

## ‘Secession’ and ‘Withdrawal’ from the European Union as Constitutional Expressions

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Carlos CLOSA (ed.): *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017) 299 pp., ISBN: 978-1-316-62336-7

A man in a Union Jack tie is sawing off the tree branch he is hanging from, while a Lilliputian figure clad in the Scottish flag flees from his pocket. Further up the trunk, a gentleman sporting a bowtie in the colours of Spain is hugging the tree as another miniature man in a striped outfit, not unlike the jersey of a famous Catalan football team, appears to fling himself, like Tarzan, off the tree...

Although one should not judge a book by its cover, it is worth noting that the imagery on the front cover of the volume at hand sets the scene aptly. To be sure, the scenarios in which either a member state seeks to leave the EU, or a territory aims to separate from a member state, currently present the EU with political and legal challenges of existential magnitude. As the specific scenario implied in the book's title suggests, a particularly complex situation arises when these two events – ‘secession’ and ‘withdrawal’ – are interconnected. In order to probe these themes, the editor, Carlos Closa, has assembled a group of authors with a solid track record in the law of the EU's institutions and external relations, as well as political science. Hence, the collection of writings addresses, as is appropriate for the subject, not only the relevant law, but also its political dimension.

This book review essay first outlines some of the main topics of the volume. It then critically evaluates certain aspects of the overall thesis of the work. On the basis of this critique, the essay reflects on the concept of ‘secession’ in the EU law context. Finally, it is concluded that the multi-faceted analysis provided by the contributions in the volume highlights the eminently constitutional nature of its themes.

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## CORE THESES OF THE BOOK

The phenomenon of exit from the EU, or from one of its constituent member states, is analysed in the book through the lens of ‘troubled membership’. According to the introduction, this concept refers to the perceived injustice of belonging to a particular community, which, as a result of a cost-benefit analysis, may lead to ‘staking membership itself as the only way forward’. The book’s thirteen chapters can roughly be divided into two parts: those dealing with regional secession from a member state, and those examining the withdrawal of a member state from the EU.

The first half of the volume tackles topics such as whether a seceding region could emerge directly as a new EU member state. Under this proposition, an ‘internal enlargement’ would be achieved by a treaty revision under Article 48 TEU, a shortcut to avoid the formal accession procedure for admitting new members foreseen in Article 49 TEU. In his chapter on this topic, Neil Walker appears not to exclude this possibility, as he criticises views on the undesirability of internal enlargement of newly-formed states within the EU as ‘dogmatic’. Incidentally, Walker argues that the EU should not categorically defer to its member states’ constitutional solutions as a benchmark for admitting such internal enlargement. In his view, the EU lacks the ‘legitimizing presence to play a robust directorial role’ in the matter and should remain neutral as regards any claims to regional secession. In sharp contrast, Jean-Claude Piris submits in his contribution that the EU institutions, as well as other member states, should not remain passive bystanders in case of a regional secession in a given member state. Refuting the idea that regional secession could be characterised as an internal affair of a member state, he advocates, instead, a ‘federal perspective’ for viewing and characterising the issues at stake. For him, on the one hand, the principle of federal loyalty commands that the member state concerned should keep the Union informed of such developments and, on the other, the effect of regional secession on EU citizens calls for the Union’s involvement. At the same time, Piris argues that since the EU must respect the territorial integrity of its members, other member states would not be legally free to recognise, as a state, an entity formed pursuant to a unilateral secession in violation of a member state’s constitutional procedures. Other contributions in the first half of the volume address certain broader issues demonstrating, for example, how EU law has played a role in the domestic constitutional debates during independence referendum campaigns, and analysing the tension between the political rights of the Union’s citizens and the principle of respect for the territorial integrity of member states. Most of the authors agree that the EU’s manoeuvring room is limited when the constitutional law of the member state does not allow secession. Nonetheless, recognising that the EU Treaties do not presently regulate regional secession from a member state

prompts some of them to suggest amendments to treaty language in the interest of legal certainty.

