ACCOMMODATING SECESSION WITHIN THE EU CONSTITUTIONAL ORDER OF STATES

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Abstract

The paper provides a holistic account of the legal mechanisms that allow the EU to accommodate all three forms of secession that may take place within its borders: internal secession, external secession and withdrawal from the EU itself. Despite conventional wisdom, this paper suggests that, provided that such secessionist processes conform with the foundational values of the Union enshrined in Article 2 of the Treaty on European Union (TEU), the EU legal order is flexible enough to accommodate them. Such a deferential and accommodating approach that respects the constitutional identity of the EU Member States and their regions is in conformity with the composite nature of the European constitution, whose component parts—the EU Treaties and the national constitutional orders—cannot function without the other. For a multi-level constitutional order of States whose very *raison d'être* has been the promotion of peace between its members, this nuanced position is of critical importance.

Keywords

EU law; secession; self-determination; withdrawal from the EU; multi-level constitutionalism; Article 2 TEU.

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I. Introduction

The European Union "constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights."[1] Within this legal order, governmental and legislative powers can be largely apportioned vertically at three tiers moving from regional to supranational: (i) substate-regional (e.g. Catalonia, Flanders and Lombardy); (ii) (Member) State-national (e.g. Spain, Belgium and Italy); and (iii) supranational, i.e. the European Union itself. These units of legislative autonomy—regions, Member States and the EU—may all potentially experience secession, i.e. the "formal withdrawal from a central authority by a member unit."[2] For instance, part of a region may be carved out of an existing one and given distinctive substate status within a federal or quasi-federal EU Member State (internal secession). A "subunit of a [Member] state [may also break off], usually to form a new state, but sometimes to join an existing neighbour"[3] (external secession). Finally, an EU Member State may withdraw from the European Union as a whole—a "unilateral decision to separate territory and citizenry" from the Union,[4] aptly characterised as "functionally akin to secession."[5]

By definition, secessionist processes that take place at any of the three aforementioned levels dramatically alter the respective legal and political order(s) as they either lead to the establishment of new subjects of (inter)national law and/or change the legal relations between existing ones. Within the EU multi-level constitutional order of States, however, such "voluntary withdrawal of a political territory from a larger one in which it was previously incorporated"[6] may also be seen "as a move to change the status or affiliation of a territory within a wider constellation of polities."[7] Seen that way, secession within the EU "is really just

[1] *van Gend & Loos v. Netherlands Inland Revenue Administration,* Case 26/62, ECLI:EU:C:1963:1.
[2] For the purpose of this Article, we follow Wood's definition of secession as the "formal withdrawal from a central authority by a member unit." *See* John R. Wood, *Secession: A Comparative Analytical Framework,* 14 CA. J. POL. SCI., 107, 110 (1981). This definition has also been used in legal literature; *see*, for example, Tom Ginsburg & Mila Versteeg, *From Catalonia to California: Secession in Constitutional Law*, 70 ALABAMA LAW REVIEW 923, 925 (2019).
[3] Tom Ginsburg, *Secession*, IDEA, (3 August 2018), https://www.idea.int/publications/catalogue/secession.
[4] Pekka Pohjankoski, *'Secession' and 'Withdrawal' from the European Union as Constitutional Expressions*, 14 EUROPEAN CONSTITUTIONAL LAW REVIEW 845, 849 (2018).
[5] Jure Vidmar, *Unilateral Revocability in Wightman: Fixing Article 50 with Constitutional Tools* 15 EUROPEAN CONSTITUTIONAL LAW REVIEW 359, 371 (2019).
[6] Rainer Bauböck, *A Multilevel Theory of Democratic Secession,* 18 ETHNOPOLITICS 227, 227 (2019).
[7] *Id*. at 229.

another form of subsidiarity – a claim about the right level for governance within a complex, multi-layered system that extends from the personal through the local, regional, state, transnational and international."[8] It triggers the repositioning of the relevant subject of EU law within the European constitutional landscape. In the case of internal secession, a newly formed substate entity within a territorially plural EU Member State would be able to effectively use the channels of regional participation in the Union policy-making processes both at the national and at the EU levels.[9] As to external secession, its proponents, such as the mainstream Catalan and Flemish independentist parties, prioritise the "upgrade" of their region from a subnational authority to a fully functional Member State within the EU legal order, enjoying all relevant rights and obligations. Finally, the withdrawal of a whole Member State from the EU, such as in the case of Brexit, inescapably leads to the recalibration of its relations with the EU and its remaining Member States.

Because any secessionist process raises questions about the relationship of the relevant entity with the Union, there has always been an inquiry about how the EU may treat such constitutional events.[10] For instance, Weiler famously suggested that the EU should not and/or would not admit independent States that have been created even out of consensual and democratic secession as members.[11] Instead, the Union should "wish them a Bon Voyage in their separatist destiny."[12]

Contrary to this view, this article argues that, provided that secessionist processes (at any level) are in conformity with the foundational values of the Union enshrined in Article 2 TEU, the EU legal order is flexible enough to accommodate them.[13] Concerning internal secession,

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[8] TIMOTHY WILLIAM WATERS, BOXING PANDORA RETHINKING BORDERS, STATES AND SECESSION IN A DEMOCRATIC WORLD 227 (2020).

[9] MICHÈLE FINCK, SUBNATIONAL AUTHORITIES IN EU LAW (2017).

[10] As the 2014 Scottish independence referendum was being discussed, there was a debate about whether an independent Scotland enjoys the right of continuous EU membership. To access differing views on this debate, see http://verfassungsblog.de/category/focus/scotlands-eu-membership/

[11] Joseph H.H. Weiler, *Slouching towards the Cool War; Catalonian Independence and the European Union; Roll of Honour; In this Issue; A Person al Statement*, 23 EUROPEAN JOURNAL OF INTERNATIONAL LAW 909, 909 (2012).

[12] *Id.*

[13] A number of authors have underlined that a newly independent State formerly part of an EU Member State can only accede to the EU if the relevant secessionist process is in compliance with the Article 2 TEU values. For instance, Fasone explains that "[t]he EU's response to such an outcome … should depend on how the secession is achieved, in particular if it is pursued in compliance with the fundamental values of the EU, such as democracy and the Rule of Law (Article 2 TEU)". Cristina Fasone*, Secession and the Ambiguous Place of Regions Under EU Law in* SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION, 48, 61 (Carlos Closa ed., 2017). Kochenov and van den Brink also "expect the EU … to take into account the other values laid down in Art. 2 TEU as well when deciding whether a newly formed State formerly part of a Member State is eligible for EU membership; a secession reflecting the will of the majority but following from or resulting in the breaches of the EU's foundational values should not result in legitimate membership claims." Dimitry Kochenov and Martijn van den Brink**,** *Secessions from EU Member States: The Imperative of Union's Neutrality*, 1 EUROPEAN PAPERS 67, 80 (2016). Caplan and Vermeer note that "Article 2, alongside democracy and human rights, recognizes 'the rule of law' as a fundamental value of the EU. This suggests that referenda and other attempted expressions of popular will must be in conformity with domestic legal requirements." Richard Caplan and Zachary Vermeer, *The European Union and Unilateral Secession: The Case of Catalonia,* 73 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 747, 763 (2018). The present article takes into account those views but goes a step further by arguing that the EU legal order is flexible enough to accommodate secessionist processes (at any level) to the extent that they are in conformity with the Article 2 TEU values. In a way, the article's thesis is the flipside of an argument put forward by Carlos Closa. According to him, "[a] unilateral [secessionist] process which did not respect the existing framework of the rule of law in a given member state might be perceived as violating Article 2 of the TEU, and could be considered illegitimate." Carlos Closa, *Secession from a Member*

the EU is not prescriptive as to the territorial (re)organisation of its Member States, provided that the effective application of EU law is secured throughout its territory. Even if an internal secession process somehow challenges the application of the four fundamental freedoms, the Member States as "Masters of the Treaties" could accommodate such derogations through treaty amendments provided that they do not affect the EU core foundational values.[14] When it comes to the most contested of these modes, external secession, this article accepts that the EU constitutional order of States does not accord a universal and unilateral right of secession to the sub-state entities of its Member States. However, it also shows that the EU constitutional order of States possesses the necessary flexibility to respect and accommodate the outcome of a process of consensual secession, provided that Article 2 TEU is respected.[15] Finally, even when in the exercise of external self-determination and sovereignty, the people of a Member State decide to withdraw and functionally secede from the EU as a whole, the Union legal order may accommodate their expressed will to the extent that the aforementioned core values are not threatened.[16]

The accommodating and flexible approach to secessionist processes that this article suggests is dictated by three fundamental aspects of the EU constitutional order of States. First is the composite,[17] intertwined[18] and multi-level[19] character of the European constitution. Pernice explained that the constitution of Europe is "made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties."[20] However, "the relation between the EU and national constitutions should not be viewed as a conglomerate of autonomous more or less detached systems which relate to each other at different 'levels'." [21] Instead, it should be viewed as a "mutually assumed relationship," "where one part cannot function without the other."[22] At the very core of this composite constitution is the idea of constitutional tolerance.[23] This is *par excellence* depicted in Article 4(2) TEU, which provides that the "Union shall respect … Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." Also, the Union "shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State."[24] This means that the starting point of how the EU accommodates secessionist processes that take place at any tier of the multi-level order is and should be the respect to the relevant Member State's position, the processes that take place within it and their outcomes, as Peers convincingly argued.[25]

State and EU Membership: the View from the Union, 12 EUROPEAN CONSTITUTIONAL LAW REVIEW 240, 250 (2016).

[14] *See* Part II.

[15] *See* Part III.

[16] *See* Part IV.

[17] LEONARD F. M. BESSELINK, A COMPOSITE EUROPEAN CONSTITUTION (2007); MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION (2006).

[18] Jacques Ziller, *National Constitutional Concepts in the New Constitution For Europe*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 247 and 452 (2005).

[19] Ingolf Pernice, *Multi-level Constitutionalism and the Treaty of Amsterdam: European Constitution Making Revisited,* 36 COMMON MARKET LAW REVIEW 703 (1999).

[20] *Id*. at 707.

[21] *See* BESSELINK, *supra* note 17, at 6.

[22] *Id.*

[23] JOSEPH H.H. WEILER, *In Defence of the Status quo: Europe's Sonderweg, in* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7 (Marlene Wind and Joseph H.H. Weiler eds., 2003).

[24] Art. 4(2) TEU.

[25] Steve Peers, *The Future of EU Treaty Amendments*, 31 YEARBOOK OF EUROPEAN LAW 17, 59 (2012).

There is a limit to such relative heteronomy and to the EU's deference to these "internal situations." This can be found in the foundational values enshrined in Article 2 TEU.[26] The latter provides that "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities." These are common values to the Member States; more importantly, however, they are set as the "prerequisite for the accession to the European Union of any European State applying to become a member of the European Union."[27] A breach of those values may lead to the triggering of Article 7 TEU's sanction procedure. As the Court of Justice pointed out, "compliance…with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties" and "cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession."[28] Because the values highlighted in Article 2 TEU "define the very identity of the European Union as a common legal order",[29] respect to them is a *conditio sine qua non* for the accommodation of any secessionist process that may take place at any of the three tiers of the multi-level legal order. The fact that Article 2 TEU applies equally to every level strongly suggests that the post-modern and somehow fragmented constitutional mosaic[30] of the EU is built on a "solid" core which includes those non-derogable principles of democracy, rule of law, respect for human rights, etc.

Second, the EU, as a subject of international law, has committed itself to "the strict observance and the development of international law."[31] In fact, the Union "has traditionally played an active and constructive part on the international stage," aiming "to honour its international commitments". [32] This is particularly relevant, as the three aforementioned modes of secession consist of different expressions of the right to self-determination as provided by common Article 1 of the two International Covenants on Human Rights.

In a recent judgment, the Court of Justice of the EU endorsed the *erga omnes* character of that right and recognised it as "one of the essential principles of international law."[33] Having said that, what the international law of self-determination (and thus the right to secession)

[26] Pernice was one of the first to highlight that the duty to comply with the Article 2 TEU principles sets a limit to the constitutional heteronomy afforded by Article 4(2) TEU. "On the one hand, Member States' national identities 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' are protected by [now Article 4(2) TEU] … The Member States are deprived, on the other hand, of part of their constitutional autonomy insofar as they are subject to the common principles and values of the Union under [now Article 2 TEU]" Ingolf Pernice, *European v. National Constitutions*, 1 EUROPEAN CONSTITUTIONAL LAW REVIEW 99, 101 (2005). In the context of the debate on secession within the EU, Closa also underlined that "national constitutional identity within the terms of Article 4(2) TEU is not to be interpreted as the absolute protection of the norms of Member State constitutions. Indeed, Article 4(2) TEU is to be read in the light of the values of the Union in Article 2 TEU." TROUBLED MEMBERSHIP: DEALING WITH SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EU, 10 (Carlos Closa ed., 2014).

[27] C-156/21, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, para 124.

[28] *Id*. at para 126.

[29] *Id*. at para 127.

[30] EUROPE'S CONSTITUTIONAL MOSAIC (Neil Walker, Jo Shaw & Stephen Tierney eds., 2011).

[31] Art 3(5) TEU.

[32] Opinion of the Advocate General Maduro, Case C-402/05 P, *Yassin Abdullah Kadi v. Council and Commission* [2008] ECR I-06351, para 22.

[33] *Council of the EU v. Front Polisario*, Case C-104/16 P, ECLI:EU:C:2016:973, para 89.

means outside the colonial context is unclear.[34] Indeed, the right to external secession and independence for peoples under colonial domination is undisputed.[35] Given that the period of classical colonialism has largely passed, this principle applies to a rather limited number of peoples, such as those of Gibraltar and New Caledonia. In 1995, however, the International Court of Justice (ICJ) proclaimed that the right to self-determination "has an *erga omnes* character."[36] This does not mean, though, that all peoples have the right to external secession and independence. In metropolitan territories such as Flanders, Scotland, Euskadi (Basque Country) and Catalonia, "peoples are expected to achieve self-determination within the framework of their existing state."[37] As the Canadian Supreme Court in *Reference re Secession of Quebec* held, outside the colonial context, the right is "normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state."[38] At its most extreme, this right to internal self-determination includes a right to internal secession –the possibility to create a new autonomous sub-state unit within the borders of the same metropolitan State. Having said that, the ICJ famously held in its *Advisory Opinion on Kosovo* that there is no prohibition on unilateral declarations of independence in international law,[39] let alone independence that has been reached via a consensual and democratic process (external secession). At the same time, the people's pursuit to "freely determine their political status and freely pursue their economic, social and cultural development"[40] clearly encompasses the sovereign choice of a nation to withdraw from an international organisation (withdrawal). As the Court of Justice of the EU (CJEU hereafter) stressed no less than five times in *Wightman*, withdrawal from the EU concerns a sovereign right or choice.[41] Therefore, overall, an EU approach that accommodates secessionist processes that do not breach Article 2 TEU is also compatible with and respectful of international law on the right to self-determination and its legitimate forms of expression: internal secession, (consensual) external secession and withdrawal from an international agreement.

