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Future(s) of the Union: Some Thoughts after Brexit

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Abstract [En]: If Brexit was the defining "constitutional moment" for the European Union in the second part of the last decade, what are the constitutional changes awaiting the Union, say, the next ten years? This article looks at this – speculative – question by exploring the Union's potential future evolution alongside two dimensions: a horizontal dimension focusing on the widening or narrowing of its membership, and a vertical dimension exploring the deepening or flattening of its level of integration. The future of European integration is thereby not directly related to Brexit; yet Brexit has offered a critical moment of reflection about further political integration – a solution that directly contrasts with the United Kingdom's decision to "take back control" to the national level.

Titolo: Futuro(i) dell'Unione: alcune riflessioni dopo la Brexit
Abstract [It]: Se la Brexit è stato il "momento costituzionale" per definizione per l'Unione europea nella seconda metà dell'ultimo decennio, quali sono le trasformazioni costituzionali che attendono l'Unione, per esempio, nella prossima decade? L'articolo cerca di rispondere a questa domanda, in termini speculativi, esplorando la possibile evoluzione dell'Unione lungo due direttrici principali: la dimensione orizzontale si concentra sull'ampliamento o, viceversa, sul ridimensionamento degli Stati membri dell'Unione; la dimensione verticale, invece, considera l'approfondimento o, al contrario, lo stallo nel suo grado di integrazione. Il futuro dell'integrazione europea, dunque, non è direttamente collegato alla Brexit; tuttavia, la Brexit ha offerto un momento cruciale di riflessione circa un ulteriore livello di integrazione politica – una soluzione su scala sovranazionale che contrasta palesemente con la decisione del Regno Unito di "ricondurre il controllo" delle politiche a livello nazionale.

Keywords: EU constitutional change; widening; deepening; Brexit; global governance
Parole chiave: modifiche costituzionali nell'UE; allargamento; approfondimento dell'integrazione; Brexit; governance globale

1. Introduction: Two Dimensions of Constitutional Change

If Brexit was the defining "constitutional moment" for the European Union in the second part of the last decade, what are the constitutional changes awaiting the Union, say, the next ten years? This article looks at this – speculative – question by exploring the Union's potential future evolution alongside two dimensions: a horizontal dimension focusing on the widening *or* narrowing of its membership, and a vertical dimension exploring the deepening *or* flattening of its level of integration. Both dimensions have been constant drivers of constitutional change in the past. For the Union's historic mission has not only

* Articolo sottoposto a referaggio.

been "to lay the foundations of an ever closer union among the peoples of Europe"; the European project was, from the very beginning, "open to the participation of the other countries in Europe",[1] and it was therefore equally informed by the idea of an ever *wider* union.

The two dimensions of constitutional change may influence each other. Indeed, every horizontal change in the membership of the Union may dialectically affect the vertical direction of European integration. For not only will formal constitutional change within an enlarged Union become more difficult (in light of the unanimity requirement for EU Treaty amendments), the prospects of further political integration may automatically be flattened in light of the widened interest constellation among Member States. Contrariwise, the deeper the Union integrates the Member States into its legal and political order, the more "sovereigntist" Member States may decide to withdraw from the Union. This is, of course, the story of Brexit. For after decades of partial opt-outs and differential integration, the United Kingdom fully abandoned the supranational project in 2020 so as to "take back control" and regain its national "sovereignty".

2. Horizontal Changes: Widening or Narrowing of Membership

Every change in the membership of the Union represents a fundamental change in its material constitution. This change can either occur through European enlargements or national withdrawals. Enlargements of Union membership are regulated in a single article, namely Article 49 TEU. It states:

> "*Any European State* which respects the *values referred to in Article 2 and is committed to promoting them* may apply to become a member of the Union… The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament… The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."[2]

All States are, consequently, free to apply for EU membership if three conditions are fulfilled. For a candidate, to be eligible, it needs to be a "State" that is "European", and which subscribes to the foundational values of the Union expressed in Article 2 TEU. While the formal notion of "statehood" is straightforwardly left to international law, the requirement to be a "European" State has been more

[1] SCHUMAN DECLARATION, see: https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en.
[2] Art. 49 TEU (emphasis added).

controversial. For even if it "combines geographical, historical and cultural elements",[3] geography has often been controlling.[4] But most importantly, a European State will have to adhere to the values on which the Union is founded, that is: "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".[5]

What are, possibly, the new Member States of the Union in the near future? The Union has today accepted a number of European States as 'candidate counties' with which it is already negotiating, while some States are viewed as 'potential candidates' in the future (Table 1).