Such suggestions contrast quite starkly with the tenor of the chapters in the second half of the book dealing with the question of member state exit from the EU. Indeed, here authors like Carlos Closa essentially liken the introduction of a withdrawal clause in the EU Treaties to providing a user manual for the Union's disintegration: the formalisation of the exit possibility is depicted as representing, at best, a gesture to assuage the fears of less integrationist member states over deeper cooperation or, at worst, as a mere bargaining tool for the said member states to gain, among other things, more extensive opt-outs from the general treaty framework. For Closa, the introduction of Article 50 TEU essentially erodes faith in the Union, thereby undermining constitutionalism in the EU. On a more hopeful note, Christophe Hillion argues that the exit process is part of the overall consolidation of the EU's constitutional makeup. Further, the possibility for exit should be appraised, according to him, in its larger context as part of the EU's neighbourhood and foreign policy; leaving the EU would not necessarily imply the complete abandonment of the European integration project. In the second half of the volume, outlining the legal procedures for withdrawal under Article 50 TEU and the Union's future treaty-based relationship with a departing member state occupy a prominent place. In apparent contrast to Hillion, Adam Łazowski estimates that the exit agreement between the EU and the departing member state might have to be concluded as a 'mixed' agreement because of its content – and therefore be concluded not only by the Council but also by the member states individually. The divergent interpretations highlight the uncharted nature of the law in this field more generally and the procedure to follow in concluding the exit agreement in particular.

#### TROUBLED TERMINOLOGY: 'SECESSION' AND 'WITHDRAWAL'

As the subject matter of the book has been a rapidly moving target over the past years, even months, nailing a cogent framework for its analysis is challenging. The main title of the work, which ties together the two separate, albeit related, issues of regional secession and member state withdrawal under the umbrella of 'troubled membership', is revelatory in this regard. According to the book's introductory chapter, the title specifically refers to the scenario of 'simultaneous withdrawal from the Union of a Member State and the parallel secession of a territory of that Member State which wishes to remain a part of the EU'. However, only some of the contributors consider these two scenarios in parallel and most of them choose to deal essentially with one or the other. The specific events most discussed in the first half of the volume are the independence movements of Scotland (United

Kingdom) and Catalonia (Spain), with the occasional mention of the secessionist groups in Veneto (Italy) and Flanders (Belgium). In the second half, the UK's plan to leave the EU (Brexit) remains the key frame of reference. That said, not a great deal of analysis is dedicated to exploring whether the specific scenario referred to in the title amounts to something more than the sum of its parts.

More fundamentally, though, the book barely addresses the significance of the way it uses the particular words 'secession' and 'withdrawal' in the EU context. Granted, it is acknowledged in the introductory chapter that there are 'evident differences between withdrawal from the Union and secession from a Member State'. Nevertheless, some of the authors seem to adopt, at least implicitly, diverging views on the need to adhere strictly to this terminology, since in certain chapters the withdrawal of a member state from the EU under Article 50 TEU is occasionally referred to as 'secession'. Yet, here the use of particular words has wide-reaching implications. Indeed, the lexicon of international organisations law habitually refers to 'withdrawal' to denote the process by which a state disengages with and leaves such an organisation.<sup>1</sup> By contrast, 'secession' under public international law essentially describes the unilateral separation of a subnational entity from an existing state.<sup>2</sup>

To be sure, the EU Treaties, in particular Article 50 TEU, speak of 'withdrawal' and, as such, it seems *prima facie* appropriate to employ that terminology when referring to a member state's exit from the EU. The *travaux préparatoires* of the 'Voluntary Withdrawal from the Union' clause, as the substantially identical Article I-60 was labeled in the defunct Constitution for Europe, show indeed that the European Convention preferred to frame the issue of member state exit in terms of 'withdrawal', not 'secession'.<sup>3</sup> Similarly, the German Federal Constitutional Court considered in its *Lisbon Treaty* decision that the ultimate power to decide on leaving the EU resides with the member states and, therefore, the procedure in Article 50 TEU is 'not a secession from a state union (*Staatsverband*), which is problematical under international law ... , but

<sup>1</sup> See e.g. N. Singh, *Termination of Membership in International Organisations* (Stevens & Sons 1958) p. 23 ('Withdrawal is the most well-known device resorted to by States for terminating their membership in international organisations ...'). For a recent example, see 'United States Gives Notice of Withdrawal from UNESCO, Citing Anti-Israel Bias', 112 *American Journal of International Law* (2018) p. 107.