The fact that such a deferential attitude is compatible with the composite, intertwined and multi-level character of the European constitution and its approach towards international law does not mean that the actual discourse that the EU institutions have adopted, especially with

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[34] James R. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLE'S RIGHTS 7 (Philip Alston ed., 2001).

[35] *See* International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16; *Advisory Opinion on Western* Sahara, ICJ Reports (1975) 12; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Reports (2019) 95.

[36] International Court of Justice, *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports (1995), 90, para 29.

[37] James R. Crawford and Alan Boyle, *Opinion: Referendum on the Independence of Scotland – International Law Aspects* 106 (2012), para 175.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf.

[38] Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 1 SCR, 217, para 126.

[39] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010) 403.

[40] Joint Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[41] *Wightman and Others v. Secretary of State for Exiting the European Union,* Case C-621/18, ECLI:EU:C:2018:999, paras 50, 56, 57, 59 and 72. For an analysis, see Armin Cuyvers, *Wightman, Brexit, and The Sovereign Right to Remain*, 56 COMMON MARKET LAW REVIEW 1303 (2019).

regard to external secession, follows such a paradigm. In fact, it has been convincingly argued that because several Member States politically oppose such phenomena, the stance of the EU towards them is influenced accordingly.[42] Still, the paper highlights the flexibility of the EU legal order that could allow the EU to explicitly adopt such deference towards secessionist processes that are in respect of the EU foundational values.

This strategic choice is justified from a normative point of view as well. It is in conformity with the EU's *raison d'être* as a peace plan—the third aspect of the EU constitutional order of States—that dictates such an approach.[43] Rather than actively fighting to eradicate nationalism, the EU, since its inception, has provided for a pragmatic legal, political and economic framework in which competing nationalisms co-exist and even cooperate. Furthermore, it has designed political and legal institutions in which competing nationalisms can continue to be negotiated.[44] It is precisely the historical success of this pragmatic framework that has transformed foes of the past, such as France and Germany, into reliable partners of today. In that sense, an emphasis on the procedural requirements of consensual secession and the subsequent normalisation of relations with the Union can have transformative effects on those constitutional conflicts. A clear message that the EU is able to accommodate secessions that respect its core constitutional values "is likely to encourage subunits to cooperate and compromise, while making [secession within the EU] a legal impossibility is more likely to result in a tug of war between separatist subunits and the central government and, thus, to encourage the resort to violence."[45]

Such "domestication" of secession that puts a strong emphasis on the respect of the Article 2 TEU values is based on "the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as 'political' issues that lie outside of, or are presumed (by the secessionists) to supersede, the law."[46] It follows the logic of the Canadian Supreme Court in *Reference re Secession of Quebec*, in which the Court constructed a procedural framework, "a normative due process"[47] that made the secession of Quebec conditional upon compliance with certain fundamental principles such as democracy, constitutionalism and the rule of law and the protection of minorities.[48] Somewhat paradoxically, this approach transforms the potential formation and/or disappearance of a State from a pure fact—a political matter remaining outside the realm of law[49]—to a smoother transitional process in which both sides should respect certain values that secure their

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[42] Emanuele Massetti*, The European Union and the challenge of 'independence in Europe': Straddling between (formal) neutrality and (actual) support for member-states' territorial integrity,* 32 REGIONAL & FEDERAL STUDIES*,* 307–330 (2022)*.* Neil Walker describes this approach of the EU as "conservative neutrality", the product of political cowardice and complacency, resulting from deflected responsibility, Neil Walker, *Internal Enlargement in the European Union: Beyond Legalism and Political Expediency, in* TROUBLED MEMBERSHIP: SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE UNION 32, 40 (Carlos Closa, ed., 2017).
2017: 40)

[43] Art 3(1) TEU.

[44] *See* CHRISTINE BELL, ON THE LAW OF PEACE, PEACE AGREEMENTS AND THE LEX PACIFICATORIA 200 (2008).

[45] Susanna Mancini, *Rethinking the boundaries of democratic secession: Liberalism, nationalism, and the right of minorities to self-determination*, 6 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 553, 583 (2008).

[46] WAYNE NORMAN, NEGOTIATING NATIONALISM: NATION-BUILDING, FEDERALISM, AND SECESSION IN THE MULTINATIONAL STATE, 188-189 (2006).

[47] Antonello Tancredi, *A normative 'due process' in the creation of States through secession*, *in* SECESSION INTERNATIONAL LAW PERSPECTIVE 171 (Marcello Kohen ed., 2006).

[48] *See Reference re Secession of Quebec*, *supra* note 38, at para 90.

[49] *See* Tancredi, *supra* note 47, at 171.

peaceful and democratic co-existence. *Mutatis mutandis*, a strong emphasis on respect for the EU foundational values as a prerequisite for normalised relations with the Union, would mean that the constituent phase of the respective seceding entity would be influenced by them, easing its transition to a new subject of EU and (inter)national law. Potentially, this could decrease the tensions that the "revolutionary" character of secession often triggers and thus contribute to the peaceful co-existence of European peoples.

The present article is situated precisely within the political and legal debates that relate to secessionist movements within the EU and seeks to determine how the EU may accommodate such processes. This is not merely an academic question as the 2014 and 2017 independence referendums in Scotland and Catalonia respectively prove. In addition, the never-ending debate on the constitutional future of Belgium and the ever-increasing probability of a *de jure* partition in Cyprus point to the same direction. At the same time, Brexit has reopened the question of Irish unification following the potential secession of Northern Ireland from the United Kingdom. In the immediate vicinity, a possible independence referendum in Republika Srpska may influence the accession prospects of Bosnia and Herzegovina. Finally, the question of secession has appeared even in legal orders in which support for such a political aim is rather minimal. Both the Italian and the German Constitutional Courts have declared as unconstitutional the organisation of regional referendums on independence.[50]

Overall, the argument that this article develops is that the remarkable flexibility of the EU legal order allows it to accommodate secessionist processes that take place at any tier, provided that they do not violate Article 2 TEU's foundational values. This finding does not question the fact that a number of Member States may be politically opposed to such phenomena and, as such, may influence the stance of the EU institutions towards them. Rather, it emphasises that the EU legal toolkit is so broad that it may absorb the frictions that such developments may create. The remainder of this article is organised as follows. It highlights the mechanisms that allow the EU constitutional order to accommodate secessionist processes that take place at the substate-regional (Part II), the (Member) State-national (Part III), and the supranational levels (Part IV), provided that they are in conformity with the principles of Article 2 TEU.

II. Internal Secession

Internal secession is a procedure available in some federal systems "where new States are carved out of the existing ones and given member State status."[51] "There are precedent cases […] that have happened inside liberal democratic federations."[52] The most cited example is the one of Jura[53] in Switzerland, while others include Nunavut in Canada and the Indian states of Chhattisgarh, Uttaranchal (renamed Uttarakhand), Jharkhand and Telangana. None of the aforementioned examples relate to an EU Member State. However, internal secession

[50] Italian Constitutional Court, Judgment 118/2015, 29 April; German Constitutional Court, 2 BvR 349/16, ECLI:DE:BVerfG:2016:rk20161216.2bvr034916.

[51] Ferran Requejo and Klaus-Jürgen Nagel, *Democracy and Borders: External and Internal Secession in the EU*, 14 *Euborders Working Paper* 9 (2017) https://www.ibei.org/working-paper-14-euborders_145139.pdf.

[52] *Id.*, at 12.

[53] *See* Maurizio Maggetti and Alexandra Fang-Bär, *The Birth of a New Canton: An Example for the Implementation of the Right to Self-determination in* STATES FALLING APART? SECESSIONIST AND AUTONOMY MOVEMENTS IN EUROPE 337 (Eva Maria Belser, Alexandra Fang-Bär, Nina Massüger and Rekha Oleschak Pillai eds., 2015); Sean Mueller, *Conflicting Cantonalisms: Disputed Sub-national Territorial Identities in Switzerland,* 3 L' EUROPE EN FORMATION 86 (2013).

involving an EU legislative region is a possible eventuality. Legally speaking, Article 29 of the German Basic Law and Article 3 of the Austrian Constitution provide for certain procedural requirements that may regulate such a process. Politically speaking, in Spain, it was reported that there was a political movement supporting the secession of the province of Léon from the Spanish Autonomous Community of Castilla y Léon.[54] Nearby, there have been discussions concerning the creation of a separate "third Croat entity" that would secede from the Federation of Bosnia and Herzegovina.[55] This part of the article highlights that the EU constitutional order of States may accommodate cases of internal secession like the aforementioned ones provided that they conform with the foundational values of Article 2 TEU.

The EU legal order is largely agnostic in terms of the internal organisation of its Member States.[56] By allowing for the modest participation of the regional tier in its decision-making processes,[57] the EU has moved on from the early days of the integration process in which the academic literature highlighted its regional blindness.[58] Notwithstanding, "it is not for the [EU] to rule on the division of competences by the institutional rules proper to each Member State."[59] In fact, Article 4(2) TEU goes a step further when it proclaims that the EU respects the "national identities [of Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." Indeed, the broad variety of systems of territorial pluralism that exist within the European constitutional landscape highlights that the EU is not prescriptive as to whether or following which processes (including internal secession) its Member States may grant their regions legislative autonomy.

The autonomy that Member States enjoy with regard to internal organisation, however, is not unfettered. The potential territorial reconfiguration of a State does not absolve it from the obligations stemming from its EU membership. Article 4(3) TEU provides that an EU Member State should "take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the EU Treaties or resulting from the acts of the institutions of the Union." In particular, since *Costa,*[60] EU law has enjoyed supremacy over national law, including constitutional law.[61] Member States, however, are free to decide how to integrate this principle into their national law.[62] In this sense, it is important that any internal secession process does not challenge the effective application of EU law within the territory of the Member State and with respect to its primacy. To this effect, any redrawing of the internal

[54] *See* Juan Navarro, *León aprueba una moción para separarse de Castilla junto a Salamanca y* Zamora, EL PAÍS, (27 December 2019), https://elpais.com/politica/2019/12/27/actualidad/1577460024_317304.html.
[55] International Crisis Group*, Bosnia's Gordian Knot: Constitutional Reform*, EUROPE BRIEFING N°68 (2012).
[56] Case C-8/88 *Germany v Commission* ECLI:EU:C:1990:241.
[57] Nikos Skoutaris, *The Role of Sub-State Entities in the EU Decision-Making Processes: A Comparative Constitutional Law Approach, in* FEDERALISM IN THE EU 210 (Elke Cloots, Geert De Baere and Stefan Sottiaux eds., 2012).
[58] *See* Fasone *supra* note 13, at 48-51.
[59] *Germany v. Commission,* Case C-8/88, ECLI:EU:C:1990:241, at para 13.
[60] *Costa v. ENEL*, Case 6/64, ECLI:EU:C:1964:66.
[61] *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, ECLI:EU:C:1970:114*; Commission v. Luxembourg*, Case C-473/93, ECLI:EU:C:1996:263.
[62] Germany (Art. 23 of German Basic Law) and Italy (Art. 11 of the Italian Constitution) have interpreted their respective constitutional provisions relating to the EU or international relations as embodying the supremacy of EU law by a "material change" of the constitution. France (Arts. 54 and 55 of the French Constitution) requires that specific constitutional provisions be formally changed before ratifying a Treaty that would otherwise entail obligations that are incompatible with those provisions. Art. 29(5) of the Irish Constitution has expressly incorporated the principle of supremacy to the Constitution.

boundaries of a Member State should not affect its mechanisms for ensuring compliance with Union law. This applies especially with regard to regional "blocking" (i.e., the inability of a region to comply with a certain piece of EU legislation). The CJEU has repeatedly held that "a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under [EU] law."[63] Therefore, the requirement for effective application of EU law may pose certain limits to the constitutional autonomy of a Member State and its respective legislative region(s) that engage(s) in a process of internal secession.

However, even in the rather improbable case that the by-product of an internal secession process raises questions regarding the application of the Treaties, the Member States as "Masters of the Treaties" can amend them as they wish. Despite functioning as a European constitution,[64] the Treaties are still subject to the intergovernmental method of treaty-making and the will of Member States to accommodate specific interests has not, thus far, been subject to legal limitations. In fact, Member States have even occasionally restricted the four freedoms permanently, as in the case of the Danish prohibition for secondary residences[65] or with the special regime of the Åland islands.[66]

Having said that, the freedom of the Member States to amend the Treaties may not be completely unfettered. It has been suggested that derogations from primary law may not touch on the very core of Union principles.[67] The idea of "untouchable" core issues is present in the constitutions of Member States[68] and in the notion of *jus cogens* in international law. In *Opinion 1/91*,[69] the CJEU provided a small hint about the existence of such a "hard core." It held that the establishment of the judicial organ of dispute settlement in the envisaged EEA agreement would threaten the role of the CJEU under then Article 164 TEC[70] and thereby the "foundations of the Community" to such a degree that it could not have been removed even if the Member States had decided to amend current Article 217 TFEU (which defines "association"). This could be read as limiting the treaty-making power of Member States.[71]

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[63] *Government of the French Community and Walloon Government v. Flemish Government,* Case C-212/06, ECLI:EU:C:2008:178, para 58; see also *Commission v Spain*, Case C-107/96, ECLI:EU:C:1997:286; Case C-323/97 *Commission v Belgium*, ECLI:EU:C:1998:347.

[64] *The Greens (Les Verts) v. The Parliament,* Case C-294/83, ECLI:EU:C:1986:166.

[65] Protocol (No 32) on the acquisition of property in Denmark [2008] OJ C115/318.

[66] Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, Protocol No 2 – on the Åland islands [1994] OJ C241/352.

[67] Andrea Ott, *The "Principle" of Differentiation in an Enlarged European Union: Unity in Diversity?*, *in* THE CONSTITUTION FOR EUROPE AND AN ENLARGING UNION: UNITY IN DIVERSITY? 104, 122 (Kirsty Inglis and Andrea Ott eds., 2005); see also Christophe Hillion, *Negotiating Turkey's Membership to the European Union: Can the Member States Do As They Please?*, 3 EUROPEAN CONSTITUTIONAL LAW REVIEW 269 (2007); Nikos Lavranos, *Revisiting Article 307: The Untouchable Core of Fundamental European Constitutional Law Values and Principles, in* SHAPING RULE OF LAW THROUGH DIALOGUE 119 (Filippo Fontanelli, Giuseppe Martinico and Paolo Wright Carrozza eds., 2009).

[68] Art 79(3) of the German Basic Law provides that the principles contained in Arts. 1–20 may never be modified. In France, the republican principle may not be modified according to Art. 89(5) of the French Constitution.

[69] Opinion 1/91 *(re Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area)* ECLI:EU:C:1991:490.

[70] Ex Article 220 TEC replaced in substance by Article 19 TEU.

[71] Opinion 1/91 (n 67), para 72.

