenship?*, in INDEPENDENCE REFERENDUMS: WHO SHOULD VOTE AND WHO SHOULD BE OFFERED CITIZENSHIP? 5, 5 (Ruvi Ziegler, Jo Shaw & Rainer Bauböck eds., 2014), http://cadmus.eui.eu/bitstream/handle/1814/32516/RSCAS_2014_90.pdf.

⁷⁴ See European Union Referendum Act 2015, c. 36, §2 (UK).

At the same time, the formula enfranchised certain categories of UK residents who are not directly affected by Brexit, as they do not hold EU citizenship (e.g., nationals of Australia, Canada, India, Pakistan, South Africa, and other Commonwealth member states).⁷⁵

Furthermore, the enfranchisement formula created an asymmetric treatment of non-UK EU citizens, as the franchise was extended to some non-UK EU citizens residing in the UK, but not others. This happened because of some overlap in EU and Commonwealth membership (Cyprus and Malta),⁷⁶ and because of the special status of Irish nationals in UK public law and their eligibility to vote in UK general elections.⁷⁷ Yet, from the perspective of EU law, nationals of Cyprus, Ireland, and Malta were treated differently than other non-UK EU citizens which may well infringe the principle of equality under EU law.⁷⁸

Prior to the Brexit referendum, the Scottish National Party (SNP) put forward a proposal that a decision on exiting the EU should not only be a matter of a UK-wide majoritarian vote but would require support in all four constitutive countries: England, Wales, Scotland, and Northern Ireland.⁷⁹ If such a solution had been implemented, Brexit would have been rejected. Indeed, Brexit was predominantly supported in England and Wales, which have a significantly larger population than Scotland and Northern Ireland, where Brexit was rejected.⁸⁰ The vote for Brexit was thus based on majoritarian decision-making whereby two devolved units of the UK were simply outvoted.

Conversely, in the *Quebec* case, the Supreme Court of Canada took a stance against using majoritarian decision-making for territorial referenda. The Court declared that a successful vote for independence

⁷⁵ For a complete list, see *Member Countries*, THE COMMONWEALTH, <http://thecommonwealth.org/member-countries> (last visited Mar. 3, 2018).

⁷⁶ *Id.*

⁷⁷ See Representation of People Act 1982, c. 2, §1 (UK) (extending the franchise to nationals of the Republic of Ireland).

⁷⁸ See TEU post-Lisbon, *supra* note 9, art. 9. The article states that:

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.

Id. It is not problematic per se that the franchise at the referendum was not extended to non-UK EU citizens in general, but rather that it was extended only to some non-UK EU citizens.

⁷⁹ *SNP's Sturgeon Says UK Withdrawal from EU "Must Have" Four Nation Backing*, BBC NEWS (Oct. 29, 2014), <http://www.bbc.com/news/uk-scotland-scotland-politics-29805045>.

⁸⁰ See OFFICE FOR NAT'L STATISTICS, *supra* note 5.

would not create a legal entitlement to independence, neither under Canadian constitutional law nor under international law.⁸¹ At the same time, the principle of democracy requires that the will of the people cannot be ignored.⁸² An affirmative vote should thus lead to negotiations on the future legal status of a territory where several options are possible, including a wider autonomy without independence. Furthermore, the Supreme Court of Canada noted that many groups within Quebec did not necessarily support secession, including the aboriginal peoples and linguistic minorities in the Province.⁸³ According to the Court, Quebec's path to independence would not have been just and legitimate in such circumstances, even if supported by a majority of its residents.

The reasoning of the Supreme Court of Canada clearly adopts the position that the democratic will of the people on territorial matters should not be expressed by a simple majority of all votes cast. Rather, a territorial referendum is a mechanism of deliberative democracy. If a majority of all votes cast decides in favor of a change in territorial status, negotiations need to take place without a pre-determined outcome, and it needs to be ensured that the will of the people is not mistaken for a simple majority rule.⁸⁴ It is true that the *Quebec* case was concerned with the prospect of Quebec's secession from Canada, while Brexit is not secession for a simple reason that the EU is not a state. However, given the special (constitutional) nature of EU legal order, its highly-institutionalized nature, and the entanglement of domestic law and EU legal regulation,⁸⁵ Brexit can be functionally compared to secession.

The Brexit referendum was a question on changing the legal status of the territory which is also what independence referenda seek to do. Pursuant to the *Quebec* deliberative model, the Brexit referendum gave the UK government the mandate to negotiate its future relationship with the EU, but in so doing the UK needs to take into account the interest of Scotland, Northern Ireland, non-UK EU citizens residing in the UK, and UK citizens residing in other EU member states.⁸⁶

Article 50 of the TEU in principle supports the deliberative model, as it specifies that within two years the EU and the UK (in this

⁸¹ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 155 (Can.).