Table 1. EU Candidate Countries

Candidate Countries	Republic of North Macedonia (candidate since 2005), Turkey (candidate since 2005), Montenegro (candidate since 2012), Albania (candidate since 2014), Serbia (candidate since 2014)
Potential Candidates	Bosnia and Herzegovina (application submitted in 2016), Kosovo (Association Agreement since 2016), Ukraine (application submitted in 2022)

Union membership is however no unilateral right that can be demanded. On the contrary, it needs to be accepted by the Union and its Member States. Procedurally, Article 49 TEU here distinguishes between a "Union phase" and a "Member State phase". The Union institutions must first decide on the "admissibility" of the new State; and only once Council and Parliament have taken a positive decision on the candidate State are the Member States asked to conclude an accession agreement with the acceding State. This final accession treaty is an international treaty that is concluded by the acceding State and the collectivity of the old Member States; and all accession treaties are thus enjoying "constitutional" status.

What about secession(s) from the Union? Most modern States categorically prohibit secessions from their territory;[6] whereas most international organisations implicitly permit withdrawals of their Member

[3] Commission, *Europe and the Challenge of Enlargement*, (1992) Bulletin of the European Communities, Supplement 3/92, 7 at 11.

[4] For example: Morocco's application was deemed inapplicable in 1987.

[5] Article 2 TEU. The provision continues: "These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." These constitutional criteria have been further specified through the so-called Copenhagen criteria according to which the candidate country must have achieved "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities", "a functioning market economy", and – most generally – the "ability to take on the obligations of membership". On the Copenhagen Criteria, see C. HILLION, *The Copenhagen Criteria and their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford, Hart Publishing, 2004, p. 1.

[6] Some federal States seem to be more tolerant with regard to secessionist claims. For the Canadian constitutional order, see *Reference Re Secession of Quebec* [1998] 2 SCR 217.

States. Within the European Union, a "sovereign" right to withdraw has always been implicit in the Union legal order.[7] Today, the Lisbon Treaty has made this implicit right explicit. Article 50 TEU states:

"1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union…"

What is the nature and character of this exit right? Article 50 represents a compromise between a "State-centred" and a "Union-centred" version tabled during the 2004 Constitutional Convention.[8] The right to withdraw from the Union is, on the one hand, unconditional and unilateral; yet it is not automatic, since Article 50 imposes a procedural obligation on the Union and the departing Member State to try and reach a contractual resolution in the form of a "withdrawal agreement".[9] This withdrawal agreement is designed to settle the past – not the future – relations between the Union and the soon-to-be-third-State. And, fundamentally, and unlike an EU accession treaty, the withdrawal agreement has no formal constitutional status. Nonetheless, there are of course significant material constitutional repercussions. For the departure of a Member States not only changes the political composition of the Union; the legal rights EU citizens enjoy will be geographically and substantively reduced.[10]

The British exit from the European Union ("Brexit") in 2020 has been the first such Member State withdrawal from the European Union. The reasons for the British exit were, in my view, primarily rooted in that State's particular constitutional and philosophical self-understanding.[11] Sternly protective of its parliamentary "sovereignty" and passionately rejecting further progress towards a "political" Union, the British people chose to chart their independent future outside the Union.

Was this a singular moment in the Union's history; or will the near future see other Member States withdrawing? The possibility of future reductions in EU membership cannot be categorically excluded;

[7] For the same view, see: J. H.H. WEILER, *Alternatives to Withdrawal from an International Organisation: The Case of the European Economic Community*, in *Israel Law Review*, 20, 1985, p. 282.

[8] For a discussion of the constitutional history of the provision, see: R. SCHÜTZE, *European Union Law*, Oxford, Oxford University Press, 2021, Chapter 20, Section 2.