At the same time, even the supposed freedom to negotiate a new Treaty is bound by the procedural requirements of Article 48 TEU and by the requirement that a condition of Union membership is a commitment to human rights, democracy and the rule of law in accordance with Articles 2 and 49 TEU. Therefore, even if one accepts that a certain "hard core" of Union law exists and could not be modified, even by way of a new Treaty, such "hardcore rules" would be found foremost in the characteristics of the institutional system of the EU as a quasi-constitution and, more importantly, in the foundational principles of the Union as defined in Article 2 TEU. These principles are to be regarded as part of the non-derogable Union *acquis* inasmuch as they are a prerequisite for membership of the Union and a serious breach of these principles attracts the possibility of sanctions under Article 7 TEU. In this sense, any constitutional settlement that entails an internal secession should be endowed with democratic institutions, respect the rule of law and effectively protect human rights and fundamental freedoms.[72]

To sum up this section, by and large, EU law respects the constitutional autonomy of Member States by not being prescriptive as to the form and the content of processes of territorial re-organisation, including internal secession. To the extent that they respect the foundational values of the Union constitutional order and do not pose hurdles to the effective application of EU law, the Union may accommodate them.

III. External Secession

Within the Union legal order, the issue of external secession (i.e. the right to external self-determination and independence) is more challenging than internal secession. As previously mentioned, Crawford explained that "no one is very clear as to what [this right] means, at least outside the colonial context."[73] Indeed, the right to external secession for peoples under colonial domination was enshrined in the UN Charter[74] and further crystalised in UN General Assembly Resolutions 1514 (XV) 1960 and 1541 (XV) 1960. As time went by, the legal right of the non-self-governing territories to become independent from their metropolitan State became well-established. The ICJ endorsed the respective decolonisation processes based on

[72] On the rule of law see requirement, see *Jonston v. Chief Constable of the Royal Ulster Constabulary*, Case C-222/84, ECLI:EU:C:1986:206; *Commission v Poland*, Case C-192/18, ECLI:EU:C:2019:924; *R Commission v. Poland*, Case C-791/19, ECLI:EU:C:2020:277.

[73] James R. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, *in* PEOPLE'S RIGHTS 7, 66 (Philip Alston, ed., 2001).

[74] Art. 55 of the UN Charter refers to "[…] the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." When it comes specifically to colonial/non-self-governing territories, Article 73 of the UN Charter provides that "Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories."

the right of external self-determination in its opinions on *Namibia,*[75] *Western Sahara*[76] and more recently *Chagos.*[77]

Outside the colonial context, however, it should be noted that Joint Article 1 of the two Covenants in the International Bill of Rights provides that "[a]ll peoples have the right to self-determination." This does not mean, however, that all peoples have the right to external secession and independence. In fact, a State that respects the principles of self-determination in its internal arrangements "is entitled to maintain its territorial integrity under international law."[78] As the Canadian Supreme Court held, "international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their parent state."[79]

Having said that, the Canadian Supreme Court did not rule out the possibility of *de facto* secession as a result of a unilateral and unconstitutional declaration of independence.[80] The ultimate success of such secession would depend on effective control of a territory and recognition by the international community.[81] The ICJ reaffirmed this finding in its *Advisory Opinion on Kosovo* in 2010.[82] There, the Court confirmed that there was no prohibition on declarations of independence in international law and that the legal obligation to respect territorial integrity is imposed only on States, not on non-State actors.[83] More importantly, for the purposes of the present article, both of these judgments accept the possibility of a consensual process of secession that would follow rules established within a given constitutional order.

In a nutshell, while the right to external secession and independence for peoples under colonial domination is undisputed, international law does not specifically grant constituent units of sovereign states the legal right to secede from their parent state. However, the judicial decisions of the Canadian Supreme Court and the ICJ underline the pragmatic approach that international law has traditionally taken regarding secessionism. Cassese summed it up as follows:

> International law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach the legal consequences depending on the circumstances of the case.[84]

The EU has largely followed this pragmatism. It is not a mere coincidence that the Union has already accommodated within its legal order the results of secessions that have taken place through consensual processes. For instance, the Czech Republic and Slovakia became independent in a consensual manner. This was never considered a hurdle to their accession

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[75] International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16.
[76] International Court of Justice, *Advisory Opinion on Western* Sahara, ICJ Reports (1975) 12.
[77] International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Reports (2019) 95.
[78] *See Reference re Secession of Quebec*, *supra* note 38, at para 154.
[79] *Id.* at para 111.
[80] *Id.* at para 106.
[81] *Id.* at para 142. See also African Commission on Human and People's Rights *Kevin Mgwanga Gunme et al v. Cameroon,* Communication No. 266/2003.
[82] *See Advisory Opinion on Kosovo*, *supra* note 39.
[83] *Id.* at paras 79–84.
[84] ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES. A LEGAL REAPPRAISAL 340 (1995).

to the EU. Even as to the heated debate on the continuing membership of a region that has consensually seceded from a Member State—as was discussed before the 2014 Scottish referendum—the main question centred on the appropriate process for Scotland to become an EU Member State rather than the eligibility and/or the legitimacy of its potential candidacy.[85]

To understand how the EU can accommodate the potential external secession of component parts of its Member States, this section incorporates the distinction that international law adopts with regard to this phenomenon by analysing three scenarios: secession of non-self-governing territories, non-consensual secession and consensual secession in the non-colonial context. Part *A* relates to the processes of unfinished decolonisation and is the most unproblematic. The right of external secession in the colonial context is undisputed and as such, the EU has adapted to the relevant international law requirements. The subsequent two parts discuss the less straightforward scenario of external secession in the non-colonial context. Part *B* points to the fact that the EU in principle cannot and should not endorse the outcomes of non-consensual external secession, as this would undermine the territorial integrity of its Member States and the foundational values of Article 2 TEU. It also points to the limits of such prohibitions by briefly referring to the issue of remedial secession and the concept of engagement without recognition. Finally, Part *C* sheds light on the flexibility of the EU legal toolkit, which allows for the accommodation of the results of consensual secession as long as it does not breach Article 2 TEU. Whether such a process could lead to the creation of a new (Member) State, the dissolution of an old one or the enlargement of another, the EU's constitutional order of States possesses the necessary legal mechanisms to achieve a smooth transition to the new reality. Overall, as in the case of internal secession, the article highlights that the Union may accommodate processes of external secession provided that they are in conformity with the foundational values of Article 2 TEU.

A. Secession of Non-Self-Governing Territories

The right to external secession in the colonial context is undisputed. As an international organisation that has vowed to strictly observe and develop "international law, including respect for the principles of the United Nations Charter,"[86] it is hardly surprising that the EU has recognised and accepted the occurrence of moving borders regarding such territories. The CJEU has acknowledged the importance of the right of self-determination for non-self-governing territories:

> [T]he customary principle of self-determination referred to in particular in Article 1 of the Charter of the United Nations is, as the International Court of Justice stated in paragraphs 54 to 56 of its Advisory Opinion on Western Sahara, a principle of international law applicable to all non-self-governing territories and to all peoples who have not yet achieved independence.[87]

The most often cited example of the EU's attitude towards decolonisation involving one of its Member States relates to Algeria's independence. Interestingly, Algeria was not initially listed as a non-self-governing territory in Chapter XI of the UN Charter. However, the General

[85] *See supra* note 10.
[86] Art. 3(5) TEU.
[87] *See Front Polisario, supra* note 33, at paras 88–89.

Assembly later affirmed the right of its people to external secession and independence.[88] Prior to its independence, Algeria enjoyed a status under the then Article 277(2) EEC that was similar to the one currently linked with the Outermost Regions.[89] When it gained its independence from France in 1962, Algeria faced the prospect of an immediate rupture of its relations with the then European Economic Community. This is why the Algerian President requested from the Council the "maintenance" (or retention) of the application of certain Treaty provisions "pending future definition of EC–Algeria relations."[90] "While receipt of the request was acknowledged by the Council in January 1963, and was assessed positively by the Commission, it is unclear whether the relevant Treaty provisions continued to apply until the conclusion of the first EC–Algeria bilateral agreement in 1976."[91]

The unclear status of the application of EU law in Algeria from the moment of its independence until the signing of the bilateral agreement does not mean that, in the current state of integration of the EU legal order, such "soft" tools will be considered sufficient for its continuing application in a former non-self-governing territory that has since become independent. Expressed differently, as a matter of legal certainty, it is only an express and legally binding agreement between the EU and the newly independent State that would secure the continuous relationship between the two, if the parties so desire. In contrast, the independence of a non-self-governing territory would trigger the end of its constitutional relationship with a Member State and, as such, their automatic expulsion from the EU's legal and regulatory orbit.

This is important if one takes into account the political developments in certain non-self-governing territories that have a constitutional relationship with an EU Member State.[92] For instance, the Nouméa Accord[93]—signed in 1998 following a period of secessionist unrest in the 1980s—permitted referendum votes for the independence of New Caledonia. The first was held in 2018 and the second in 2020. In both votes, the majority chose to remain French. The Nouméa Accord permitted a final referendum to be organised. It was held in December 2021 and widely rejected independence amid boycotts by the independence movement.

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[88] UN General Assembly Resolution 1573 (XV) (1960), para 1; UN General Assembly Resolution 1724 (XVI) (1961).

[89] The current Outermost Regions are French Guadeloupe, French Guiana, Martinique and Réunion, Saint-Barthélemy, Saint-Martin, the Spanish Canary Islands and the Portuguese Azores and Madeira. Mayotte became an outermost region of the European Union on 1 January 2014, following a 2009 referendum with an overwhelming result in favour of the department's status. By virtue of Art 355(1) TFEU the EU *acquis*, generally speaking, applies on them. However, in accordance with Art 349 TFEU, the Council, "taking account of the structural social and economic situation" of these regions and "their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development," has adopted "specific measures aimed, in particular, at laying down the conditions of application" of the Treaties to those regions, including common policies.

[90] Allan F. Tatham, *"Don't mention divorce at the wedding, darling!": EU Accession and Withdrawal after Lisbon, in* EU LAW AFTER LISBON 128, 144 (Andrea Biondi, Piet Eeckhout and Stefanie Ripley, eds., 2012).

[91] Phoebus Athanassiou and Stéphanie Laulhé Shaelou, *EU Accession from Within?—An Introduction*, 33 YEARBOOK OF EUROPEAN LAW, 335, 351 (2014).

[92] Following the UK's withdrawal from the EU, there are eight remaining Overseas Countries and Territories—five with France: New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands (known collectively as "*Territoires d'outre mer*") and Saint Pierre and Miquelon; two with the Netherlands: Aruba and the Netherlands Antilles (Bonaire, Curaçao Saba, Sint Eustatius and Sint Maarten); and one with Denmark: Greenland.

[93] Nouméa Accord (1998), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000555817.

Similar constitutional and political debates are currently taking place in other self-governing territories as well. This is a result of international law obligations that EU Member States have undertaken and the relevant constitutional law provisions.[94] In this sense, it is by no means unthinkable that the EU and at least one of its Member States might face in the years to come a similar situation to the one relating to Algeria in the 1960s. In any case, the EU will respect and accommodate the outcome of such decolonisation process by terminating its current contractual relationship with the relevant entity and/or by building a new legal framework with the newly independent State, as it did in the case of Algeria. The last section of this part of the article puts forward a proposal about how the EU may engage with the newly independent State to secure an orderly transition to the new state of affairs.

B. Non-colonial context: Non-Consensual Secession

While the right to unilateral secession is undisputed in the case of non-self-governing territories, in the non-colonial context, unilateralism is arguably allowed only in the context of remedial secession. In this sense, the distinction between consensual and non-consensual secession is crucial to the legality of such processes. In fact, "the compatibility of secessions with EU law depends decisively on whether they are unilateral (i.e. non-consensual) or consensual/agreed processes."[95] This section explains why the EU cannot endorse non-consensual secessions, as this would threaten the territorial integrity of its Member States and breach Article 2 TEU's foundational values. This confirms the thesis of the article that the EU legal order may only accommodate external secessions that conform with the EU's core constitutional principles. Conversely, the position of EU law in case it is the metropolitan State that flagrantly and persistently violates the principles of Article 2 TEU in its effort to deal with a secessionist movement should be also analysed; therefore, this section also explores whether the EU legal order allows for an exception concerning remedial non-consensual secessions. Finally, despite the fact that respect to Article 2 TEU is a *conditio sine qua non* for the accommodation of a secession, this section highlights that the Union does not deal with non-consensual secessions in a purist and monolithic way, as conventional wisdom suggests. The case of Cyprus highlights the flexibility of the EU legal order—the Union has managed to engage with the respective unrecognised entity without formally recognising it.

(1) Non-Consensual Secession and EU Law

At its inception, the United Nations General Assembly had 51 member states. Today, it has 193 members. Out of those States created during the second half of the twentieth century, almost three-quarters were born out of secession.[96] The vast majority of these secessions were non-consensual and sometimes even violent. Still, they led to the creation of functioning, internationally recognised States. This historic reality, *inter alia*, led to the ICJ recognising that there was no prohibition on declarations of independence in international law.[97] The Court

[94] The Preamble of the French Constitution provides that "[b]y virtue of these principles and that of the self-determination of peoples, the Republic offers to the overseas territories which have expressed the will to adhere to them new institutions founded on the common ideal of liberty, equality and fraternity and conceived for the purpose of their democratic development."
[95] *See* Closa, *supra* note 13, 247 (2016).
[96] RYAN D. GRIFFITHS, AGE OF SECESSION: THE INTERNATIONAL AND DOMESTIC DETERMINANTS OF STATE BIRTH (2017).
[97] *See Advisory Opinion on Kosovo*, *supra* note 39, at paras 79–84.

went a step further with its pragmatist view by highlighting that the legal obligation to respect the territorial integrity of States is imposed only on other States, not on non-State actors.[98] In that sense, an independentist movement of a sub-state entity cannot be found *per se* as breaching this principle in international law unless it is actively supported by another State.

And yet, secession and/or a political movement supporting it may be found as breaching national constitutional law by threatening the integrity of the State and its law and order. In fact, most Constitutions are generally hostile to secession by affirming either explicitly or implicitly the primacy of the State's territorial integrity.[99] Even when they are silent on the matter, they often adopt tools and strategies to prevent secession for "existential –and not so existential needs—rather than democratic reasons alone."[100] These strategies include the use of "eternity clauses" and bans on either on partition/secession or secessionist political parties.[101] For instance, Article 2 of the Bulgarian Constitution proclaims the inviolability of Bulgaria's territorial integrity. The indivisibility of the Republics of France and Romania is enshrined in Article 1 of their respective Constitutions, while Article 2 of the Spanish Constitution speaks of the indissoluble unity of the Spanish Nation. Similarly, Article 185 of the Cypriot Constitution prohibits the integral or partial union of the island with another State and separatist independence.