⁸² *Id.* para. 88; see also *id.* para. 96.

⁸³ *Id.* para. 96.

⁸⁴ *Id.* para. 67 (arguing that “[i]t would be a grave mistake to equate legitimacy with the ‘sovereign will’ or majority rule alone, to the exclusion of other constitutional values”).

⁸⁵ *Cf. supra* notes 23–41.

⁸⁶ *Cf.* Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 96 (Can.).

case) need to negotiate their future relationship.⁸⁷ The problem is, however, that Article 50 requires the negotiations to begin only after the notification has been given, and then sets a two-year guillotine.⁸⁸ While it is true that Article 50 also allows an extension of the two-year period by agreement or even reversal of the withdrawal process,⁸⁹ it is highly contested whether or not the exiting state could revoke its notification of withdrawal *unilaterally*.⁹⁰ If a unilateral revocation were allowed, nothing would prevent the exiting state from filing a new notification one day after revoking it and thus buying another two years for negotiations. This would seem to go against the spirit of Article 50, which seeks to make withdrawal an efficient process.

However, with the two-year guillotine, the exiting state is pushed into an unequal position, which is hardly compatible with the deliberative model of the *Quebec* case. If the UK does not manage to secure sufficient guarantees for Scotland, Northern Ireland, and its own nationals residing in other EU member states, the UK nevertheless needs to exit, unless agreed otherwise. At the same time, Article 50 does not foresee negotiations before giving a withdrawal notification at which moment the clock starts ticking. The outcome of the Article 50 mechanics is that the deliberative model for a change of territorial legal status is severely disadvantaged and majoritarian principles effectively favored. The majoritarian model was given some further prominence through certain developments in UK constitutional law which will be considered in turn.

B. THE MILLER CASE

In the *Miller* case, the United Kingdom Supreme Court had to consider, inter alia, whether UK Parliament had the power to trigger Article 50 without a prior approval of the Parliaments of Northern Ireland and Scotland.⁹¹ While this is an eminent question of UK constitutional law, it has broader comparative implications. In the *Quebec* case, the Supreme Court of Canada explicitly said that decision-

⁸⁷ TEU post-Lisbon, *supra* note 9.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ In the *Miller* case, the UK Supreme Court took the position that an Article 50 notification is irrevocable. See R (on the application of Miller and another) v. Sec'y of State for Exiting the European Union [2017] UKSC 5, [92] (appeal taken from N. Ir.).

⁹¹ *Id.* paras. 129, 130, 136.

making with regards to territorial referendums is not a simple matter of majoritarian principles.⁹² But Canada is a federation which the UK is not. Nevertheless, UK constitutional law operates on the principle of devolution; that is, a limited transfer of legislative power to the Parliaments of Northern Ireland, Scotland, and Wales.⁹³ The question thus arises whether UK Parliament has the sole competence to trigger Article 50 without an approval of the devolved Parliaments.

The Supreme Court reasoned that “within the United Kingdom, relations with the European Union, like other matters of foreign affairs, are reserved or excepted in the cases of Scotland and Northern Ireland, and are not devolved in the case of Wales.”⁹⁴ The Supreme Court concluded that “the devolved legislatures do not have a parallel legislative competence in relation to withdrawal from the European Union,”⁹⁵ but given certain consequences of Brexit, the Court was prepared to accept that this could nevertheless be a matter of overlapping competencies between the UK Parliament and the devolved Parliaments.⁹⁶

The Memorandum of Understanding between the UK government and the devolved governments provides:

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.⁹⁷

The UK Supreme Court considered this statement and concluded:

⁹² See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 96 (Can.).

⁹³ See R (Miller) [2017] UKSC 5, [129].

⁹⁴ *Id.*

⁹⁵ *Id.* para. 130.

⁹⁶ *Id.* para. 136.

⁹⁷ JOINT MINISTERIAL COMMITTEE, MEMORANDUM OF UNDERSTANDING AND SUPPLEMENTARY AGREEMENTS BETWEEN THE UNITED KINGDOM GOVERNMENT, THE SCOTTISH MINISTERS, THE WELSH MINISTERS, AND THE NORTHERN IRELAND EXECUTIVE COMMITTEE, 2013-2014, HC, ¶ 14 (UK), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/316157/MoU_between_the_UK_and_the_Devolved_Administrations.pdf.