[9] The wording of Article 50 TEU only imposes an obligation to negotiate such an agreement on the Union; yet such a duty is equally imposed on the withdrawing state. This duty, while not directly based on Article 50 TEU, derives from its (continued) status as a Member State of the Union and the duty of loyal cooperation under Article 4(3) TEU.

[10] For example: the right to work and live in the departing Member State; or the mutual recognition of national legislation or professional qualifications from the departing Member State will be lost.

[11] For an overview of the history and reasons for the British withdrawal, see: R. SCHÜTZE, *European Union Law*, cit., Chapter 20, Section 1.

yet the political appetite – even of the two newly "awkward partners" – seems minimal.[12] And a national exit from the European Union will also be much harder for those States of the Union that have *constitutionally* committed themselves to European integration. The German Constitution, for example, mandatorily demands in its Article 23 that "the Federal Republic of Germany *shall* participate in the development of the European Union";[13] and similarly strong constitutional commitments to European integration can be found in many other national constitutional orders.[14]

The Brexit process has certainly shown how hard and costly a divorce from the Union is; and it seems to have strengthened – rather than weakened – the resolve of the remaining 27 Member States to act in common and to consolidate Europe.[15] In their "Rome Declaration", celebrating the 60th anniversary of the Rome Treaty in 2017, we thus read:

"We will make the European Union stronger and more resilient, through even greater unity and solidarity amongst us and the respect of common rules. Unity is both a necessity and our free choice. Taken individually, we would be side-lined by global dynamics. Standing together is our best chance to influence them, and to defend our common interests and values. We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible."[16]

[12] While another withdrawal from Union seems not on the horizon in the immediate future, a possible development in the next few years may however be the suspension of a Member State due to a persistent violation of the values of the European Union mentioned in Article 2 TEU. At the time of writing, the two "candidate countries" here are Hungary and Poland – both of which have, while not wishing to leave the Union, engaged in an extensive battle with the Union over the question of the rule of law within both countries. While unable to "force", or ultimately "expel" recalcitrant Member States, the Union here theoretically possesses the constitutional remedy of a membership "suspension", which is laid down in Article 7 TEU.

[13] Article 23 (1) German Constitution; and see also its Preamble ("Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law."). For an excellent discussion of the constitutional hurdles for a "G-Exit", see T. GROß, *Erlaubt das Grundgesetz einen Austritt aus der EU?*, in *Europarecht*, 53, 2018, p. 387.

[14] For example, Article 88-1 of the French Constitution states: "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007." For a discussion of the "Europe clauses" in national constitutions, see: M CLAES, *Constitutionalizing Europe at its Source: The 'European Clauses' in the National Constitutions: Evolution and Typology*, in *Yearbook of European Law*, 24, 2005, p. 81; as well as A. ALBI, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge, Cambridge University Press, 2015.

[15] Contra, H. HOFMEISTER, *The End of the Ever Closer Union*, Baden Baden, Nomos, 2018.

[16] The "Rome Declaration" can be found here: https://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/.

3. Vertical Changes: Deepening or Flattening of Integration

What, then, is to be done? Should the Union stay as it is? Should it deepen and consolidate; or, should it devolve and divest powers back to the Member States? These questions have recently been posed in the European Commission's "White Paper on the Future of Europe".[17]

Five scenarios were here discussed to offer "a series of glimpses into the potential state of the Union by 2025".[18] According to the first possible future, the Union will simply "carry on" and progress incrementally in the next five years.[19] The second option, by contrast, sees the Union scaled down to its common market – a choice that would have pleased the United Kingdom.[20] According to a third scenario, the Union abandons its (relatively) uniform legal order and splits into groups of Member States – with those States willing to do more being allowed to go ahead without being blocked by the others.[21] The Union may however – fourthly – also decide to reduce its thematic scope and do less but more efficiently;[22] or, it may take a new qualitative constitutional leap and decide to do much more in all domains in the future.[23]

What is the most likely future scenario here? The most "conservative" scenarios undoubtedly are the first and the fourth options,[24] because all other European "futures" would require formal Treaty amendments.[25] Yet what are the chances of such formal constitutional change? In their "Rome Declaration", the Member States committed themselves to four major projects for the next decade: "In the ten years to come we want a Union that is safe and secure, prosperous, competitive, sustainable and socially responsible, and with the will and capacity of playing a key role in the world and of shaping globalization".[26] These symbolic pledges were confirmed and reinforced in 2019 by the European Council's "A New Strategic Agenda: 2019-2024";[27] and the new Commission's political guidelines were