Due to the composite nature of the EU constitution, the secessionist-restraining attitude that national constitutions often adopt has a knock-on effect on the legal stance of the EU towards cases of non-consensual secession. In particular, Article 4(2) TEU provides that "[t]he Union shall respect . . .Member States' national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government". In addition, the EU "shall respect [Member States'] essential State functions, including ensuring the territorial integrity of the State." As Peers noted, the obvious consequence to be drawn from this provision is that in the "event of a purported secession from a Member State, the Union must respect that Member State's position as regards whether the secession is valid and the date upon which the secession takes place." [102] Therefore, a non-consensual secession that breaches national constitutional law and undermines the territorial integrity of a Member State ought to be condemned by the EU institutions pursuant to Article 4(2) TEU that lies at the centre of the Union's constitutional order of States.[103]

In addition, the duty of loyal cooperation enshrined in Article 4(3) TEU imposes a legal obligation on the EU institutions and the Member States not to undermine the position that the respective metropolitan State adopts with regard to the relevant non-consensual

[98] *Id.* at para 80.

[99] Patrick Monahan, Michael J. Bryant and Nancy C. Coté, *Coming to Terms with Plan B: Ten Principles Governing Secession*, Commissioned Reports and Studies Paper 71 (1996).

[100] Rivka Weill, *Secession and the Prevalence of Both Militant Democracy and Eternity Clauses Worldwide*, 40 CARDOZO LAW REVIEW 905, 913 (2018).

[101] *Id.*

[102] *See* Peers, *supra* note 25, at 59–60.

[103] In an open letter to the Spanish Member of the European Parliament, Beatriz Becerra Basterrechea, then President of the European Parliament Antonio Tajani underlined that "[t]he constitutional frameworks of individual Member States are part of the legal framework of the European Union. Their respect must be guaranteed at all times. […] Any action against the constitution of a Member State is an action against the European Union's legal framework." Letter from Antonio Tajani to Beatriz Becerra Basterrechea MEP, European Parliament (September 7, 2017), https://beatrizbecerra.eu/wp-content/uploads/2017/09/Respuesta-Tajani-Cataluña.pdf.

secession. In *Ireland v. Commission,*[104] the Court of Justice held that "the duty to cooperate in good faith governs relations between the Member States and the institutions" [105] and emphasised that this obligation "imposes on Member States and the [Union] institutions mutual duties to cooperate in good faith."[106] This means that the Member States and the EU should not, for instance, build economic and political relations with a breakaway entity without the explicit consent of the relevant Member State. If they acted in such a way, they would be *de facto* challenging and questioning the legal stance that the metropolitan State would have adopted. As such, they would be breaching the duty of loyal cooperation. This is one of the arguments that the Republic of Cyprus has put forward to block the proposal for a Regulation that would establish direct trade relations between the Union and the unrecognised Turkish Republic of Northern Cyprus.[107] In particular, they emphasised that due to the duty of loyal cooperation, the EU and its Member States should respect the closure of the ports in northern Cyprus and not build direct economic relations between the breakaway State and the rest of the EU without the explicit consent of the Republic.[108]

Finally, pursuant to Article 2 TEU, the EU emphasises a richer conception of democracy that "inserts values such as respect of human rights and observance of the rule of law."[109] In fact, the Commission has stressed that "respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa". [110] However, proponents of non-consensual secession rarely claim that their actions conform with the constitution of the given metropolitan State. In fact, the aim of independence referendums and unilateral declarations of independence, like the ones that took place in Catalonia in 2017, is precisely to mark the rupture with the old constitutional order and to create a new one without necessarily respecting the rules of the national constitution. This disregard for the norms of the national constitutional order raises—at a minimum—questions as to whether non-consensual secession adheres to values such as democracy and the rule of law enshrined in Article 2 TEU. Respect for those values, however, is a prerequisite for EU membership under Article 49 TEU. Therefore, a non-consensual secession that does not respect those foundational principles, including the observance to the rule of law, would be deemed antithetical to the EU's constitutional ethos. Even should it lead to the creation of a functioning State, its membership to the EU would be questioned, at least in the short term, as the Member States and the EU institutions examine its respect for these values. This confirms the overall argument of the article that compatibility with Article 2 TEU is a necessary condition for a secession to be accommodated within the Union's constitutional order of States.

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[104] *Ireland v. Commission*, Case C-339/00, ECLI:EU:C:2003:545.

[105] *Id.* at para 71.

[106] *Id.*

[107] Proposal for a Council Regulation on special conditions for trade with those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control, Brussels, 7.7.2004, COM (2004), 466 final.

[108] NIKOS SKOUTARIS, THE CYPRUS ISSUE: THE FOUR FREEDOMS IN A (MEMBER-) STATE UNDER SIEGE 151–153 (2011).

[109] *See* Closa, *supra* note 13, at 249–250.

[110] European Commission, Communication, A New EU Framework to Strengthen the Rule of Law, COM (2014) 158, at 4.

(2) Non-Consensual Remedial Secession

Article 4(2) TEU dictates that the EU and its Member States should respect the position of the relevant State towards a purported secession that takes place within its borders. In this sense, a non-consensual secession that breaches the principles of the EU, including democracy and rule of law, cannot be accommodated by the Union. Such deference and reliance, however, on the Member States' domestic orders creates a legal and political space in which metropolitan States may potentially suppress secession. This raises the question of whether there is a limit to this deferential attitude. What should be the stance of the EU if, for instance, a constituent unit of a Member State fully adheres to Article 2 TEU in its effort to gain independence, but it is the metropolitan State that breaches it by using excessive coercion and brutal force to deter this event from happening? Does EU law recognise the possibility of remedial secession?

The right to external secession arises only "in the most extreme of cases and, even then, under carefully defined circumstances." [111] Outside the colonial context, a right to unilateral secession may be recognised to people "subject to alien subjugation, domination or exploitation."[112] This understanding is very much based on the Saving Clause of the Friendly Relations Declaration of 1970.[113] UN General Assembly Resolution 2625 appears to qualify the guarantee of territorial integrity by restricting it to States "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[114] As a special rapporteur of the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities summed up this point:

> The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law. In such cases, the peoples concerned have the right to regain their freedom and constitute themselves independent sovereign States.[115]

Having said that, the Canadian Supreme Court went a step further by suggesting that a people is also entitled to secession when it "is blocked from the meaningful exercise of its right to self-determination internally." [116] In other words, it "is denied meaningful access to government to pursue their political, economic, social and cultural development." [117] Interestingly, in its judgment annulling the Catalan Law on the organisation of the October 2017 independence referendum, the Spanish Constitutional Court also found that a right of remedial secession exists.[118] Obviously, in neither of the two cases did the relevant highest court of the land hold that the ethnic group in question—the Quebecers and Catalans, respectively—satisfied the conditions to lawfully claim such right.

Despite these proclamations, the status of remedial secession in international law remains unclear. In its *Advisory Opinion on Kosovo,* the ICJ noted that:

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[111] *See Reference re Secession of Quebec* , *supra* note 38, at para 126.
[112] *Id.* at para 133.
[113] *Id.*
[114] *Declaration on Friendly Relations*, G.A. Res. 2625 (1970), 124.
[115] AURELIU CRISTESCU, THE RIGHT TO SELF-DETERMINATION. HISTORICAL AND CURRENT DEVELOPMENT ON THE BASIS OF UNITED NATIONS INSTRUMENTS Doc. E/CN.4/Sub.2/404/Rev.1 [1981] at para 173.
[116] *See Reference re Secession of Quebec* , *supra* note 38, at para 134.
[117] *Id., at* para 138.
[118] Spanish Constitutional Tribunal, Case 114/2017, 17 October, ECLI:ES:TC:2017:114, para I.1 G.

> "whether. . . self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed. . . Similar differences existed regarding whether international law provides for a right of 'remedial secession' and, if so, in what circumstances."[119]

Given this, it is not unsurprising that the EU legal order does not appear to have a clear position on the matter. In fact, during the proceedings of the *Kosovo Advisory Opinion*, the differences between the Member States became evident. On one hand, Finland accepted remedial secession in a range of circumstances, including "abnormality, or rupture, or revolution, war, alien subjugation or the absence of a meaningful prospect for a functioning internal self-determination regime[.]"[120] On the other hand, Spain, Slovakia and Cyprus rejected this understanding of international law.[121] This difference of opinion between Member States alludes to the very real possibility that the Union may not accommodate a case of non-consensual secession even if in response to flagrant violations of the foundational principles of Article 2 TEU.

That being said, these values are a prerequisite for accession to the EU, and compliance with them is a *sine qua non* for the continuous enjoyment of EU membership. The CJEU recently held:

> Once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded.[122]

A persistent breach of those values may lead to the triggering of the procedure outlined in Article 7 TEU. Thus, if a Member State, in its effort to counter a secessionist movement, flagrantly violates Article 2, it may face sanctions under Article 7 TEU as well as financial repercussions under Regulation 2020/2092, which provides for "the rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States."[123]

(3) Engagement without Recognition

The two previous sub-sections explain why the EU legal order is unable to accommodate non-consensual secession. However, this does not mean that the EU refuses to interact with entities that have been established as a result of these processes. Instead of adopting a purist and monolithic approach towards unrecognised entities, the Union often legally, politically and economically engages with them without being understood to have recognised them as full and equal sovereign actors in the international system.[124] The most obvious example of such flexibility is evident in how the EU has interacted with the *status quo* in northern Cyprus.

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[119] *See Advisory Opinion on Kosovo*, *supra* note 39, at para 82.

[120] Kosovo Advisory Opinion, Written Statement of Finland, at para 9.

[121] *See* Kosovo Advisory Opinion, Written Statement of Cyprus, at paras 140-148; Kosovo Advisory Opinion, Written Statement of Slovakia, at para 28; Kosovo Advisory Opinion, Written Statement of Spain at para 15.

[122] *See Hungary v. European Parliament and Council of the European Union*, *supra* note 27, at para 125.

[123] Art 1 of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433/1.

[124] On the concept of "engagement without recognition," *see* Dimitris Bouris and George Kyris, *Europeanisation, Sovereignty and Contested States: The EU in northern Cyprus and Palestine,* 19(4) THE BRITISH JOURNAL OF POLITICS AND INTERNATIONAL RELATIONS 755 (2017); Nina Caspersen, *The pursuit of international*

The Republic of Cyprus (RoC) gained its independence from the United Kingdom in 1960. The international legal framework that established the new State[125] set out a complicated power-sharing arrangement between the Greek-Cypriot and Turkish-Cypriot communities on the island. This sophisticated institutional regime collapsed just four years later,[126] while the territorial division of the two communities was consolidated and took its current form in 1974, when Turkey militarily intervened. Almost a decade later, on 15 November 1983, the Turkish Cypriot community proclaimed its independence as the so-called Turkish Republic of Northern Cyprus (TRNC hereafter). The UN Security Council deplored "the purported secession of part of the Republic of Cyprus" and called upon all States "not to recognise the purported State of the 'Turkish Republic of Northern Cyprus' set up by secessionist acts."[127] This was reiterated in Security Council Resolution 550 (1984).[128] In other words, the UN Security Council condemned the Turkish Cypriot non-consensual secession.

On 24 April 2004, the Greek Cypriot community rejected in a referendum the UN-sponsored plan for the Comprehensive Settlement of the Cyprus Problem—commonly known as the Annan Plan.[129] Despite this, a week later, Cyprus as a whole became an EU Member State. More importantly, for the purposes of this article, the EU legal order proved to be flexible enough to engage with the regime in northern Cyprus, despite TRNC being the outcome of a non-consensual secession resulting from an act of aggression.

At the very centre of the EU pragmatic approach lies Protocol No. 10 on Cyprus of the Act of Accession 2003, which describes the terms of RoC's accession.[130] It highlights the remarkable flexibility of the Union's legal order to manage the unprecedented (for an EU Member State) situation of not controlling part of its territory without recognising the breakaway entity. In the preamble of the Protocol, the EU Member States and the acceding States considered that in the absence of a comprehensive settlement, it was necessary to provide for the terms under which EU law would apply to northern Cyprus. Thus, according to Article 1(1) of this Protocol, the application of EU law is suspended in the north—an area where RoC's internationally recognised government does not exercise effective control. Despite this, Article 2 of the Protocol allowed the Council, acting unanimously, to adopt the Green Line Regulation.[131] This legislative device provides rules for the free crossing of persons and goods of the "border" between the north and the south of the island. In other words, it provides for the partial application of the EU *acquis* in northern Cyprus despite the fact that there lies an unrecognised state. In addition, Article 3 allows for measures that promote the economic development of this part of the world. Indeed, in 2006, the Council unanimously adopted the Financial Aid

recognition after Kosovo, 21(3) GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS 393 (2015); James Ker-Lindsay, *Engagement without recognition: The limits of diplomatic interaction with contested states,* 91(2) INTERNATIONAL AFFAIRS 267 (2015).

[125] Cyprus Agreements (1959), www.kypros.org/Constitution/English/.

[126] *See* SKOUTARIS, *supra* note 108, at 22-25.

[127] UN Security Council Resolution 541 (1983).

[128] UN Security Council Resolution 550 (1984).

[129] http://www.hri.org/docs/annan/Annan_Plan_April2004.pdf.

[130] Protocol No 10 on Cyprus of the Act of Accession 2003 [2003] OJ L236/955 (hereafter Protocol No 10 on Cyprus).

[131] Council Regulation (EC) No 866/2004 of 29 April 2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession 2003 [2004] OJ L206/51.

Regulation, which established an instrument for encouraging the economic development of the Turkish Cypriot community.[132]

The existence of this legal framework highlights the fact that the EU constitutional order is more flexible on secessionism than conventional wisdom suggests. The Union can engage with unrecognised entities that have been established as a result of a non-consensual secession, even when they are the outcomes of acts of aggression condemned by the UN Security Council. Of course, this accommodation was made possible through the consent of the metropolitan State and primary legislation in the form of an Accession Treaty. If the Republic of Cyprus had not consented to it, it would not have been possible for the EU legal order to engage with the regime in northern Cyprus to such an extent. The pragmatic approach towards this unprecedented situation, however, did not lead to the complete normalisation of the relations between the EU and northern Cyprus. It merely eased the frictions created by the territorial division of the island. Still, it is important to highlight that without formally recognising the breakaway entity that lies within its borders, the EU engages with it regarding trade, free movement of people and economic assistance.

Cyprus is not the only case of non-consensual secession with which the EU interacts. A similar kind of pragmatism and flexibility are evident in the EU's stance towards Kosovo. To this day, five EU Member States have not recognised Kosovo condemning the fact that it unilaterally declared its independence. They do not want such a practice to become a precedent for their own internal political conflicts. This has not stopped the EU from successfully engaging with Kosovo—the EU always emphasises that such engagement is in line with the UN Security Council Resolution 1244/1999 and the ICJ Opinion. In 2015, for instance, they signed the Stabilisation and Association Agreement.[133]

More importantly, in a recent judgment, the Court of Justice held that:

> A territorial entity situated outside the European Union which the European Union has not recognised as an independent State must be capable of being treated in the same way as a "third country" within the meaning of [a provision of an EU regulation], while not infringing international law.[134]

So, according to the CJEU, Kosovo can be considered a "third country" despite it not being recognised by some Member States, given that the ICJ did not find any illegality under international law in terms of its declaration of independence. This judgment underlines the fact that the EU's constitutional order of States is pragmatic and flexible enough to engage even with unrecognised entities that have been created through a process of non-consensual secession, although its own constitutional architecture prevents it from formally endorsing and recognising them. The interaction of the EU both with northern Cyprus and Kosovo proves that the position of the EU towards non-consensual secession is more nuanced than conventional wisdom suggests.