<sup>2</sup> See, to this effect, e.g. J. Dugard, 'A Legal Basis for Secession – Relevant Principles and Rules', in J. Dahlitz (ed.), *Secession and International Law: Conflict Avoidance – Regional Appraisals* (United Nations/T.M.C. Asser Press 2003).

<sup>3</sup> For an overview of these debates, see A. Wyrozumska, 'Article 50 [Voluntary Withdrawal from the Union]', in H.-J. Blanke and S. Mangiameli (eds.), *The Treaty on the European Union (TEU): A Commentary* (Springer 2013) p. 1385 at p. 1402–1406.

merely the withdrawal from an association of sovereign states (*Staatenverbund*) which is founded on the principle of the reversible self-commitment'.<sup>4</sup>

One may thus conclude: formally, 'withdrawal' it is. Similarly, the unilateral separation of a region from its member state represents, for the latter, a classic case of 'secession'. Does it matter then if the terms are used interchangeably, as long as it is clear from the context what situation is being referred to? It is submitted that, in the context of exiting the EU, the meanings conveyed by these words are not necessarily self-explanatory. In fact, as 'constitutional expressions', their use has great significance for framing the whole discussion. To highlight the constitutional relevance of the phenomena scrutinised in the volume and to probe the argument further, the next section reflects on the concept of secession in the context of EU law.

#### SECESSION FROM THE EU? A CONSTITUTIONAL READING

For argument's sake, could the phenomena under scrutiny be addressed from a more constitutional vantage point, as being really about *seceding* from the EU? In fact, viewed from the EU's perspective, the two scenarios, although obviously different, nevertheless concern unilateral decisions to separate territory and citizenry from the Union. Without suggesting that the book should have adopted this – for the reasons just given, admittedly unorthodox – approach, the following paragraphs explore the hypothesis a little further to shine light on the constitutional weight that the expressions 'secession' and 'withdrawal' carry in the EU context.

On the one hand, could cancelling membership in 'the EU club' under Article 50 TEU be perceived as secession?<sup>5</sup> Instead of rejecting this proposition out of hand, it is worth bearing in mind that secession is 'situated at the intersection of constitutional and international law'.<sup>6</sup> In fact, the possibility of member state exit highlights the EU's constitutional characteristics, notably its autonomous procedures under Article 50 TEU and the ensuing loss of EU citizenship for the departing member state's citizens. Although the terminology of 'withdrawal' may serve to underline the EU's nature as an international organisation, the

<sup>4</sup> BVerfG (Second Senate) 30 June 2009, 2 BvE 2/08 et al., *Dr. G. v German Bundestag*, para. 233. An English-language version of the judgment is available at < [www.bundesverfassungsgericht.de/entscheidungen/es20090630\\_2bve000208en](http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en) >, visited 22 October 2018.

<sup>5</sup> For deliberate use this vocabulary, see e.g. R.J. Friel, 'Secession from the European Union: Checking Out the Proverbial "Cockroach Motel"', 27 *Fordham International Law Journal* (2003) p. 590 at p. 592.