Judges . . . are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question . . . but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world.⁹⁸

On this basis, the Court ultimately concluded that “the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom’s withdrawal from the European Union. Nor in our view has the Northern Ireland Assembly.”⁹⁹ The Supreme Court thus essentially pronounced devolution a political convention rather than a legally-binding, constitutional principle. With this pronouncement, the Supreme Court also opened the door for implementation of the Brexit decision made on the basis of majoritarian principles.

The concept of a referendum is odd in the UK constitutional model in which the sovereign is the parliament and not the people.¹⁰⁰ While the Brexit referendum was not legally binding, accepting its outcome was seen as being politically unavoidable.¹⁰¹ Domestically, the field was thus regulated by two political conventions. Indeed, triggering Article 50 of the TEU by the UK Parliament is merely a political convention, and so is the principle that the UK Parliament does not legislate in devolved matters.¹⁰² The outcome was that the Parliament triggered Article 50 with a narrow majority and against the wishes of two devolved units of the UK. The UK Parliament may well have had the right to act under such circumstances as a matter of UK constitutional law. But the Parliament was not bound by the referendum results and its action was not in line with international practice which requires a clear majority and respect for minorities where decisions on territorial status are to be made.¹⁰³ Such international practice refers to independence referendums, which the Brexit referendum was not. Given the complexity of EU legal order and its consequences, Brexit can be seen as a functional secession and the issues arising from Brexit are reminiscent of those arising out of state succession.¹⁰⁴ It is thus more appropriate to

⁹⁸ R (Miller) [2017] UKSC 5, [146].

⁹⁹ *Id.* para. 150.

¹⁰⁰ *Id.* para. 117.

¹⁰¹ *See id.* para. 125.

¹⁰² JOINT MINISTERIAL COMMITTEE, *supra* note 97.

¹⁰³ For an overview, see JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE 171–98 (2013).

¹⁰⁴ *Id.*

compare Brexit to secession rather than see it as an ordinary withdrawal from a treaty of public international law.

Overall, the *Miller* case addressed the controversy of whether the notification of withdrawal in the case of the UK is a prerogative of the Crown (the government acting on its behalf), or the Parliament.¹⁰⁵ The underlying question in this case is the UK's dualist approach to international treaty law, and dualism in UK legal order exists precisely to avoid the possibility that the Crown would legislate indirectly—by concluding a treaty, which in a monist jurisdiction becomes domestically effective law without any act of parliament.¹⁰⁶

In the UK, an international treaty becomes domestic law *only* if it is incorporated by an act of parliament.¹⁰⁷ The EU Treaties are incorporated by the European Communities Act (ECA),¹⁰⁸ and if the government terminates UK's membership in the EU (i.e., withdraws the UK from TEU and TFEU) there is effectively nothing left for the ECA to incorporate, and this act of parliament becomes hollow. Although the Crown would thereby not repeal the ECA *de jure*, it would create such an effect *de facto*. The High Court of England and Wales acknowledged this formalistic distinction, but decided to look at the effects rather than subscribe itself to legal formalism of this kind.¹⁰⁹ The UK Supreme Court confirmed the High Court's approach and argued:

The EU Treaties as implemented pursuant to the 1972 Act were and are unique in their legislative and constitutional implications. In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was grafted onto, and above, the well-established existing sources of domestic law: Parliament and the courts. And . . . ministers, acting internationally, waited for Parliament, acting domestically, (i) to give clear, if not legally binding, approval in the form of resolutions, and (ii) to enable the Treaty to be effective by passing the 1972 Act. Bearing in mind this unique history and the constitutional principle of Parliamentary sovereignty, it seems most improbable that those two parties had the intention or expectation that ministers, constitutionally the junior partner in that exercise, could subsequently remove the graft without

¹⁰⁵ See *R (Miller) [2017] UKSC 5*, [34]–[39].

¹⁰⁶ *Id.* 69, paras. 55–57 (especially paragraph 57 where the Court observed: “It can thus fairly be said that the dualist system is a necessary corollary of Parliamentary sovereignty, or, to put the point another way, it exists to protect Parliament not ministers.”).

¹⁰⁷ *Id.* para. 56.

¹⁰⁸ European Communities Act 1972, c. 68, § 2 (Eng.).

¹⁰⁹ *R. (Miller) v. Sec’y of State for Exiting the EU [2016] EWHC (Admin) 2768 [94]* (Eng.).

formal appropriate sanction from the constitutionally senior partner in that exercise, Parliament.¹¹⁰

Ultimately, the Supreme Court concluded that “ministers require the authority of primary legislation before they can take that course [of triggering Article 50],” and the Government gave Article 50 notification on the basis of a prior Act of Parliament.¹¹¹

The two-year guillotine creates an additional problem pertaining to the legal effects of such a withdrawal notification. It is unclear whether the actual withdrawal agreement also needs to be incorporated by an act of parliament, and indeed whether an Article 50 notification even leads to a legislative change. Since a legal path exists for a withdrawal to be reversed—although it may not be available unilaterally¹¹²—the notification alone does not *necessarily* remove the international substance of the ECA.¹¹³ The notification certainly does have this potential, but there is no certainty and only subsequent developments can clarify the situation.