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[132] Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] OJ L 65/5.

[133] Council Decision (EU) 2016/342 of 12 February 2016 on the conclusion, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] OJ L71/ 3.

[134] *Spain v. Commission,* Case C-632/20 P*,* ECLI:EU:C:2023:28, para 50.

C. Consensual Secession

The previous section discussed the inherent characteristics of the Union constitutional order, including its composite nature, Article 2 TEU's foundational values and the duty of loyal cooperation, which dictate that the Union cannot endorse a non-consensual secession. At most, the EU may engage with such a secessionist entity without recognising it. Having said that, international law treats the issue of "the existence or disappearance of [a] State as a question of fact"[135] as it does not prohibit unilateral declarations of independence, let alone consensual secessions. This raises the question of the position of EU law in case a consensual external secession occurs within a Member State.

It is true that, in the history of the European Union, "no valid precedent exists of a territory gaining independence and at the same time acceding to the EU."[136] The closest we came to test how such a phenomenon could work in practice—if at all—was in the context of the 2014 Scottish independence referendum. The majority of the Scottish electorate rejected independence. As a result, the debate on how the EU could accommodate such a consensual process and in particular the question of the continuity of Scotland's EU membership remained theoretical.

At that time, the official position of the Commission was clear:

> If part of the territory of a Member State would cease to be part of that State because it were to become a new independent state, the Treaties would no longer apply to that territory. In other words, a new independent state would, by the fact of its independence, become a third country with respect to the EU and the Treaties would no longer apply on its territory.[137]

This understanding of EU law is legally accurate in the sense that there is no specific provision in the Treaties that addresses this situation or suggests otherwise. Moreover, the EU cannot "comprise a greater number of Member States than the number of States between which they were established."[138] Therefore, a new subject of international law that would have been the result of a consensual secessionist process, such as an independent Scotland, would not be a signatory of the Treaties and could therefore find itself outside the EU.

That being said, this understanding of EU law is also based on a very narrow reading of the Treaties. It sits rather uncomfortably with the three fundamental aspects of the Union legal order we set out in the introduction: its composite nature, its respect to international law and its function as a peace plan. Concerning the first, the article already set out that Article 4(2) TEU dictates that the EU should respect the constitutional position of a Member State

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[135] Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Opinion No 1, 11 January, 4 July 1992, 31 ILM 1488 (1992).

[136] *See* Closa, *supra* note 13, at 249–251.

[137] President JM Barroso's 10.12.2012 letter to the House of Lords Economic Affairs Committee regarding the status of EU membership for Scotland in the event of independence. In fact, this letter expresses almost verbatim a similar position espoused by a previous President of the Commission R Prodi in 2004: "[w]hen a part of the territory of a member-state ceases to be a part of that state, e.g. because the territory becomes an independent state, the Treaties will no longer apply to that territory. In other words, a newly independent region would, by the fact of its independence, become a third country with respect to the Union and the Treaties would from the day of its independence, not apply anymore…" If the new country wished them to apply again, there would need to be "a negotiation on an agreement between the applicant state and the member-states on the conditions of admission and the adjustments to the Treaties which such admission entails. This agreement is subject to ratification by all member-states and the applicant state." (President R Prodi to the European Parliament Official Journal of the European Union, C84E/422 (3.4.2004)).

[138] *Région Wallonne v. Commission of the European Communities*, Case C-95/97, ECLI:EU:C:1997:184.

concerning a secessionist process. Therefore, as long as the latter is consensual and in conformity with the values of Article 2 TEU, the EU should at least exert an effort to accommodate it. With regard to the second, a consensual secessionist process that does not breach international law is a legitimate expression of the right to self-determination. As such, the EU, which has committed itself to the "strict observance and the development of international law,"[139] should respect the outcome of the process and try to accommodate it. Finally, an automatic expulsion from the EU of a new State that has been created as a result of a consensual process that respects the domestic constitutional order and the Article 2 TEU values may exacerbate the tensions, frictions and fissures that a separation by definition creates and as such would undermine the role of the EU as a peace plan.

If the Union endorses the Commission's position towards external secession, this would lead to the following paradoxical situation. While Member States as a whole cannot be expelled and should trigger and follow the procedure prescribed in Article 50 TEU to withdraw from the European Union, their regions face the prospect of automatic expulsion should they decide to become independent. Apart from creating a legal paradox, a cliff-edge exit from the Union could threaten the political and economic stability of the project, but also can have negative consequences on the life choices of the EU citizens that live in the relevant region. Finally, such an one-size-fits-all approach towards the phenomenon of consensual external secession within the EU vastly underappreciates the complexities and legal questions that the different outcomes of a secessionist process may raise. The repercussions for the Union legal order would be very different if a consensual secession were to lead to the dissolution of a Member State, the reunification of another or the creation of a new independent State.

Thus, this section analyses how the EU may accommodate the three potential scenarios of consensual external secession. As seen in ***Figure 1***, the legal implications of those alternative scenarios can be represented and examined in the form of three cascading questions. Does the predecessor State continue to exist? If the answer is in the negative, we must assess the effect of the relevant State dissolution on the EU membership of the successor States. If the answer is positive, the next question to be posed is whether the breakaway entity becomes an independent State or joins another Member State. If the latter happens, we must explore the scenario of reunification. If it is the former, then we need to examine whether the new independent State enjoys a right to continuous Union membership.

The aforementioned scenarios of a consensual secessionist process that respects the domestic constitutional order and Article 2 TEU's foundational values lead to a new state of affairs that should be accommodated. To this effect, the article puts forward a legally sound argument to manage a smooth transition to the new reality. The duty of loyal cooperation as enshrined in Article 4(3) TEU, the duty to respect the constitutional identity of Member States per Article 4(2) TEU and the respect to Article 2 TEU values provide for a legal basis in order the EU to engage with the breakaway entity and the metropolitan State with the aim of achieving a smooth transition to a new state of affairs. The result of negotiations such as the ones under Article 50 TEU, should not be considered pre-determined, but they should aim to prevent a "cliff-edge" withdrawal of the seceding entity from the EU. Such a deferential and accommodating approach is compatible with the composite nature of the EU constitution, the EU's commitment to the international legal order including the right to self-determination and its role as a peace plan.

[139] Art. 3(5) TEU.

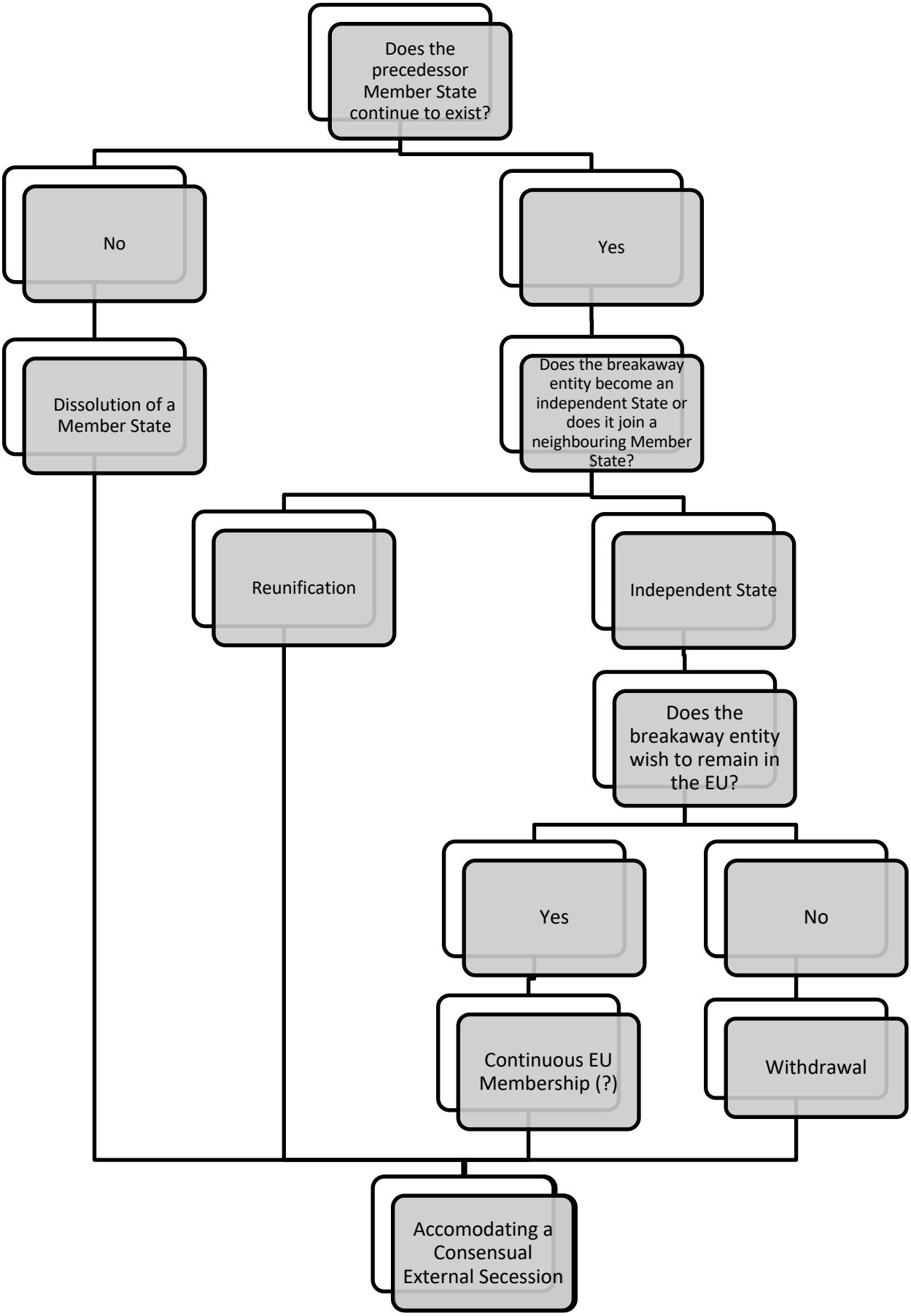

Figure 1: Cascading Scenarios of Consensual External Secession

(1) Dissolution and Member State Continuity

The first question in our cascading scenarios asks whether the predecessor Member State continues to exist following the consensual secession of one of its constituent units. If the answer is in the negative, dissolution occurs. For instance, following the "velvet divorce" of Czechoslovakia, the new States mutually agreed that their predecessor State ceased to exist on 31 December 1992.[140] As such, they subsequently made separate applications for membership in international organisations, such as the United Nations.[141]

Crawford and Boyle have identified which factors influence State continuity. State practice suggests that the continuator State "[is] the unit retaining the majority of the predecessor state's population and territory and retain[s] substantially the same governmental institutions as the predecessor state".[142] Other criteria include situations in which "the parties negotiate terms of state succession that expressly or impliedly identif[y] a continuator state" and where "the identity of their predecessor states [is] not questioned by the seceding states, by other states or by organs of the UN".[143] If, following a secession, no component unit exhibits these characteristics, "the international community may conclude that the predecessor state is extinct."[144] If this is the case, it would raise questions about the effect of such events on the Union membership of newly independent States. Would they have to reapply? This question is not purely academic as there are two Member States that could potentially find themselves in such an unenviable position: Belgium and a future reunified Cyprus.

Concerning the former, the federal constitutional order is underpinned by the partnership between the Flemish and Walloon communities and institutions. According to its Constitution, Belgium comprises three territorial regions: the Flemish Region, the Walloon Region and the Brussels Region; as well as four linguistic regions: the Dutch-speaking region, the French-speaking region, the bilingual region of Brussels-Capital and the German-speaking region.[145] It is precisely because of this political and constitutional equality between the different entities that, if Flanders were to become independent, would raise difficult questions about the continuous existence of Belgium as a State and a Member of the EU. Even if one were to apply the previously mentioned public international law criteria that regulate State continuity, the outcome might not be straightforward. This is because "Flanders comprises the majority of Belgium's territory and population" and controls most of its wealth.[146] In this sense, it would be the most obvious choice for being recognised as the continuator State. "To allow for this outcome, however, would be to transform Flemish secession into a situation where Flanders had, in effect, kicked Wallonia out of the Belgian state".[147]

With regard to a future reunified Cyprus, it is noted that:

> [a] Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity

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[140] Michael P. Scharf, *Musical Chairs: The Dissolution of States and Membership in the United Nations*, 28 CORNELL INTERNATIONAL LAW JOURNAL 29, 65 (1995).
[141] *Id.* at 65–67.
[142] *See* Crawford and Boyle, *supra* note 37, at para 68.
[143] *Id.*
[144] *Id.*
[145] Constitution of Belgium, Arts. 3 and 4.
[146] Christopher K. Connolly, *Independence in Europe: Secession, Sovereignty and the European Union*, 24 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 51, 89.
[147] *Id.*

> safeguarded, and comprising two politically equal communities as described in the relevant Security Council resolutions, in a bi-communal and bi-zonal federation.[148]

Therefore, if Cyprus were to ever be reunified under the said agreed parameters, the federation would be comprised of Greek Cypriot and a Turkish Cypriot Constituent States of equal status. According to the 2004 UN Comprehensive Settlement Plan, which was rejected in a referendum, these two constituent States would "sovereignly exercise all powers not vested by the Constitution in the federal government".[149] Given that this federation would be established under the joint constitutive power of the two ethno-religious communities and that the two constituent States would enjoy political equality, there would be a genuine question whether any of the two would be considered as the continuator State in the case of another partition.

In both Belgium and reunified Cyprus, the secession of a sub-state entity could lead to the dissolution of these (Member) States. The model that could be used in case there is no obvious continuator State would be one of the "velvet divorce," as in Czechoslovakia. From an EU membership point of view, however, this might prove problematic, not least because the EU cannot comprise a greater number of Member States than the number of the signatory parties to the Treaties.[150] In this sense, the continuous membership of the new States in the EU would not be considered automatic, and they could face the prospect of a "cliff-edge" withdrawal from the EU. Interestingly, in the case of Belgium, the debate on the continuing EU membership of the successor States has an additional EU dimension given the status of Brussels as the home of the Union's political institutions. Even in the case of Cyprus, however, a possible partition of the reunified State would bring into the fore questions reassessing the EU's *raison d'être* as a peace plan. To avoid such a "cliff-edge" scenario, which may exacerbate the issues that dissolution would raise, the Union should engage with the breakaway entities to secure an orderly transition to the new state of affairs. The aim of such negotiations would be open-ended, as they could potentially lead either to an orderly withdrawal or to the continuous EU membership of those States, should they wish it. As discussed later on, the Treaties allow the EU to adopt a path that would be compatible with the deferential and accommodating approach that the article suggests.