[17] The Commission White Paper can be found here: https://ec.europa.eu/commission/future-europe/white-paper-future-europe-and-way-forward_en.
[18] Ibid., 15.
[19] Ibid., 16.
[20] Ibid., 18.
[21] Ibid., 20.
[22] Ibid., 22.
[23] Ibid., 24.
[24] On the "unused" constitutional potential of the Lisbon Treaty, see the European Parliament Resolution of 16 February 2017, available here: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0049_EN.html.
[25] For an excellent analysis as to why Scenario 3 would require constitutional change, see B. DE WITTE, *Editorial: The future of variable geometry in a post-Brexit European Union*, in *Maastricht Journal of European and Comparative Law*, 24, 2017, p. 153.
[26] Rome Declaration (supra n.16).
[27] The document can be found here: https://www.consilium.europa.eu/en/press/press-releases/2019/06/20/a-new-strategic-agenda-2019-2024/.

equally and strongly committed to "[a] Union that strives for more".[28] But the strongest recent "impulse" towards a deeper European Union has been given by the Union's breathtaking fiscal response to the Covid pandemic. This impressive "temporary" solution, a new installment of "EU emergency law",[29] may potentially lay the permanent foundations for a deeper fiscal European Union.[30]

However, if the Union and its Member States were really serious about all these – and other – integrationist commitments, they need to formally "upgrade" the EU Treaties to their next evolutionary stage. Sadly, the prospects of such significant Treaty amendment are not bright, as long as the rules of constitutional change are not themselves constitutionally changed. For while the unanimity rule for EU Treaty amendments could, in the past, still be expected to produce "reasonable" results with six, nine, twelve, and even fifteen Member States,[31] in a Union of 27 Member States (and potentially more following new enlargements) major treaty changes are as unlikely as never before.[32]

The only way forward is here to amend the process of constitutional amendment itself, that is: to replace the unanimity requirement in Article 48 TEU by a (super-)qualified majority requirement.[33] Crucially, such an amendment to the amendment rules would not turn the Union into a federal state in which "sovereignty" is transferred to the centre.[34] Nor would it undermine the *plural* nature of its constituting power(s); on the contrary, the ability of a *plurality* of states in favour of constitutional change is increased by removing the possibility of a *single* Member State to block the "future".[35] From an ideal-typical perspective, a majority rule for constitutional amendments would furthermore best befit and reflect the

[28] The Commission "Political Guidelines" can be found here: https://ec.europa.eu/info/strategy/priorities-2019-2024_en. For an excellent criticism of especially von der Leyen's bold-yet-conservative manifesto, see: H.J. BLANKE and S. PILZ, *Europa 2019 bis 2014: Wohin trägt uns der Stier? Sieben Thesen zu den Herausforderungen der Europäischen Union*, in *Europarecht*, 2020, p. 270.

[29] GUEST EDITORIAL, *EU emergency law and its impact on the EU legal order*, in *Common Market Law Review*, 59, 2022, p. 3. For some early reflections on the European Union and global emergencies, see: A. ANTONIADIS, R. SCHÜTZE and E. SPAVENTA, *The European Union and Global Emergencies*, Oxford, Hart Publishing, 2011.

[30] On the past, present, and future of the EU fiscal union, see: A. HINAREJOS & R. SCHÜTZE, *EU Fiscal Federalism: Past, Present, Future*, Oxford, Oxford University Press, forthcoming.

[31] Famously, and after the prolonged and aggravated Nice Treaty negotiations, Tony Blair (former UK Prime Minister) is reported to have exclaimed: 'We cannot go on working like this!'

[32] This is not just a question of numbers and quantity but also one of the greater heterogeneous quality in Union membership. The diversity within the Union has significantly increased since 1973, especially after Eastern enlargement.

[33] Contra, J.-C. PIRIS, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge, Cambridge University Press, 2012, p. 59. This (super-)qualified majority requirement could be limited by declaring certain particularly sensitive areas to be still subject to unanimity; or by expressly excluding some matters altogether.