<sup>6</sup> V.C. Jackson, 'Secession, Transnational Precedents, and Constitutional Silences', in S. Levinson (ed.), *Nullification and Secession in Modern Constitutional Thought* (University Press of Kansas 2016) p. 314 at p. 316.

formalisation of the exit procedure in the EU Treaties reinforces, in itself, a more federal view of the Union.<sup>7</sup> Indeed, the EU, acting through its institutions, is a key actor in the exit procedure: not only are the negotiations conducted by the Commission, on behalf of the Union, but, in accordance with Article 50(2) TEU, the withdrawal agreement is concluded between the departing member state and the Council of the European Union (not the remaining member states) – which further adopts its decision, on behalf of the Union, not unanimously but by qualified majority. The European Parliament, a directly elected body representing EU citizens, must give its consent.<sup>8</sup> Incidentally, the loss of EU citizenship is comparable to any situation where the people of a seceding territory are deprived of rights as a consequence of secession.<sup>9</sup>

A devil's advocate might argue that the right to leave the EU cannot possibly mean that the EU is actually *more* of a federal polity as a consequence. Admittedly, some authors consider that a right of secession is per se incompatible with federalism.<sup>10</sup> While it is true that many federal states do not allow secession, some constitutional systems do not exclude it, and the issue is hardly categorical.<sup>11</sup> Indeed, it has also been argued that providing for a right to secession may equally be part of a deliberate strategy to render a (federal) polity stronger.<sup>12</sup> Be that as it may, the fact is that the founding documents of the EU establish self-standing

<sup>7</sup> See e.g. P. Eeckhout and E. Frantziou, 'Brexit and Article 50 TEU: A Constitutionalist Reading', 54 *CMLR* (2017) p. 695 at p. 732 (characterising Art. 50 TEU's context as 'one of constitutionalisation'), and C. Hillion, 'Withdrawal under Article 50 TEU: An Integration-Friendly Process', 55 *CMLR* (2018) p. 29 at p. 49 (describing withdrawal process as 'a vigorous (re)affirmation of core constitutional principles of the EU').

<sup>8</sup> According to Art. 50(2) TEU, the withdrawal agreement shall be concluded 'on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament'. See also J. Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?', 6 *German Law Journal* (2005) p. 1755 at p. 1758.

<sup>9</sup> On the legal significance of the loss of citizenship in the EU sphere, see ECJ 2 March 2010, Case C-135/08, *Janko Rottman v Freistaat Bayern* (requiring proportionality analysis in case of individual decision to deprive EU citizen of Member State nationality), and ECJ Case C-221/17, *M. G. Tjebbes and Others v Minister van Buitenlandse Zaken* (OJEU C 239, 24.7.2017, p. 26), currently pending.

<sup>10</sup> F. Harbo, 'Secession Right – an Anti-Federal Principle? Comparative Study of Federal States and the EU', 1 *Journal of Politics and Law* (2008) p. 132.

<sup>11</sup> See, most famously, Supreme Court of Canada 20 August 1998, 2 S.C.R. *Reference re Secession of Quebec*, p. 217 at p. 220 (holding that right of each participant in federation to initiate constitutional change implies duty on other participants to 'engage in discussions to address any legitimate initiative' on secession).

<sup>12</sup> See Z. Elkins, 'The Logic and Design of a Low-Commitment Constitution (Or, How to Stop Worrying About the Right to Secede)', in S. Levinson (ed.), *Nullification and Secession in Modern Constitutional Thought* (University Press of Kansas 2016) p. 294 at p. 310 (describing right to secession as 'flagship component of a low-commitment constitution').

provisions for assessing how a constituent member of the Union may disengage from it through negotiated exit, breaking in the process the bond of EU citizenship. Is this not what constitutional secession essentially looks like?