(2) Reunification

If the predecessor State continues to exist, the next question to be asked is whether the breakaway entity forms a new State or whether it joins a(nother) EU Member State. If the aim of consensual secession is to join an existing neighbour, then we are faced with a case of reunification. This section briefly discusses how the EU legal order may accommodate the moving of borders.

The Union may face such a scenario in the future in the case of Northern Ireland. A consensual secession of Northern Ireland from the UK would trigger the territorial expansion of an EU Member State—the Republic of Ireland—to which EU law already applies in accordance with Article 52 TEU. The Belfast/Good Friday Agreement recognises a right for consensual secession

[148] UN Security Council Resolution 1251 (1999) at para 11.
[149] The Comprehensive Settlement of the Cyprus Problem, Foundation Agreement, Art 2(1).
[150] *See supra* note 138.

to the region in no uncertain terms.[151] Such rights have also been enshrined in domestic legislation.[152] Schedule 1 of the Northern Ireland Act 1998 describes the circumstances under which a referendum for the reunification of Ireland can and should be called by the UK Secretary of State.

> The Secretary of State is given a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland. [153]

However, if it appears to her that a majority would be likely to vote for a united Ireland, then, she is under a duty to call a poll.[154]

From an EU law point of view, a reunification such as in the case of Ireland could follow the precedent of the German reunification, in which the application of the Union *acquis* was extended to East Germany without any amendment to the primary legislation, as agreed upon in a special meeting of the European Council in Dublin on 28 April 1990. "The necessary acts of secondary law were adopted on the basis of delegation of powers to the Commission, in order to avoid that the EU legislative process was overtaken by the speed of historical events".[155] The difference is that, in the case of Germany, the *acquis* did not apply at all in the East before reunification.[156] In Northern Ireland, even after the UK's withdrawal from the EU, a substantial

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[151] Art. 1 of the part on Constitutional Issues of The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (April 1998, Cm 3883) provides that the UK and the Republic of Ireland
(i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
(ii) recognise that it is for the people of the island of Ireland alone, […] to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland;
(iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.

[152] Northern Ireland Act 1998, s. 1.

[153] High Court of Justice in Northern Ireland, *Re Raymond McCord* [2018] NIQB 106, at para 18.

[154] *Id.* at para 20. A similar statutory duty for calling a referendum on Irish unification does not exist on the other side of the Irish border. The Irish Constitution, especially the text of the revised Articles 2 and 3, reveals that there is nothing that explicitly states that the Taoiseach or any other institution and/or office holder is obliged by the Constitution, and the duties of their office, to pursue a United Ireland. The procedure for holding a referendum in the Republic of Ireland can be found in Article 46 of the Constitution and in the Referendum Acts. In sum, the proposal must be supported by both houses of the *Oireachtas* and must be submitted to and approved by the electorate and signed into law by the President. Thus, in purely legal terms, the decision to propose a referendum on unity lies with the parliament, while the approval or rejection of the Irish unification proposal rests with the electorate.

[155] Dagmar Schiek, *'Hard Brexit'-How to address the new conundrum for the Island of Ireland?*, QUEEN'S UNIVERSITY BELFAST LAW RESEARCH PAPER, https://dx.doi.org/10.2139/ssrn.2949264. On how the EU legal order accommodated the German reunification, *see* Christian Tomuschat, *A United Germany within the European Community*, 27 COMMON MARKET LAW REVIEW 415 (1990); Christiaan W.A. Timmermans, *German Unification and Community Law*, 27 COMMON MARKET LAW REVIEW 437(1990).

[156] The relationship of the German Democratic Republic with the then European Economic Community was clarified in the judgment of the Court of Justice in *Norddeutsches Vieh- und Fleischkontor GmbH v. Hauptzollamt Hamburg-Jonas – Ausfuhrerstattung*, Case 14/74*,* ECLI:EU:C:1974:92, where the Court held that the relevant rules exonerating West Germany from applying the rules of EEC law to German Internal Trade

part of EU law continues to enjoy extraterritorial application due to the Protocol on Ireland/Northern Ireland attached to the UK's Withdrawal Agreement.[157]

Notwithstanding, former Taoiseach Enda Kenny asked for a special provision in any Brexit deal to allow Northern Ireland to rejoin the EU should it be united with the Republic.[158] At the time of that request, the question was focused on what such a provision would look like. There is only one EU law provision that explicitly regulates the (re)unification of (Member-)States: Article 4 of Protocol No 10 on Cyprus of the Act of Accession 2003. If the reunification of Cyprus were to occur, this Article provides for a simplified procedure that enables the Union to accommodate the terms of the relevant unification plan. In particular, it allows the EU, via a unanimous Council Decision, to alter the terms of Cyprus's EU accession, which are contained in the Act of Accession 2003. In other words, it allows the Council to amend primary law (i.e. Act of Accession 2003) through a unanimous decision to ease the transition of northern Cyprus within the Union.[159]

The examples of both Germany and Cyprus show that the EU legal order is flexible enough to accommodate the frictions that reunification might create. In Germany, the relevant adaptations took place through secondary legislation. In the case of Cyprus, they will be enshrined as amendments to the primary legislation. In the absence of a specific provision either in the UK's Withdrawal Agreement or in the Trade and Cooperation Agreement, the reaccession of Northern Ireland to the EU would probably follow the precedent of German reunification.[160] In any case, the Union must engage with the relevant breakaway entity and the metropolitan State(s) to ensure that the relevant adaptations that a smooth process of reunification requires are in place. This approach would be in line with the accommodating approach towards consensual secession the article puts forward.

(3) The Right to Continuous EU Membership of a Newly Independent State

Apart from reunification, a consensual secession might lead to the creation of an independent State. As evidenced in ***Figure 1***, such newly independent State may wish to remain within the EU. If it does not, it may withdraw from the EU. In either case, the EU should engage with it and its metropolitan State to secure an orderly transition to the new state of affairs. Before

"does not have the result of making the German Democratic Republic part of the Community, but only that a special system applies to it as a territory which is not part of the Community".

[157] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland/Northern Ireland [2020] OJ L29/1. For an analysis, see THE LAW AND PRACTICE OF THE IRELAND-NORTHERN IRELAND PROTOCOL (C. McCrudden ed., 2022).

[158] Daniel Boffey, *Irish leader calls for united Ireland provision in Brexit deal*, THE GUARDIAN, (23 February 2017), https://www.theguardian.com/politics/2017/feb/23/irish-leader-enda-kenny-calls-for-united-ireland-provision-in-brexit-deal.

[159] See Marise Cremona and Nikos Skoutaris, *Speaking of the De…rogations: Accommodating a Solution of the Cyprus Problem within the Union Legal Order*, 11 JOURNAL OF BALKAN AND NEAR EASTERN STUDIES 381 (2009).

[160] To this effect, the European Council released the following statement in the minutes to the agreement on the Brexit negotiating guidelines on 29 April 2017: "The European Council acknowledges that the Good Friday Agreement expressly provides for an agreed mechanism whereby a united Ireland may be brought about through peaceful and democratic means; and, in this regard, the European Council acknowledges that, in accordance with international law, the entire territory of such a united Ireland would thus be part of the European Union." European Council, *Minutes of Special meeting of the European Council (Art.50) held on 29 April 2017* (23 June 2017).

we analyse how the Treaties allow the Union to adopt such an approach in the next section, we must establish whether a new independent State that has been founded following a process of consensual secession enjoys a right to continuous EU membership at all. Depending on the answer to this question, we should then determine what is the correct procedure that should be followed to secure its participation to the Union. Is a mere amendment of the EU Treaties in accordance with Article 48 TEU sufficient or does the newly independent State need to join the queue of candidate States and undergo the accession process per Article 49 TEU? This is a question that dominated the political debate during the 2014 Scottish independence referendum.[161] The same analysis, however, may apply *mutatis mutandis* in case Catalonia and/or Euskadi (Basque Country) become independent from Spain following processes of consensual secession or should Belgium and a reunified Cyprus be dissolved in the future.

From an international law point of view, the 1978 Vienna Convention on succession of States with respect to Treaties regulates the question of the continuous membership of a successor State in an international organisation. At first glance, Article 34 lays down a presumption of continuity. It suggests that a new state's succession to the treaty obligations of its former parent State is automatic. However, its effect is limited by Article 4, which establishes that the effects of state succession on membership in an international organisation depend on the relevant rules of that organisation. In fact, the International Law Commission held that if membership of an international organisation is subject to a formal process of admission, then the established practice in international law suggests that a new State is not automatically entitled to membership.[162] This is particularly relevant for the EU, in which accession to is regulated by Article 49 TEU. However, a number of academics and politicians have consistently argued that this provision cannot apply to a region that has already been part of the EU. They suggest that a legal basis other than Article 49 TEU is applicable in cases of consensual secession to accommodate the new independent State.[163]

Article 49 TEU provides that "[a]ny European State which respects the values referred to in Article 2 TEU and is committed to promoting them may apply to become a member of the Union." After receiving this application, the Council has to unanimously decide on opening the accession negotiations after consulting with the Commission and receiving the consent of the majority of the component members of the European Parliament. The negotiations are compartmentalised in chapters and are driven by soft law instruments in the form of bilateral accession partnerships and progress reports.[164] Once the Member States agree that the candidate State has complied with all the relevant conditions contained in all the negotiating chapters, an Accession Treaty is drafted. This Treaty provides for all "[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entail".[165] The signatories are the candidate State and the Union Member States

[161] *See supra* note 10.
[162] UNITED NATIONS, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, VOL II, PART 1 (United Nations Publications, 1974) at 177–178.
[163] *See* Sionaidh Douglas-Scott, *How Easily Could an Independent Scotland Join the EU?* Oxford Legal Studies Research Paper No. 46/2014.
[164] *See* Christophe Hillion, *EU Enlargement, in* THE EVOLUTION OF EU LAW 187 (Paul Craig and Grainne de Búrca, eds., 2nd edn, 2011); Christophe Hillion, *Accession and Withdrawal in the Law of the European Union, in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 126 (Anthony Arnull and David Chalmers eds., 2015).
[165] Art 49(2) TEU.

that have to ratify the Accession Treaty in accordance with their respective constitutional requirements.

Practice suggests that the procedure outlined in Article 49 TEU can be arduous and cumbersome. However, this was not the only concern that led the Scottish government in 2014 to explore alternative routes to Union membership. It was mainly the fact that if Scotland followed that procedure, it would find itself outside the EU between the time of its independence and the time of its accession to the EU. This might have been a significant time period in which Scotland's laws, policies and regulatory structures may have diverged sharply from the EU's while its economy would experience the shockwaves of a 'cliff-edge' withdrawal from the Union. Therefore, the Scottish government suggested a different route. They based their argument[166] on the fact that the Scottish situation was *sui generis*. It would have been the first time that a region would have seceded from an EU Member State through a consensual and lawful constitutional process. They stressed this point in order to differentiate themselves from other secessionist claims in Europe and to ease the concerns of the respective metropolitan States. According to the Scottish government's position, Article 49 only regulates "conventional enlargement where the candidate country is seeking membership from outside the EU".[167] However, Scotland had been part of the EU since 1973. Therefore, the appropriate legal basis that would have facilitated Scotland's transition to Union membership was Article 48 TEU, the generic provision for the amendment of the EU Treaties. In other words, the Scottish position was that the amendment of Article 52 TEU, which provides for the States to which the EU Treaties apply and the relevant Articles concerning the composition of the EU institutions would have been, by and large, sufficient in order for Scotland to become an EU Member State after attaining its independence.

Of course, it must be noted that, after Brexit, the debate concerning Scotland's independence became a moot point. Since 1 February 2020, the use of Article 48 TEU for securing Scotland's membership in the EU became impossible. However, the debate remains topical and important for other regions that might have ambitions to become independent.

There are two possible methods that the Member States and the EU institutions may use to determine the appropriate provision to regulate this situation. One is based on international law and the other on EU law practice. Both lead to the same conclusion: in the current legal framework, Article 49 TEU (and not Article 48 TEU) seems to be the appropriate legal basis to regulate the EU accession of a region that consensually secedes from a Member State.

In international law, the well-established rule of Article 31(1) of the Vienna Convention on the Law of the Treaties suggests that international agreements should be interpreted in accordance with the ordinary meaning to be given to their terms. If this rule is applied to the interpretation of the Union Treaties, it would be difficult to justify the use of the generic provision on Treaty amendment (Article 48 TEU) when there is a special provision regulating the accession of new Member States (Article 49 TEU). Of course, the counterargument is that it would not be the accession of a new Member State, but rather a change in status of an entity that is already part of the EU. From a public international law perspective, this is a rather unconvincing argument. If, for instance, Catalonia secedes from Spain, it would be considered a newly independent country under public international law. It would have to apply to be

[166] See Scottish Government, *Scotland's Future* (2013), www.gov.scot/resource/0043/00439021.pdf.
[167] *Id.* at 21.

admitted as the 194th member of the United Nations. In this sense, it would be a new European State that would also have to apply for EU membership under Article 49 TEU.

Similarly, EU law practice suggests that institutions use the "aim and content" test when choosing the appropriate legal basis for an act of secondary legislation. Accordingly, "[t]he choice of the legal basis for a [certain measure and/or action] may not depend simply on an institution's [or Member States'] conviction as to the objective pursued but must be based on objective factors… Those factors include in particular the aim and content of the measure."[168] Therefore, if the same rule is used *mutatis mutandis* when choosing the legal basis of primary legislation, as long as the objective pursued by this treaty amendment will be the accession of a new Member State, the EU Treaties provide for a *lex specialis* rule (i.e. Article 49 TEU).[169]

Overall, the EU Treaties, including Articles 48 and 49 TEU, do not make any distinction based on the process of the formation of the States with regard to their EU accession. If the EU and the Member States opted for Article 48 to regulate the EU Accession of a seceding region of a Member State, they would *de facto* distinguish between European States that have become independent from old Member States through a consensual procedure and the rest. Consequently, they would create a special procedure for the EU accession of the former, although this is not envisaged in the Treaties. Of course, the Member States, as "Masters of the Treaties," could always amend the text to provide for such a distinction. Until this takes place, however, Article 49 TEU seems like the more appropriate procedure, also because it allows for the same level of pre-accession scrutiny that all candidate States must be subjected to. In other words, an Article 49 TEU process is the most effective tool the EU has for ensuring that a newly independent State is established following a process of consensual secession that respects the foundational EU values enshrined in Article 2 TEU.

In sum, the continuous EU membership of newly independent States that have been established through a process of consensual secession is not automatic. The amendment of the Treaties is necessary even if the EU institutions experience a damascene conversion and agree with the suggestion that such a situation could be addressed via an Article 48 TEU amendment procedure. Given the current state of EU law, however, it seems that the appropriate legal basis for an amendment to the text of the EU Treaties can be found in Article 49 TEU.

The reason why the proponents of (Scottish and) Catalan independence strongly prefer an Article 48 TEU process relates to the fact that through such a process, it is (at least theoretically) possible to prevent a situation in which a newly independent State would find itself outside the EU legal order in a rather abrupt fashion. Legitimate as this political ambition might be, it could not be considered, in itself, a valid legal ground. It seems that the legal obstacles to the use of Article 48 TEU could only be set aside by a Treaty amendment.