C. THE CLASH BETWEEN A TREATY LAW MECHANISM AND CONSTITUTIONAL PRINCIPLES

Notwithstanding the constitutional ambiguity in the UK, it appears that Article 50 did not sufficiently accommodate the fact that every member state wishing to withdraw from the EU would likely give such a notification only after holding a referendum. In the present situation, voters do not know what they are voting for, as the exact modalities of an EU exit depend on subsequent negotiations in which several outcomes are possible.

As per *Quebec*, territorial referenda in a constitutional democracy create no more than an obligation to negotiate,¹¹⁴ so this aspect of Article 50 is not problematic per se. It does become problematic in combination with the two-year guillotine which has no equivalent in comparative constitutional practice.¹¹⁵ The guillotine makes

¹¹⁰ R (Miller) [2017] UKSC 5, [90].

¹¹¹ *Id.* paras. 101, 104.

¹¹² See TEU post-Lisbon, *supra* note 9, art. 50(5).

¹¹³ *Id.* art. 50(2). Note that Article 50 TEU still leaves a possibility for any kind of agreement between the EU and the UK. There could at least theoretically be an agreement on UK's continued full-fledged membership in the EU, perhaps on somewhat modified terms.

¹¹⁴ Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 88 (Can.).

¹¹⁵ For a summary of territorial referenda, see VIDMAR, *supra* note 103, at 171–98.

EU withdrawal automatic, unless specifically agreed otherwise, which leaves no guarantees that the state could stay if the exiting conditions—including for the minorities who opposed the withdrawal—were not satisfactory.¹¹⁶ It is also unclear what would happen if the withdrawal agreement were to be rejected at a subsequent referendum, should another referendum be held.¹¹⁷ It appears that even in this case there would be no automatic guarantees that the two-year guillotine would not fall.

The combined effects of a withdrawal referendum and the mechanics of Article 50 are that majoritarian decision-making prevails and that the room for negotiations depends on the interest of the EU. This narrows the negotiating power of the exiting state. In this particular case, it also means that the UK has less power to negotiate a suitable arrangement for Scotland and Northern Ireland which voted to stay. In the most extreme scenario the two EU-favoring UK countries, Northern Ireland, and Scotland, could find themselves completely severed from the EU against explicit wishes of their respective electorates.

Article 50 does not take enough account of the fact that EU legal order is constitutionalized and EU withdrawal is functionally similar to secession. The mechanics of Article 50 are reminiscent of an ordinary safety valve in an international treaty which gives a state party the right to denounce the treaty.¹¹⁸ It is debatable if this is appropriate for the TEU and TFEU which are not mere treaties of public international law.¹¹⁹ Yet, the Brexit episode also reminds us that EU law is still embedded in public international law, and in technical legal terms Brexit is treaty denouncement of one of the parties. It thus appears that the main conceptual problem is found in the special nature of the EU legal order, as established by the CJEU in *Van Gend en Loos*. The EU legal order is constitutionalized and from this perspective Brexit invokes very similar legal problems as secession and state succession. Mechanisms for secession are, however, rare in comparative constitutional law.¹²⁰

¹¹⁶ Cf. *Reference Re Secession of Quebec*, [1998] 2 S.C.R., para. 96.

¹¹⁷ See Joe Watts, *Brexit: Tony Blair Says There Must Be a Second Vote on UK's Membership of EU*, INDEPENDENT (Oct. 28, 2016, 9:33 AM), <http://www.independent.co.uk/news/uk/politics/brexit-tony-blair-second-eu-referendum-vote-article-50-latest-a7384411.html>.

¹¹⁸ See VCLT, *supra* note 15, art. 57 (“The operation of a treaty in regard to all the parties or to a particular party may be suspended: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.”).

¹¹⁹ Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1, 12.

¹²⁰ See RAIČ, *supra* note 11.

Article 50 TEU is a treaty denouncement mechanism, but since the TEU is a constitutional document of the EU, Article 50 is effectively also a secession mechanism. The legal problem of triggering Article 50 thus oscillates between treaty denouncement, secession, and succession.

