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## The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)

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## ARTICLE

# THE WITHDRAWAL CLAUSE OF THE LISBON TREATY IN THE LIGHT OF EU CITIZENSHIP: BETWEEN DISINTEGRATION AND INTEGRATION

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### INTRODUCTION

The advent of the Lisbon Treaty brought among numerous changes, a provision which explicitly now allows Member States to withdraw from the European Union. While some scholars have begun to examine the provision,<sup>1</sup> it is surprising that they are analyzing the clause in isolation. Yet, if one had to categorize the concept of withdrawal, most likely, it would fall into the camp of *disintegrating provisions*, which therefore are in stark contrast with any provisions that could be considered as *integrating norms*; an obvious example for this latter category

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1. See, e.g., Anna Wyrozumska, *Withdrawal from the Union*, in THE EUROPEAN UNION AFTER LISBON: CONSTITUTIONAL BASIS, ECONOMIC ORDER AND EXTERNAL ACTION 343 (Hermann Josef Blanke & Stelio Mangiameli eds., 2012); Hannes Hofmeister, 'Should I Stay or Should I Go?'—A Critical Analysis of the Right to Withdraw from the EU, 16 EUR. L.J. 589 (2010).

would be EU citizenship. The claim that is made in this Article is that in order to fully understand the application and the functioning of the withdrawal clause, it is necessary to accommodate the tensions between integration and disintegration—between ‘citizenship’ and ‘withdrawal.’

The withdrawal clause comes at a time when it seems no longer unthinkable for a Member State to ‘reduce’ membership obligations or even completely withdraw from the European Union. The case of the United Kingdom is interesting in two ways: first, in his speech on Europe, Prime Minister David Cameron promised an in-or-out referendum on EU membership;<sup>2</sup> one can take this as an example of voluntary loss of EU membership. The case of Scotland, on the other hand, would be an example of involuntary loss of membership; Scotland has announced a referendum about its independence from the United Kingdom, which is scheduled for 2014.<sup>3</sup> One aspect of the discussion for and against independence is whether Scotland could remain an EU Member State.<sup>4</sup>

Apart from these rather extreme and maybe exceptional cases mentioned above, it seems, as Piris points out, that “the time is approaching when the choice will be between the status quo, which might mean a diluted European Union, slowly stagnating and becoming irrelevant, and a European Union that accepts, as a temporary measure, more differentiation between its Member States.”<sup>5</sup> The withdrawal clause may have its role to play in this process. If this is so, and keeping in mind the two above examples, it is necessary to clearly define the normative and doctrinal limits of this clause.

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2. U.K. Prime Minister David Cameron, Speech Regarding Referendum on British Membership in the European Union (Jan. 23, 2013), *available at* <http://www.guardian.co.uk/politics/2013/jan/23/david-cameron-eu-speech-referendum>.

3. Severin Carrell, *Alex Salmond Announces Scottish Independence Referendum Date*, *GUARDIAN* (Mar. 21, 2013, 2:55 PM), <http://www.guardian.co.uk/politics/2013/mar/21/scottish-independence-referendum-date>.

4. *Cf.* James Crawford & Alan Boyle, ANNEX A OPINION: REFERENDUM ON THE INDEPENDENCE ON SCOTLAND—INTERNATIONAL LAW ASPECTS (2013), *available at* [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/79408/Annex\\_A.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf); *Scottish Independence: EC's Barroso Says New States Need "Apply to Join EU"*, *BBC NEWS* (Dec. 10, 2012, 3:11 AM), <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20664907>.

5. JEAN-CLAUDE PIRIS, *THE FUTURE OF EUROPE: TOWARDS A TWO-SPEED EU?* 147 (2012).

The only ‘test case’ of complete ‘withdrawal’ that exists at this point is the rather special case of Greenland, which stems from the mid-1980s. When the Danish electorate decided to accede to the European Union, the people of Greenland opposed that move, but nevertheless had to follow because they were part of the Danish territory. Yet, over the years, what was to be observed was a form of devolution that took place in which powers were transferred from Denmark back to Greenland culminating in a 1982 referendum concerning whether Greenland was to remain within the European Union.<sup>6</sup> It is worth pointing out that the subsequent request to ‘withdraw’ from the European Union was not made by Greenland itself, but by Denmark in order to renegotiate the application of the Treaties to its territory;<sup>7</sup> needless to say, Member States were rather sensitive with regard to Greenland’s wishes given the colonial context.<sup>8</sup>