On the other hand, under this 'realist constitutionalist' view, regional secession from a member state also arguably implies secession *from the EU*. Leaving aside the (implausible) hypothesis of quasi-automatically continued membership, the breakaway region would have to be considered as no longer part of the Union, which is made up of the member states enumerated in Article 52 TEU. That the seceding region severs its ties with a member state hardly diminishes the impact of the region's simultaneous exit from the EU itself. As many contributors in the book correctly point out, the citizens of such a region would feel acutely the impact of secession, since they would no longer enjoy the rights associated with their EU citizenship. As a matter of *EU law*, the two phenomena are, of course, different. As pointed out in the volume at hand by J.H.H. Weiler, since the member states have an unquestionable right to leave the Union unilaterally, a member state exit is, as far as EU law is concerned, 'lawful' (although Weiler's chapter focuses rather on the real-life impact of 'the two secession discourses' [sic] and not on this point of law). By contrast, unilateral regional secession from a member state would in most cases be 'unlawful' under the EU Treaties, since the latter are not only silent on such a right but, as Jean-Claude Piris observes in his contribution, require that the Union respects the territorial integrity of its constituent members.<sup>13</sup>

The foregoing considerations, while perhaps somewhat academic, highlight the intensely constitutional character of the book under review. To quote Rosas and Armati, 'while the EU is undoubtedly a beast of international law, it has always been and is still today much more than that'.<sup>14</sup> As much was also implied by the Supreme Court of the UK when it ruled in January 2017 that the UK government

<sup>13</sup> See Art. 4(2) TEU. On a comparative note, in the United States, the secession of states from the union is generally considered contrary to the US Constitution, while the (un)constitutionality of forming new states within existing states seems less clear. See, on secession of states, US Supreme Court 12 April 1869, 74 U.S., *Texas v White*, p. 700 at p. 725 ('The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states'). The Alaskan Supreme Court has even gone so far as to consider on this basis that states are precluded from holding a referendum on secession. See Supreme Court of Alaska 17 November 2006, 147 P. 3d, *Kohlhaas v Alaska*, p. 714. On the partitioning of existing states, see US Constitution, Art. IV, Sec. 3. The proper construction of this provision appears to elude consensus, see V. Kesavan and M. Stokes Paulsen, 'Is West Virginia Unconstitutional?', 90 *California Law Review* (2002) p. 291, at p. 332 ff. On the recent debate concerning dividing up California, see e.g. S. Bomboy, 'California three-state plan faces major legal, political hurdles', *Constitution Daily* (13 June 2018), available at < [constitutioncenter.org/blog/california-three-state-plan-faces-major-legal-political-hurdles](http://constitutioncenter.org/blog/california-three-state-plan-faces-major-legal-political-hurdles) >, visited 22 October 2018.

<sup>14</sup> A. Rosas and L. Armati, *EU Constitutional Law: An Introduction* (Hart 2018) p. 32.

lacked the necessary powers to decide on the country's EU exit without parliamentary consent: 'the EU Treaties not only concern the international relations of the United Kingdom, they are a source of domestic law, and they are a source of domestic legal rights many of which are inextricably linked with domestic law from other sources. Accordingly, the Royal prerogative to make and unmake treaties, which operates wholly on the international plane, cannot be exercised in relation to the EU Treaties'.<sup>15</sup> It follows from the unique character of the EU that 'withdrawal' under Article 50 TEU is intrinsically something more than leaving an international organisation – something closer to secession, perhaps?

#### CONCLUSION: MORE TROUBLED SCENARIOS?

As a final, yet different, point, one may wonder whether the 'troubled membership' approach of the book could encompass still another – potentially timely – scenario: the incorporation of a third country (or a region thereof) into a member state with which it has historical ties. Lately, news has broken that some Moldovans would like their country to join Romania.<sup>16</sup> As a matter unregulated by the EU Treaties, the absorption of a third country, or a part thereof, into an existing member state raises questions not unlike those connected with regional secession and the subsequent accession of that region as a new member state. Could it take place without changing the treaties, via a treaty revision, or through a formal accession procedure for the new (successor) state? The basic rule regarding succession of states in respect of treaties under customary international law is that the 'treaties of the incorporating state extend to the absorbed territory'.<sup>17</sup> This rule may not apply, however, if it appears that 'the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation'.<sup>18</sup> Although the territorial scope of the EU Treaties is defined in Article 52 TEU by reference to the member states' – not the Union's – territory, such an incorporation, which enlarges the territory

<sup>15</sup> *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5, at para. 86.