III. ROOM FOR COMPROMISE AND HUMAN RIGHTS LAW SAFEGUARDS

Article 50 of the TEU leaves the exact modalities of an EU withdrawal in the realm of political negotiations. Brexit therefore has a range of possible scenarios from a complete withdrawal of the UK from the single market¹²¹ to the UK's Swiss-like continued participation in the economic dimensions of the EU, possibly with some opt-outs.¹²² The UK government had initially indicated it would like to stay on the single market, but limit the free movement of persons.¹²³ EU Commission and some member states have responded that there would be no single market à la carte for the UK.¹²⁴ In other words, the UK would need to accept the free movement of persons in order to keep the other three freedoms. The UK government later declared it would seek no membership in the single market, but it is questionable whether this is a genuine agenda or a negotiation strategy.¹²⁵ Is a compromise possible?

The concept of European free movers is very complex. The level of rights in the host state depends on the nature of their activity (e.g., worker, work-seeker, or student),¹²⁶ and the length of residence (e.g., in residence for at least five years).¹²⁷ The rights stemming from EU citizenship are extended to certain non-EU citizens who are family

¹²¹ See *Brexit: UK to Leave Single Market, Says Theresa May*, BBC NEWS (Jan. 17, 2017), <http://www.bbc.com/news/uk-politics-38641208>.

¹²² See Directorate for European Affairs, *supra* note 43.

¹²³ See Derrick Wyatt, *Can the UK Retain Access to the Single Market Without Allowing Free Movement of Workers? Let's Rephrase the Question*, BRICK COURT CHAMBERS: BREXIT LAW (July 26, 2016), <https://brexit.law/2016/07/26/can-the-uk-retain-access-to-the-single-market-without-allowing-free-movement-of-workers-lets-rephrase-the-question/>.

¹²⁴ See Jon Henley & Jennifer Rankin, *Brexit: EU Leaders Say UK Cannot Have 'À La Carte' Single Market*, GUARDIAN (June 29, 2016, 6:19 AM), <https://www.theguardian.com/politics/2016/jun/29/eu-leaders-begin-summit-talks-without-uk-for-first-time>.

¹²⁵ See BBC NEWS, *supra* note 121.

¹²⁶ Directive 2004/38 art. 7(1)(a)–(c), 2004 O.J. (L 158) 77, 93–94 (EC) [hereinafter Citizens Directive].

¹²⁷ *Id.* art. 16.

members of EU citizens.¹²⁸ Workers have full access to public funds,¹²⁹ and there is a very high public safety threshold for exclusion of individuals with a criminal record.¹³⁰

The free movement of people is therefore not a binary concept. It has many shades and room exists for a compromise. Indeed, prior to holding the Brexit referendum, the UK had already negotiated some concessions in the sphere of access to public funds.¹³¹ Further, after the 2004 expansion, the EU limited free movement rights for up to seven years for workers from new member states with the exception of Cyprus and Malta.¹³² Hence, a single market deal at present is actually not either four freedoms in their full extent, or nothing. In fact, the EU has already shown some flexibility and unprincipled willingness to strike asymmetric deals. It is therefore not impossible that a free movement compromise would be reached and a Switzerland-plus-minus deal for the UK would be arrived at.

The UK could thus move from the comprehensive EU law regime to a public international law treaty regime.¹³³ There is a realistic possibility that the UK would stay on the single market and not much would change in practice for an average UK or EU citizen. Metaphorically, the UK would be moving from an emotional bonding into a marriage of convenience. And perhaps Brexit is exactly about that: economic benefits without emotions. Even if Brexit was simply an emotional decision, emotions do matter in a constitutionalized legal system.¹³⁴ It is not in the interest of the EU and its citizens if the two-year guillotine falls and the UK—including Scotland and Northern Ireland—completely severs itself from this legal order. The nature of this legal order makes both sides responsible for arriving at a viable compromise in the interest of UK and EU citizens.

¹²⁸ *Id.* art. 7(d).

¹²⁹ *Id.* art. 7(a) (noting that the article does not specify that workers would need to have sufficient funds); *see also id.* art. 27(1) (“Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. *These grounds shall not be invoked to serve economic ends.*”) (emphasis added).

¹³⁰ *Id.* art. 27(2).

¹³¹ *See* Memorandum from the Gen. Secretariat of the Council to Delegations to the Eur. Council (Feb. 19, 2016), <http://docs.dpaq.de/10395-0216-euco-conclusions.pdf>.

¹³² *See Employment, Social Affairs, & Inclusion: Enlargement – transitional provisions*, EUR. COMM., <http://ec.europa.eu/social/main.jsp?catId=466&> (last visited Apr. 14, 2018).