[34] Unlike, say, the German Constitution and its Article 79(2), EU Treaty amendments would not be in the hands of "federal" institutions alone, because they would still primarily, if not exclusively, involve the Member States as political and constitutional actors. Moreover, in the Union legal order, each State remains of course politically "sovereign" in that it can unilaterally decide to leave the Union, see Article 50 TEU.

[35] Let me, tongue-in-cheek, quote a passage from the German Constitutional Court's Maastricht Judgment here, available in Common Market Law Reports, 57, 1994, at 86: "Unanimity as a universal requirement would inevitably set the wills of the particular States above that of the Community of States itself and would put the very structure of such a community in doubt."

federal character of a Union of States. And binding a (small) minority of states by a legitimate decision of a (qualified) majority of states hardly seems undemocratic, unless one is mentally stuck in conceptual world of the sovereign state and "its" international legal order.[36]

This antiquated way of thinking however makes the Union immobile and ultimately defenceless vis-à-vis the future. For a polity "without the means of some change is without the means of its conservation".[37] The Union and its Member States must quickly recognise this, lest they be published by life. For neither is presently able to solve the serious problems raised by their citizens (and the world). Neither is able to fly against the cold winds of globalisation and its disorganised capitalism; nor seem they be able to properly tackle international problems, such as climate change or global pandemics. The Member States thereby ought to realise that their fear of European federalism and political union is often a fear of losing something (sovereignty, control) that is often already lost.[38] Indeed, perhaps the only way to "rescue" their national democracies today is, as at the end of the Second World War seventy years ago,[39] within a stronger supranational European Union.

4. Conclusion: And what about Brexit?

Any such stronger supranational solution would, almost undoubtedly, have been rejected by the United Kingdom. Indeed: from the very start, Britain's feelings towards European integration were complex; and when Britain finally joined the 'common market' in 1973, its reasons were predominantly of an economic nature. Its profound doubts of any federal or political union became a recurring theme throughout its membership; and, in later years, Britain's critical attitude towards transfers of legislative powers to the European Union found numerous expressions in a wide range of 'opt-outs'. But even this half-way house inside and outside the European Union could not prevent a majority of British citizens in 2016 to opt-out of Union membership altogether.

What makes the British exit from the EU so momentous, in a specific and general way, is that it will put to the test the very oppositive answer to (European) supranational integration – classic (intergovernmental) internationalism, which ultimately regards the nation state as the centre of the normative universe. If "Westminster" thereby managed to trump "Brussels" in a battle over where political authority should lie, it was in no small measure the EU's perceived democratic deficits that won the Brexit day. (And yet, ironically, already the immediate process of "getting Brexit done" revealed the

[36] I am particularly thinking of Richard Bellamy, Dieter Grimm and Joseph Weiler (and their intellectual followers) here.
[37] E. BURKE, *Reflections on the Revolution in France,* in *Revolutionary Writing*, I ed., Hampsher-Monk, Cambridge, Cambridge University Press, 2014, p. 23. Two hundred years later, the same thought can of course be found in Gorbachev's reflections on the German Democratic Republic: "Life punishes those who come too late."
[38] A. GIDDENS, *Turbulent and Mighty Continent: What Future for Europe*, Cambridge, Polity Press, 2014, p. 10.
[39] A. MILWARD, *The European Rescue of the Nation State*, London, Routledge, 1999.

limits of national democracy in the arena of international trade negotiations.) Brexit has here brought to the fore a question that is destined to become one of the most important political theory questions of the twenty-first century: how should (political) power and (democratic) legitimacy be organized between states? How can transnational markets be regulated, transnational pandemics be managed, and global climate change be tackled while allowing for forms of democratic or demoicratic agency and control? Should this be done via classic international law or the "law of integration"?

The United Kingdom and the European Union will have to answer this key question (and its multiple variants) in the next decade; and their respective futures in the twenty-first century will depend on the respective answers they will find.[40]

[40] For a comparison of various solutions offered to transnational problems by classic international law and European supranational law, see: R. SCHÜTZE, *Globalisation and Governance: International Problems, European Solutions*, Cambridge, Cambridge University Press, 2018.