<sup>16</sup> 'Thousands rally for Moldova to become part of Romania', *Politico*, 25 March 2018, available at <[www.politico.eu/article/moldova-romania-thousands-rally-to-become-part](http://www.politico.eu/article/moldova-romania-thousands-rally-to-become-part)>, visited 22 October 2018.

<sup>17</sup> A. Zimmermann, 'State Succession in Treaties', *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2015) paras. 4 and 9. See also ECJ 21 December 2011, Case C-366/10, *Air Transport Association of America et al v Secretary of State for Energy and Climate Change*, para. 101 (holding customary international law is binding upon EU institutions).

<sup>18</sup> See Art. 15(b) of the Vienna Convention on Succession of States in respect of Treaties (1978) 1946 UNTS, p. 3.



and population of one of the constituent members of the Union, would arguably nonetheless alter the conditions for the operation of the EU Treaties in a fundamental manner. Despite its formal similarity, German unification could hardly serve as a useful legal precedent, both due to the particular internal constitutional arrangements of that member state and its close historical links with the European integration process.<sup>19</sup> Thus, as a matter of EU law, accommodating such troubled belonging by incorporation would require treaty amendment with the consent of all the member states.

To conclude, it is an understatement to remark that the volume at hand is timely. The EU faces an imminent departure of one of its largest member states. At the same time, the idea of others leaving the Union is floated with surprising ease (Grexit, Polexit...)<sup>20</sup> – to the point that some politicians are even proposing actively expelling member states.<sup>21</sup> Moreover, the independence referenda in Scotland and Catalonia, as well as their aftermaths, have shown that regional secession persists as an issue to grapple with inside the EU. In the present volume, the authors' analyses of themes such as internal enlargement, the Union's role in regional secession, the rights of EU citizens, as well as the procedures for concluding the exit deal with the outgoing member state build a mosaic of the multiple challenges that the EU faces in this age. Nevertheless, as with all crises, the challenges of these turbulent times also offer new horizons for EU constitutionalism. The foregoing excursion into the realm of constitutional expressions and troubled scenarios has demonstrated that exiting the EU, one way or another, may be framed either as 'secession' or 'withdrawal' depending notably on whether one views the EU primarily as a constitutional polity with federal characteristics or as an intergovernmental organisation acting above all on a mandate from the 'Masters of the Treaties'. As such, the discussion on the relative merits of these phenomena strikes at the heart of the larger debate about the constitutional nature of the EU itself.

On the cover of the volume at hand, the little men sawing off the tree branch they are clinging from or those brazenly ejecting themselves from their arboreal community clearly have their frustrations. To be sure, the tide of 'troubled membership' in the EU does not show signs of abating. However, as the present book shows, the issue of leaving the Union, or one of its constituent members, has

<sup>19</sup> See Protocol on German Internal Trade and Connected Problems, annexed to the 1957 EEC Treaty. See also J.-P. Jacqu , 'German Unification and the European Community', 2 *European Journal of International Law* (1991) p. 1.

<sup>20</sup> See, in particular, "Time to get out" Will Poland leave the EU? Third of Poles demand EU Polexit', *Express*, 22 March 2018, < [www.express.co.uk/news/world/935620/Poland-EU-exit-Polexit-will-Poland-leave-European-Union](http://www.express.co.uk/news/world/935620/Poland-EU-exit-Polexit-will-Poland-leave-European-Union) > , visited 22 October 2018.

<sup>21</sup> 'Exclude Hungary from EU, says Luxembourg's Asselborn', BBC News, 13 September 2016, < [www.bbc.com/news/world-europe-37347352](http://www.bbc.com/news/world-europe-37347352) > , visited 22 October 2018.

to be analysed with its EU law dimension in mind. Indeed, these phenomena are matters of common concern for the member states and EU citizens alike. As such, those voicing their troubles over membership and advocating exit may increasingly find themselves having to reckon with EU law as the constitutional framework for their proposed course of action.