¹³³ *Cf.* TFEU, *supra* note 14, art. 2–8; EEA Agreement, *supra* note 42, at 3; KLABBERS, PETERS & ULFSTEIN, *supra* note 41; O’DONOGHUE, *supra* note 41; de Wet, *supra* note 41.

¹³⁴ *See generally* Andras Sajo, *Emotions in a Constitutional Design*, 8 INT’L CONST. 354 (2010).

A. THE SAFEGUARD OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS

Even if the UK were to become completely severed from EU legal order, it is arguable that some existing rights stemming from EU citizenship could be retained. If the UK exits the EU, the question then arises as to what happens with the right of residence of UK citizens currently residing in other member states, and of non-UK EU citizens currently residing in the UK.¹³⁵ This is a pressing legal and social problem that potentially affects over four million people.¹³⁶ Thus far, a loss of EU citizenship has only covered situations where an individual lost nationality of an EU member state.¹³⁷ The novel problem now is that EU citizenship could be lost collectively because a member state withdraws from the EU and these problems have not been clarified. Is Europe potentially facing a mass resettlement of millions of EU citizens as well as their non-EU family members?

Pursuant to Article 50 of the TEU the exact terms of withdrawal of a member state from the EU ought to be negotiated. The status of persons presently exercising free movement rights would inevitably become one of the most important questions to tackle in the course of EU-UK negotiations. The problem could be resolved through the doctrine established by the European Court of Human Rights (ECtHR) in the 2012 case of *Kurić v. Slovenia*.

¹³⁵ See Memorandum from the Gen. Secretariat of the Council to Delegations to the Eur. Council (Mar. 31, 2017), <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2017/03/FullText.pdf> (indicating that one of the fundamental issues in the EU-UK negotiations would be residency rights of EU citizens presently exercising their right to free movement).

¹³⁶ See Travis, *supra* note 51.

¹³⁷ See Case C-34/09, *Zambrano v. ONEm*, 2011 E.C.R. I-01177, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=80236&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=305567>; Case C-135/08, *Rottmann v. Freistaat Bayern*, 2010 E.C.R. I-01449, para. 56, <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d52a6e1a4d500a427f8d7fce83973c61fa.e34KaxiLc3eQc40LaxqMbN4PaNuKe0?text=&docid=75336&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=302774>; Case C-200/02, *Zhu v. Sec'y of State for the Home Dep't*, 2004 E.C.R. I-09925, <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=49231&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=305252>; Case C-184/99, *Grzelczyk v. CPAS*, 2001 E.C.R. I-06193, <http://curia.europa.eu/juris/showPdf.jsf?docid=46599&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=304649>.

Upon achieving independence, Slovenia denied the continued right to residency to a number of citizens of other states emerging in the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) who had, at the time of the former federation, established their permanent residency in Slovenia.¹³⁸ According to the ECtHR, withdrawing the right to permanent residency to these foreign citizens upon independence was, *inter alia*, a violation of the convention right to private and family life.¹³⁹

The court recalled that the ECHR did not give a citizen of a party to the convention a right of residence in another state party.¹⁴⁰ Under some circumstances, however, restrictions on the right to residence can interfere with the convention right to private and family life.¹⁴¹ As the court put it in the case of Slovenia, “prior to Slovenia’s declaration of independence, [the applicants] had been lawfully residing in Slovenia for several years, and as former SFRY citizens, enjoyed a wide range of social and political rights.”¹⁴² The court then continued:

[A]n alien lawfully residing in a country may wish to continue living in that country without necessarily acquiring its citizenship. As shown by the difficulties faced by the applicants, for many years, in obtaining a valid residence permit, the Slovenian legislature failed to enact provisions aimed at permitting former SFRY citizens holding the citizenship of one of the other republics to regularise their residence status if they had chosen not to become Slovenian citizens or had failed to do so. Such provisions would not have undermined the legitimate aims of controlling the residence of aliens or creating a corpus of Slovenian citizens, or both.¹⁴³

Following this logic, once you have legally established permanent residency, you keep the right of residence, even if the legal status of either your home or your host state changes and, as a result of this change, your new citizenship status alone would no longer give you a right to residence. What matters is that you have acquired the right *before* the change of the territorial status.

Following the *Kurić* doctrine, it appears that regardless of the outcome of the EU-UK negotiations, UK nationals residing in other EU

¹³⁸ *Kurić v. Slovenia*, 2012-IV Eur. Ct. H.R. 1, paras. 21–39.

¹³⁹ *Id.* para. 337.

¹⁴⁰ *Id.* para. 355.

¹⁴¹ *Id.*

¹⁴² *Id.* para. 356.