To prevent this "cliff-edge" withdrawal of a newly independent region from the EU and the repercussions this might have on the lives of the people, the EU needs to engage with the relevant metropolitan State—if it is not dissolved—and the respective breakaway entity/ies to ensure an orderly transition to the new state of affairs. The same need to absorb the shockwaves from the abrupt termination of the relationship with the EU would also apply if

[168] *Commission v. Council*, Case C-300/89, ECLI:EU:C:1991:244.

[169] Jean-Claude Piris, *Political and Legal Aspects of Recent Regional Secessionist Trends in Some EU Member States (I), in* SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION: TROUBLE MEMBERSHIP 69 (Carlos Closa ed., 2017).

the new State does not wish to participate in the Union, as evidenced in ***Figure 1***. The next section shows that the Treaties allow the Union to achieve the aim of an orderly transition. This accommodating approach respects the intertwined nature of the European constitution, the right to self-determination and its role as a peace plan.

(4) Accommodating a Consensual External Secession

The official position of the Commission has been that a new independent state by virtue of becoming independent from an existing Member State—even if it follows a process of democratic and consensual secession—would become a third country with respect to the EU. The Treaties would no longer apply on its territory, and it would find itself outside the Union's legal order. Despite the fact that the answer to the question of how EU law would regulate the external secession of a sub-state entity of one of its Member States cannot be explicitly found in the EU Treaties, an abrupt withdrawal of a region because of a consensual secession seems to run counter to the spirit of the Treaties and the recent EU practice. In order to appreciate the danger of such a scenario, let us imagine the following. Due to a "velvet divorce" triggered by Flanders' secession and the subsequent extinction of Belgium, the two new States find themselves abruptly outside the scope of the EU Treaties. This would lead to an absurd situation where Brussels—the home of the Union's political institutions—would be outside the EU.

This approach, which may be compatible with the black letter of the Treaties, sits rather uncomfortably with the fundamental aspects of the Union's constitutional order highlighted in the introduction of this article. A consensual secession that has not breached domestic constitutional procedures and Article 2 TEU's foundational values should be respected, as Article 4(2) TEU and the duty of loyal cooperation per Article 4(3) TEU suggest. It is a legitimate expression of the right to self-determination. As such, the Union, which has committed itself to observing international law and creating an area of peace and prosperity,[170] should be able to accommodate it. Therefore, this article suggests that in case there is a consensual secession, the Union should engage with the metropolitan State and the respective secessionist entity/ies to ensure a smooth transition to the new state of affairs. To do that, this section presents a legally sound argument that highlights that the EU institutions and Member States have the power to engage with the actors in a consensual secession to manage an orderly transition. This argument is based on the EU's respect for the constitutional identity of its Member States; the duty of loyal cooperation; and Article 50 TEU, which regulates the orderly withdrawal of a constituent part of the Union.

As mentioned before, pursuant to Article 4(2) TEU, the Union must respect the respective Member State's view with regard to a purported secession. [171] This provision requires the EU to respect the "national identities [of Member States], inherent in their fundamental structures, political and constitutional". [172] Within the EU's legal order, the concept of

[170] Art 3(1) TEU.

[171] *See* Peers, *supra* note 25, at 59–60.

[172] On the concept of constitutional identity, *see* Monica Claes and Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, 16 GERMAN LAW JOURNAL 917 (2016); Pietro Faraguna, *Taking constitutional identities away from the courts*, 41 BROOKLYN JOURNAL OF INTERNATIONAL LAW 491 (2016); Tamás Szabados, *Constitutional Identity and Judicial Cooperation in Civil Matters in the European Union – An Ace up the Sleeve?*, 58 COMMON MARKET LAW REVIEW 71 (2021); Luke Dimitrios Spieker, *Framing and Managing Constitutional Identity conflicts: How to Stablilise the*

"national identity" has reformulated to "constitutional identity" over time.[173] This is evident *inter alia* from the fact that the said provision clearly links national identity and the fundamental political and constitutional structures of the EU's Member States.[174] Cloots has suggested that "the identity clause protects the features that make a national community what it is (e.g., its history, language, values, traditions), and without which the community would no longer be the same, in so far as those features are mirrored in fundamental domestic structures, most notably constitutional law."[175] This link between national and constitutional identity has been verified in the case law of the CJEU. In *Runevič-Vardyn and Wardyn,*[176] *Las*[177] and *Cilevičs*[178] the protection of national languages was recognised as part of the national identity of the relevant States. In *Sayn-Wittgenstein*,[179] a law on the abolition of nobility that enjoyed constitutional status was acknowledged as part of Austria's national identity. This finding was confirmed in *Bogendorff von Wolffersdorff.*[180] More interestingly, for the purposes of the article, the CJEU has deemed this Treaty provision capable of covering the internal allocation of competences at the regional or local level as well.[181]

Thus, a constitutional provision regulating the secession of a sub-state entity could also be considered part of the constitutional identity of a Member State. For example, the secession clause provided in section 1 of the Northern Ireland Act 1998 highlights this point. This section provides that the secession of Northern Ireland and the subsequent Irish unification can only be made with the consent of the majority of the people in the region. This principle of consent is the foundation upon which the whole peace agreement was built and underpins its entirety. As such, it is the main reason why Northern Ireland has a special constitutional status within the United Kingdom.[182] Given how central this arrangement is to the UK's territorial constitution and the regional legal order, it would hardly be an overstatement to argue that it is part of their constitutional identity. As such, Article 4(2) TEU outlines a duty to the Union to respect the outcome of process provided by this arrangement.

Of course, Northern Ireland is outside the EU, and its secession would not trigger the creation of a new independent State. Still, the same analysis would apply by analogy to any consensual process of secession that has resulted from a constitutional arrangement so deeply embedded within a legal order of a Member State, should this ever occur in the future. In any case, Article

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Modus Vivendi Between the Court of Justice and National Constitutional Courts, 57 COMMON MARKET LAW REVIEW 361 (2020).

[173] Leonard Besselink, *National and Constitutional Identity before and after Lisbon*, 6 UTRECHT LAW REVIEW 36, 37 (2010).

[174] Armin Von Bogdandy and Stephan W. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 COMMON MARKET LAW REVIEW 1417, 1427 (2011).

[175] Elke Cloots, *National Identity, Constitutional Identity, and Sovereignty in the EU*, 45 NETHERLANDS JOURNAL OF LEGAL PHILOSOPHY 82, 91 (2016).

[176] *Runevič-Vardyn and Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, Case C-391/09, ECLI:EU:C:2011:291.

[177] *Las v PSA Antwerp NV*, Case C-202/11, ECLI:EU:C:2013:23.

[178] *Boriss Cilevičs et al.,* Case C-391/20, ECLI:EU:C:2022:638.

[179] *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Case C-208/09, ECLI:EU:C:2010:806.

[180] *Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe, Zentraler Juristischer Dienst der Stadt Karlsruhe*, Case C-438/14, ECLI:EU:C:2016:401.

[181] *European Commission v. Spain*, Case C-151/12, ECLI:EU:C:2013:690; *Digibet Ltd and Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG*, Case C-156/13, ECLI:EU:C:2014:1756; *Remondis GmbH & Co. KG Region Nord v. Region Hannover*, Case C-51/15. ECLI:EU:C:2016:985.

[182] In *Robinson*, Lord Bingham described the Northern Ireland 1998 Act as "in effect a constitution" UK House of Lords, *Robinson* v. *Secretary of State for Northern Ireland* [2002] UKHL 32, para 11.

4(2) TEU is to be read in light of Article 2 TEU's values.[183] In this sense, Article 4(2) TEU allows the EU to constructively engage with a process of secession that has respected the Article 2 TEU foundational values to achieve a smooth transition to the new state of affairs.

In addition, this accommodating approach is also dictated by the duty of loyal cooperation per Article 4(3) TEU. The provision requests the EU and its Member States to "assist each other in carrying out tasks which flow from the Treaties". The establishment and proper functioning of the internal market is one of these aims.[184] Kenealy and MacLennan argued that "[t]he task of ensuring that the Single Market does not suffer any sudden, sharp dislocation is one that flows from the Treaties."[185] The abrupt "cliff-edge" withdrawal from the Union of a region that has declared its independence following a consensual process would cause a significant dislocation in the internal market. Failure to enter negotiations that would secure a smooth transition would hardly represent sincere cooperation to a Member State that is experiencing a loss of its territory and to a region of the EU that has exercised its constitutionally protected rights and to the internal market as a whole.

EU's competence to enter negotiations that would lead to a smooth transition is further supported by at least the spirit of Article 50 TEU, if not by a direct interpretation of the law. It is true that the said provision recognises only Member States as vestees of a right to withdraw from the EU. However, the overall logic of the article is to create the legal, political and institutional toolkit for effectively regulating the orderly withdrawal of an EU territory.[186] The preference for a negotiated and orderly withdrawal of a territory from the EU is further supported by the Greenlandic precedent. The 1982 vote of Greenland to withdraw from the EU triggered a negotiation between the Union institutions, the metropolitan State and the regional government. After three years, EU law stopped applying to Greenland and a new relationship with the EU was built.[187] It would be ironic if that practice that suggests the preference for a negotiated settlement did not prevail in the future because of a strict interpretation of Article 50.

Finally, one of the strongest arguments in favour of the EU engaging with a secessionist entity and its metropolitan State to achieve a negotiated settlement can be found in the EU practice as formed during the Brexit negotiations. The UK and the EU jointly admitted that one of the objectives of the UK's Withdrawal Agreement was to provide reciprocal protection for EU and UK citizens residing on the other side of the English Channel before Brexit and their rights derived from EU law and based on past life choices.[188] Indeed, the 2019 Agreement secured

[183] *Troubled Membership: Dealing with secession from a member state and withdrawal from the EU EUI Working Paper RSCAS 2014/91*, http://hdl.handle.net/1814/32651 (Carlos Closa ed., 2014), at 10.
[184] Art. 3(2) TEU.
[185] Daniel Kenealy and Stuart MacLennan, *Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?*, 20 EUROPEAN LAW JOURNAL 591, 599 (2014).
[186] *See Wightman*, *supra* note 41, at para 56.
[187] Treaty amending, with regard to Greenland, the Treaties establishing the European Communities [1985] OJ L29/1.
[188] Joint Report from the negotiators of the EU and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the EU, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf, para 6.

their EU law-derived rights.[189] In particular, they retained their residence rights[190] while they can benefit from the non-discrimination principle as if the UK was still a Member State.[191]

Mutatis mutandis, the EU should strive to protect those who have exercised the relevant EU law rights in the past to move, reside and work in a region that has decided to declare its independence. It is true that in the current state of EU law, a political decision that leads to a withdrawal of a territory from the EU, such as Brexit, has repercussions for the EU citizenship status of its people. The CJEU has clarified that the "possession of the nationality of a Member State is an essential condition for a person to be able to acquire and retain the status of citizen of the Union and to benefit fully from the rights attaching to that status."[192] In that sense, the citizens of a newly seceded region might lose their EU citizenship status until the moment when the new independent State acceded to the EU. Still, it would be unfair to those who moved *bona fide* in the past to that territory exercising their EU law rights to suffer from an abrupt withdrawal of that territory without the EU at least trying to find a negotiated settlement. As Douglas-Scott has argued, "the existence of Article 50 acknowledges that acquired EU rights and mutual dependencies cannot be immediately extinguished".[193] This is why the commitment to sincere cooperation would suggest that the EU should enter such negotiations to at least attempt to secure an outcome that respects the continuing exercise of rights currently conferred by EU law.[194] At the end of the day, "protection of the common code of fundamental rights […] constitutes an existential requirement for the EU legal order."[195]

Having said that, one must accept that the purpose of such pre-separation negotiations would be to agree on the necessary arrangements to accommodate the new situation and not necessarily the accession of the breakaway entity/ies in the EU.[196] Given that Article 49 TEU recognises only independent European States as possible vestees of the right to EU membership, accession negotiations may only be available after the official independence of a State. Still, the pre-separation negotiations should aim at setting out the terms of a smooth (temporary) withdrawal of a seceding entity and a possible transitional arrangement that would create a space for accession negotiations. As in the case of Brexit, there was the possibility for a disorderly withdrawal, the outcome of the negotiations in the situation of a

[189] *See* UK's Withdrawal Agreement, *supra* note 157, Part Two, Arts. 9–39.
[190] *Id.*, Arts. 13 and 15.
[191] *Id.*, Art. 12.
[192] *EP v. Préfet du Gers and Institut national de la statistique et des études économiques,* C-673/20, ECLI:EU:C:2022:449, para 57. *See also Shindler v. Commission,* T-627/19, ECLI:EU:T:2020:335.
[193] Sionaidh Douglas-Scott, *Scotland, Secession and the European Union, in* THE SCOTTISH INDEPENDENCE REFERENDUM, CONSTITUTIONAL AND POLITICAL IMPLICATIONS 175, 180 (Aileen McHarg, Tom Mullen, Alan Page and Neil Walker eds., 2016).
[194] Stephen Tierney and Katie Boyle, *An Independent Scotland: The Road to Membership of the European Union*, ESRC SCOTTISH CENTRE ON CONSTITUTIONAL CHANGE BRIEFING PAPER (20 August 2014) 18, https://dspace.stir.ac.uk/bitstream/1893/29010/1/An%20Independent%20Scotland%20The%20Road%20to%20Membership%20of%20the%20EU.pdf.
[195] Opinion of AG Maduro in Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, ECLI:EU:C:2007:505, para 19.
[196] David Edward, *EU law and the separation of Member States*, 36 FORDHAM INTERNATIONAL LAW JOURNAL, 1151, 1167 (2013).

consensual secession should not be considered as predicted but rather a product of the political process itself.[197]

Overall, the above discussion highlights the thesis of the paper. The Union legal order has the required flexibility to accommodate a consensual external secession, provided that Article 2 TEU foundational values are not threatened. In fact, precisely because a consensual secession is compatible with the domestic legal order and the foundational values of the EU, Union institutions and the Member States should opt for this accommodating approach. This stance is supported by the inherent characteristics of the project: the composite constitution, the respect to international law and its function as a peace plan.

IV. Withdrawal from the EU

Internal and external secession are procedures that lead to a part of a (constituent) State being separated from an existing (constituent) State. The EU, however, "is, under international law, precluded by its very nature from being considered a State".[198] This is one of the reasons why some authors have distinguished withdrawal from the EU from the phenomenon of secession.[199] They understand the former more as a "habitual way of referring to a decision to leave an international organisation."[200] However, secession is "situated at the intersection of constitutional and international law" [201] and has historically been defined as a form of withdrawal.[202]

More importantly, the EU constitutional order of States is a complex and overarching system of public law. It is a "community of unlimited duration, having its own institutions, its own personality, its own legal capacity [and] real powers stemming from a limitation of sovereignty or transfer of powers from the [Member] States".[203] To the extent that Article 50 TEU allows the withdrawal of a Member State from that community of law and the abrupt end to the symbiotic relationship of its legal order with the EU one, it is also a process that "is functionally akin to secession; it is not a simple severance of contractual obligations" [204] as withdrawal from an international treaty usually is. In other words, "given the special (constitutional) nature of EU legal order, its highly institutionalized nature, and the entanglement of domestic law and EU legal regulation, [withdrawal from the EU] can be functionally compared to secession".[205] This is perhaps why the CJEU refused to treat withdrawal from the Union and its revocation

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[197] *Id.*

[198] Opinion 2/13 (*re Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom*), ECLI:EU:C:2014:2454, para 156.