¹⁴³ *Id.* para. 357.

member states and non-UK EU citizens residing in the UK will retain their right to residence. The ECHR steps in and protects the right of residence of those lawfully residing in the territories covered by EU law in the moment of the change in legal status of the territory. Importantly, this effect would only cement the existing residence rights; it would not extend the applicability of EU law to the UK after Brexit, nor would it give UK citizens a post-Brexit EU citizenship.

In order to establish eligibility of those entitled to benefit from the *Kurić* doctrine, a critical date will need to be set. Since the Brexit referendum was not legally binding, nothing had been modified in law until a formal notice of withdrawal had been given. Pursuant to Article 50, the notice itself somewhat modifies the legal status of the exiting state in the EU.¹⁴⁴ It would thus appear that the most suitable critical date would be the day of the withdrawal notice. Those non-UK EU citizens in residence in the UK on the critical date and UK citizens residing in other EU member states will retain their right to residence even after Brexit, but it will no longer be possible to start free movement anew.

B. SOME POTENTIAL COMPLICATIONS ARISING FROM THE KURIĆ ANALOGY

The *Kurić* case dealt with the aftermath of the dissolution of the SFRY. As noted by the ECtHR:

16. [SFRY] was a federal State composed of six republics SFRY nationals had “dual citizenship” for internal purposes, that is, they were citizens both of the SFRY and of one of the six republics

17. The regulation of citizenship was similar in all republics of the SFRY, with the basic principle of acquiring citizenship by blood (*jus sanguinis*). In principle, a child acquired his or her parents’ citizenship; if the parents were citizens of different republics, they jointly agreed on their child’s citizenship. On the date of acquisition of the citizenship of another republic, a person’s prior republic citizenship came to an end.

18. From 1947 a separate Register of Citizenship was kept at the level of the republics and not at the level of the federal State. From 1974 the citizenship data for newly born children were entered in the Register of Births and from 1984 the entry of data in the Register of Citizenship ended, all citizenship data being entered in the Register of Births.

¹⁴⁴ TEU post-Lisbon, *supra* note 9, art. 50.

19. SFRY citizens had freedom of movement within the federal State and could register permanent residence wherever they settled on its territory. Full enjoyment of various civil, economic, social and even political rights for SFRY citizens was linked to permanent residence.

20. SFRY citizens living in the then Socialist Republic of Slovenia who were citizens of one of the other SFRY republics, such as the applicants, registered their permanent residence there in the same way as Slovenian citizens.¹⁴⁵

The SFRY ‘dual citizenship’ regulation is *mutatis mutandis* comparable to the EU where quasi-dual citizenship also exists: that of the member state and that of the EU.¹⁴⁶ Under EU law, citizenship of the union is residual and contingent on citizenship of a member state.¹⁴⁷ Under the law of the SFRY it was the other way around: citizenship of a constitutive unit was subordinated to an overarching citizenship of the federation. The inverted logic has certain consequences. As the ECtHR noted in the *Kurić* case, the SFRY citizens enjoyed a complete freedom of movement within the federation. The freedom of movement in the EU is not unqualified. Article 7 of the EU Citizens Directive provides:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

¹⁴⁵ *Kurić*, 2012-IV Eur. Ct. H.R. 1, paras. 16–20.

¹⁴⁶ See TFEU, *supra* note 14, art. 20(1).

¹⁴⁷ *Id.*

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances

...¹⁴⁸

EU law thus knows several categories of free movers, depending on the nature of their activity in the host state. This circumstance would, however, complicate the applicability of the *Kurić* doctrine in the case of Brexit. Which EU free movers would be entitled to a continuous residence?

In addition, Article 16(1) of the Citizens Directive provides: “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions [indicated above]”¹⁴⁹ The SFRY free movement regulations did not distinguish the level of rights between those who had and those who had not been resident for at least five years. This is different under EU law. Would the *Kurić* doctrine then apply only to those falling within Article 16 of the Citizens Directive or also to some (or even all) categories of Article 7 of the Citizens Directive? It would ultimately be on the ECtHR to render a decision on this matter. Such a case before the ECtHR is likely to arise if indefinite residency rights to all Brexit-affected EU and UK citizens who fall within Articles 7 and 16 of the Citizens Directive are not extended either (i) by an agreement reached between the EU and the UK; or (ii) by domestic law of the UK and EU member states should no agreement be reached between the two sides.

¹⁴⁸ Citizens Directive, *supra* note 126, art. 7.

¹⁴⁹ *Id.* art. 16(1).

IV. CONCLUSION

Shortly upon taking office, Prime Minister Theresa May stated: “Brexit is Brexit.”¹⁵⁰ In reality, no one will know what Brexit actually means before the withdrawal agreement is adopted and ratified by the UK on one side and the EU and its member states on the other. Article 50 of the TEU leaves enough space for a political compromise after which the UK would move from the constitutionalized system of EU law to a Swiss-like set of public international law treaty regimes. But such an outcome is not pre-guaranteed; it is also possible that the UK would become just another third state in its relations with the EU (like, e.g., the United States).

The fact that voters did not, could not, and indeed still do not know what Brexit actually means does not necessarily delegitimize the referendum vote. Territorial referenda rarely produce direct legal effects. For the most part, they are consultative in nature and in a constitutional democracy they may trigger the obligation on both sides to negotiate a future legal arrangement for the territory in question, and do so without a predetermined outcome.¹⁵¹ However, territorial referendums usually do not contain an irreversible guillotine after a relatively short time period. Pursuant to Article 50 of the TEU, the withdrawing state needs to give notice, at which point the clock set for two years starts ticking.¹⁵² If a withdrawal notice is given upon holding a referendum—which would virtually always happen—this means that a simple will of the majority may be implemented, regardless of the level of minority guarantees negotiated for Scotland and Northern Ireland, for example. This is problematic in light of the fact that these two units predominantly voted to stay in the EU. It also goes against the deliberative model developed in the *Quebec* case.¹⁵³

Article 50 thus makes the referendum de facto self-executing. This would not have been the case if the withdrawing state retained an explicit right to revoke the withdrawal notice within the period of two years. It is true that both sides can agree to an extension of the two-year period or even to a reversal of the whole process,¹⁵⁴ but it appears that the

¹⁵⁰ Mark Mardell, *What does ‘Brexit means Brexit’ mean?*, BBC NEWS (July 14, 2016), <http://www.bbc.com/news/uk-politics-36782922>.

¹⁵¹ See VIDMAR, *supra* note 103, at 171–98.

¹⁵² See TEU post-Lisbon, *supra* note 9, art. 50(2).

¹⁵³ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 88 (Can.).

¹⁵⁴ TEU post-Lisbon, *supra* note 9, art. 50(3).

withdrawing state does not have the right to do so unilaterally. This regulation significantly weakens the position of the withdrawing state. It can undermine the process of negotiations and also the ability of the withdrawing state to protect the rights of its citizens in other EU member states and negotiate certain assurances for the outvoted minorities.

In the interest of both EU and UK citizens, both sides have a duty to negotiate a viable compromise which would protect the already acquired rights stemming from EU citizenship. A Swiss-like agreement could serve as a good model. Even if this does not happen and the two-year guillotine falls, the ECHR would step in and protect the residency rights of those non-UK EU citizens in the UK and of UK citizens in other EU member states who exercised their free movement rights on the critical date. In order to establish eligibility of those entitled to benefit from the *Kurić* doctrine, a critical date will need to be set. Since the Brexit referendum is formally not legally binding, nothing had been modified in law until a formal notice of withdrawal had been given. Pursuant to Article 50, already the notice somewhat modifies the legal status of the exiting state in the EU, but until its exit the UK nevertheless still is an EU member state.¹⁵⁵ Two critical dates are now possible for establishing the residency status: retroactively March 29, 2017; or March 29, 2019.¹⁵⁶ Ultimately, the critical date will be subject to negotiations, while residency status is not negotiable, as it is protected by European human rights law.¹⁵⁷

The *Kurić* doctrine of the ECHR would only cement the rights on the critical date, while free movement could no longer be started anew. This would only be the right to residence in the host state and no longer a free movement right under EU law. On the other hand, a Swiss-like agreement would likely preserve the free movement right. Since the concept of European free movers is complex category, some room for compromise exists. At the same time, the complexity of the free mover status and its various categories obscures the applicability of the *Kurić* doctrine.

¹⁵⁵ *Id.* art. 50(2).

¹⁵⁶ See *supra* text accompanying notes 1 and 10.

¹⁵⁷ The non-binding interim understanding between the EU and the UK, reached on December 8, 2017, suggests the critical day would be the date of UK's withdrawal, but there is no guarantee that this understanding would eventually become formalized as binding law. See *Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union*, at 1 (Dec. 8, 2017), https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

The EU legal order is so complex that Brexit can be functionally treated as secession from the EU. The Brexit referendum is thus comparable to independence referendums, and UK's denouncing of the TEU and TFEU is comparable to the problems posed by state succession. But Brexit will not happen in isolation of other international legal orders. While the level of some rights stemming from EU citizenship may well be diminished, the human rights framework will provide a safety net for the fundamental rights under ECHR.