[199] Eleni Frantziou*, Was Brexit a Form of Secession?* 13 GLOBAL POLICY, 69 (2022).

[200] *Id.* at 70.

[201] Vicki C. Jackson, *Secession, Transnational Precedents, and Constitutional Silences, in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT, 314, 316 (Sanford Levinson ed., 2016).

[202] "Secession is a withdrawal from the Union; a separation from partners, and, as far as depends on the member withdrawing, a dissolution of the partnership. It presupposes an association; a union of several States or individuals for a common object. Wherever these exist, secession may; and where they do not, it cannot", John C. Calhoun, *To General Hamilton on the subject of State Interposition* (1832), https://archive.org/stream/correspondenceof00calhrich/correspondenceof00calhrich_djvu.txt

[203] *Costa v. ENEL*, Case 6/64, ECLI:EU:C:1964:66.

[204] *See* Vidmar, *supra* note 5, at 371.

[205] Jure Vidmar, *Brexit, democracy and human rights: The law between secession and treaty withdrawal,* 35 WISCONSIN INTERNATIONAL LAW JOURNAL, *425,* 440 (2018).

as an international law issue.[206] Instead, it analysed the question of revocation in light of EU law, holding that its conclusion "is only corroborated by the provisions of the Vienna Convention on the Law of the Treaties".[207]

Much like external secession, withdrawal from the EU leads to the separation of territory and citizenry from the Union.[208] It also "leads to legal problems that resemble those that arise when secession occurs, e.g. regarding the continuation of citizenship rights, succession of treaty obligations, relations with third states, and various financial settlements".[209] Like internal and external secession, withdrawal from the EU as a functional secession also denotes the "formal withdrawal from a central authority by a member unit."[210] Therefore, precisely because "Article 50 is effectively also a secession mechanism",[211] the EU legal order may accommodate withdrawal to the extent that Article 2 foundational values are not breached, as it is the case for internal and external secession.

According to Friel, the Article 50 TEU secession right follows the state primacy or sovereignty model, which provides every constituent unit of a federal order with an unqualified right to secede.[212] It is characterised by unilateralism as "[t]he decision to withdraw is for [a] Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice."[213] It "is totally independent of the will of the EU [and] the remaining Member States".[214] Such unilateralism is very different from what the Canadian Supreme Court, in its decision on *Reference re Secession of Quebec*,[215] held. The Court decided that "a referendum unambiguously demonstrating the desire of a clear majority of Quebeckers to secede from Canada, would give rise to a reciprocal obligation of all parties of the Confederation to negotiate secession."[216]

Apart from unilateral, the Article 50 TEU right is also unconditional in that "the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision".[217] Article 50(1) TEU allows a Member State "to withdraw from the Union in accordance with its own constitutional requirements". Article 50(3) TEU foresees that the withdrawal can take place two years after the Member State has notified the EU of its intention to leave if no withdrawal agreement has been achieved by then. This is in marked contrast to the majority of constitutional provisions that regulate secessions. Usually, those provide for conditions with regard to the organisation

[206] *See Wightman*, *supra* note 41, at para 44.
[207] *Id.* at para 70.
[208] *See* Pohjankoski, *supra* note 4, at 849.
[209] *Id.*
[210] *See supra* note 2.
[211] *See* Vidmar, *supra* note 205, at 447 (2018).
[212] Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INTERNATIONAL & COMPARATIVE LAW QUARTERLY, 407 (2004).
[213] *See Wightman*, *supra* note 41, at para 50.
[214] Carlos Closa*, Interpreting Article 50: Exit, Voice and… What About Loyalty?, in* SECESSION FROM A MEMBER STATE AND WITHDRAWAL FROM THE EUROPEAN UNION, 187, 193-194 (Carlos Closa ed., 2017).
[215] *Reference re Secession of Quebec* [1998] 2 SCR 217.
[216] Susanna Mancini, *Secession and Self-Determination, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 481, 497 (Michel Rosenfeld and András Sajó eds., 2012).
[217] *See* Closa, *supra* note 214, at 195.

of a referendum that could potentially lead to secession and/or foresee an *inter partes* agreement as an important step for finalising the process.[218]

CJEU went a step further in underlining the unconditional and Member State-driven nature of the Article 50 TEU process.

> A Member State that has reversed its decision to withdraw from the European Union is entitled to revoke that notification for as long as a withdrawal agreement concluded between that Member State and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in Article 50(3) TEU, possibly extended in accordance with that provision, has not expired.[219]

To the extent that such a decision is unequivocal and unconditional, "the sovereign nature of the right of withdrawal enshrined in Article 50(1) TEU supports the conclusion that the Member State concerned has a right to revoke the notification of its intention to withdraw from the European Union".[220]

Having said that, despite the unilateral and unconditional nature of the right to secede from the EU, it faces two limitations: one at the national level and another at the supranational level. Both relate to the protection of the underogable values of Article 2 TEU. Concerning the national level, we note that pursuant to Article 50(1) TEU, the withdrawal of a Member State should take place in accordance with its own constitutional requirements. In the case of Brexit, this provision was in the epicentre of the first *Miller* judgment.[221] There, the UK Supreme Court decided that the UK government could not rely on executive powers in the area of international relations to trigger Article 50 TEU. Instead, in accordance with the uncodified British constitution, the sovereign UK Parliament had to enact relevant legislation authorising the government to trigger the withdrawal process, which they subsequently did.[222]

Eeckhout and Frantziou argued, however, that following the constitutionally prescribed procedure with regard to the notification of the European Council was a necessary but not sufficient condition to satisfy British constitutional requirements.[223] A "constitutionalist interpretation [of Article 50 TEU] requires deep and genuine respect for the withdrawing Member State's constitutional requirements" throughout the process of withdrawal.[224] In the UK context, such respect led the UK Supreme Court in *Miller/Cherry*[225] to find that the UK government had illegally prorogued Parliament in autumn 2019, when they used the standard

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[218] For instance, according to Schedule 1 of the Northern Ireland Act 1998, a referendum for the reunification of Ireland can only be organised if "it appears likely to [the UK Secretary of State] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland." Similarly, Article 113 of the Constitution of Saint Kitts and Nevis allows for the secession of Nevis Island following a process that is described in a very detailed manner in the same provision. Art. 4(2) of Liechtenstein's constitution provides that secession can only be regulated by law or by treaty. Finally, Art. 39(4)(e) of the Ethiopian constitution allows for secession "when the division of assets is effected in a manner prescribed by law."

[219] *See Wightman*, *supra* note 41, at para 69.

[220] *Id. at* para 57.

[221] UK Supreme Court, *R (on the application of Miller and another) v. Secretary of State for Exiting the European Union* [2017], UKSC 5.

[222] European Union (Notification of Withdrawal) Act 2017.

[223] Piet Eeckhout and Eleni Frantziou, *Brexit and Article 50 TEU: A constitutionalist reading*, 54 COMMON MARKET LAW REVIEW 695, 710 (2017).

[224] *Id.*

[225] UK Supreme Court, *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)* [2019], UKSC 41.

and ancient procedure of prorogation[226] as a tool to prevent Members of Parliament from intervening prior to the UK's departure from the EU on 31 October. According to the unanimous decision of the Court, respect for parliamentary sovereignty and democratic accountability meant that a prorogation is unlawful when it has "the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive."[227] Finally, the requirements of the British constitutional order that is founded on the principle of parliamentary sovereignty included the need for Parliament to approve the Withdrawal Agreement.[228] Indeed, after one of the most tumultuous periods in modern British politics, Westminster managed to approve the revised Withdrawal Agreement by passing the necessary implementation legislation –the EU (Withdrawal Agreement) Act 2020.

More importantly, for the purposes of the article, the composite nature of the EU constitution suggests that the fulfilment of the condition to respect the "national constitutional requirements" may also be judicially reviewed by the Court of Justice.[229] Of course, the ability of the CJEU to judicially review "national constitutional requirements" would be extremely modest. In essence, its role would be limited to ensuring that the relevant withdrawal would not be grossly violating the common constitutional traditions of the Member States per Article 6(3) TEU and the foundational values of the European constitutional order, as provided for in Article 2 TEU. If this were to be proven, the EU would be faced with the following paradoxical scenario. Its judicial branch would be blocking the withdrawal of a Member State due to breaches of constitutional principles that could have led to a suspension of its membership rights according to Article 7 TEU.

As to the supranational limitation, on the other hand, the following should be noted: "Article 50 TEU confers an 'exceptional horizontal competence', enabling the Union to negotiate and conclude the withdrawal agreement deemed to encompass 'all matters necessary to arrange the withdrawal.'"[230] Despite the wide scope of this exceptional competence, Tridimas suggests that "in concluding the withdrawal agreement the EU […] is bound to respect the EU Treaties and higher ranking constitutional norms of EU law".[231] In fact, the CJEU in *Kadi* held that the obligations imposed on the EU by an international agreement cannot have the effect of prejudicing the constitutional principles of EU law, which include the principle that all EU acts must respect fundamental rights.[232] This means that the terms of the orderly withdrawal of a Member State should not violate Article 2 TEU values, including democracy, rule of law and protection of human rights. Indeed, to do that, the Withdrawal Agreement that the EU and the UK endorsed in 2019 is a wide-ranging international treaty that settles the rights of EU citizens living in the UK, UK citizens living in the EU and their families,[233] includes rules on

[226] Prorogation marks the end of a parliamentary session. It is the formal name given to the period between the end of a session of Parliament and the State Opening of Parliament that begins the next session. The Sovereign formally prorogues Parliament on the advice of the Privy Council.
[227] *Id.* at para 50.
[228] *See* Eeckhout and Frantziou, *supra* note 223, at 710.
[229] Takis Tridimas, *Article 50: An Endgame without an End?*, 27 KING'S LAW JOURNAL 297, 303 (2016).
[230] Christople Hillion, *Withdrawal under Article 50 TEU: An Integration-Friendly Process*, 55 COMMON MARKET LAW REVIEW, 29, 40 (2018).
[231] *Id.* at 311.
[232] *Kadi v Council and Commission*, Joined Cases C–402/05 P and C–415/05 P, ECLI:EU:C:2008:461, at para 285.
[233] *See* UK's Withdrawal Agreement, *supra* note 157, Part Two, Arts 9-39.

dispute settlement[234] and provides an imaginative solution with regard to Northern Ireland[235] among else.

Overall, the right to secede under Article 50 TEU is "[the only undeniable legal limit that Member States have at their disposal against competence creep under the current Treaty framework".[236] It serves as an important reminder that Member States have the power to put an end to the federalist "Sonderweg" of "an ever closer union".[237] However, like the other two forms of secession, it may be exercised and accommodated within the EU constitutional order provided that Article 2 foundational values are protected.

V. Conclusion

48 hours before the 2014 Scottish independence referendum, the then Spanish Secretary of State for the EU, Méndez de Vigo, appeared on the BBC. During his interview, he rejected the claims of the then Scottish First Minister, Alex Salmond, according to which an independent Scotland could negotiate membership "from within" the EU. Instead, he argued that Scotland would have had to follow the accession process provided by Article 49 TEU, casting doubt on whether Spain would ever consent to it. The continuous EU membership of an independent Scotland was seen as a dangerous precedent that could further encourage centrifugal tendencies on their soil. The result of the 2014 referendum meant that the question on independent Scotland's participation in the EU was never tested in practice and remained hypothetical.

This largely forgotten interview, however, highlights two distinct but interrelated dimensions of the question of secession within the EU constitutional order. First, it underlines how political elites often use law as a political "sword" in such highly contested issues. Parties in a political and/or constitutional conflict are likely to use every forum as another arena for their political battle and as a platform for seeking international and local endorsement of their political arguments.[238] In this particular case, the legal debate on the correct legal basis for independent Scotland's EU accession acted as a proxy for a political debate on the issue of independence itself.

More importantly, this incident serves as a reminder that the question of secession within the composite, intertwined and multi-level constitutional order of the EU cannot just be dealt with at the domestic level. It has significant implications for the EU, as it denotes a change of status within and an altered relationship with the Union. Contrary to conventional wisdom, this article has clearly shown that the EU is more than capable of accommodating any (consensual) secession that could take place at any level of its constitutional order: the sub-state level, the Member State level and the supranational level. This remarkable flexibility that the Union constitutional order of States is able to exhibit is a by-product of the constitutional tolerance

[234] *Id.,* Part Six, Arts. 158-185

[235] *Id.*, Protocol on Ireland/Northern Ireland.

[236] Sacha Garben, *Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers*, 58 JOURNAL OF COMMON MARKET STUDIES 41, 52 (2020).

[237] *See* Weiler, *supra* note 23, at 7.

[238] Gordon Anthony and John Morison, *The Judicial Role in the New Northern Ireland: Constitutional Litigation and Transition*' 21 EUROPEAN REVIEW OF PUBLIC LAW 1219 (2009); Nasia Hadjigeorgiou, *Conflict resolution in post-violence societies: some guidance for the judiciary*, 25 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 695 (2021); SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS (2015); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE LAW JOURNAL 2009 (1997).

provided in Article 4(2) TEU, which lies at the core of this project. However, there is a limit to such deference. The Union is able to accommodate all three modes of secession that might occur within its borders, provided that they do not threaten the foundational values enshrined in Article 2 TEU.

Concerning internal secession, the EU is not prescriptive with regard to the territorial (re)organisation of its Member States. As such, the Union may accommodate such a phenomenon to the extent that it does not jeopardise the uniform application of EU law and its underogable core. Concerning the most controversial aspect of this debate, i.e. the right to external secession of regions, the article has pointed to the difference between consensual and non-consensual secession. While the latter should be condemned, as it breaches the territorial integrity of the Member States and the foundational values of the EU legal order, the Union has the necessary flexibility to accommodate the latter. In fact, the Union is able to engage with a secessionist entity and its metropolitan State in order to achieve a smooth transition to the new reality. Finally, the recent experience of Brexit proves beyond any reasonable doubt that the EU is able to accommodate the sovereign decision of a Member State to exercise its right of self-determination by withdrawing from the Union itself without neglecting its commitment to Article 2 TEU.

Such an accommodating and flexible approach to secessionist processes that do not breach the EU foundational values is compatible with the ethos of this constitutional order. Its composite nature dictates respect for domestic constitutional procedures. Its observance to international law favours the acceptance of legitimate expressions of the right to self-determination. However, it is its *raison d'être* as a peace plan that offers the most convincing normative argument. By adopting such an approach, institutions may incentivise self-determination movements to ensure that they only use methods that are compatible with those values instead of engaging in an endless paralysing tug of war.