Despite the case above, generally there has always been a debate as to whether withdrawal from the European Union is possible at all under EU law. Heated discussions also took place in the Constitutional Convention, which drafted the withdrawal clause originally for the Constitutional Treaty.<sup>9</sup> There were delegates who saw withdrawal as acceptable according to the principles of international law, and those who considered withdrawal incompatible with EU law in general. One viewpoint that represented the conservative or traditional side was expressed by the delegate of the Austrian Government, Hannes Farnleitner, who argued that “[t]he provisions of the Vienna Convention on the Law of Treaties provide a sufficient basis for termination of membership.”<sup>10</sup> On the other side, there were delegates such as the representatives of the Dutch government who pointed out “that facilitating the possibility to withdraw

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6. MICHAEL SWEITZER ET AL., *EUROPARECHT: DAS RECHT DER EUROPÄISCHEN UNION* 37 (2007) (Ger.).

7. Wyzomska, *supra* note 1, at 343–44.

8. Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT’L. & COMP. L.Q. 407, 409–11 (2004).

9. Draft Treaty Establishing a Constitution for Europe art. I-60, 2004 O.J. C 310/1, at 40 (never ratified) [hereinafter Draft Constitutional Treaty].

10. Hannes Farnleitner, Suggestion for Amendment of Article I-59, *available at* [http://european-convention.eu.int/Docs/Treaty/pdf/46/46\\_Art%20I%2059%20Farnleitner%20EN.pdf](http://european-convention.eu.int/Docs/Treaty/pdf/46/46_Art%20I%2059%20Farnleitner%20EN.pdf) (last visited Nov. 5, 2013).

from the Union [was] contrary to the idea of European integration as set out in the preamble of the TEU [which]: ‘[r]esolved to continue the process of creating an *ever closer union among the peoples* of Europe’.<sup>11</sup> Despite that discussion, the clause not only made it into the failed Constitutional Treaty but was one of the provisions which was preserved and transplanted into the Lisbon Treaty as the new article 50 of the Treaty of the European Union (“TEU”).<sup>12</sup>

This paper is pragmatic with regard to the question as to whether the withdrawal clause should exist at all in the first place. The question is, ‘Who should stop a Member State willing to cut off ties completely with the EU?’ Nevertheless, the argument is normative when it comes to the question of ‘how the withdrawal clause has to be understood or applied?’—this is a question that clearly has implications on a future relationship between the withdrawn Member State and the European Union. In order to develop the argument, this Article first identifies the principles of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) with regard to withdrawal.<sup>13</sup> Second, this Article will discuss the withdrawal clause of the Lisbon Treaty itself. In the last section, this Article will add the issue of citizenship to the discourse on withdrawal, and it will evaluate whether this has any implications on how withdrawal by a Member State can be executed.

### I. WITHDRAWAL UNDER INTERNATIONAL LAW

This first section will outline the parameters of withdrawal under international law. Despite the fact that there now exists a specific provision on withdrawal within the EU framework, it is nevertheless useful to briefly provide an overview of the withdrawal framework under international law, and identify its

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11. G.M. de Vries & T.J.A.M. de Bruijn, Suggestion for Amendment of Article : 46, available at <http://european-convention.eu.int/Docs/Treaty/pdf/46/art46vriesEN.pdf> (last visited Nov. 5, 2013).

12. Consolidated Version of the Treaty on European Union art. 50, 2012 O.J. C 326/13, at 43–44 [hereinafter TEU]. The Treaty of Lisbon Amending the Treaty Establishing the European Union and the Treaty Establishing the European Community, Including Protocols and Annexes, will be referred to as the “Lisbon Treaty” throughout this Article.

13. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

guiding principles such as the role of state-sovereignty or whether unilateral withdrawal from a treaty is possible. After all, the conceptual ideas between ‘withdrawal’ on the international and the European level are the same; withdrawal allows for a state to exit a treaty.

Section 3 of the Vienna Convention offers detailed and numerous provisions on the specific question of “Termination and Suspension of the Operation of Treaties.” For the purposes of this Article, the focus will be on two specific articles: (1) article 54, which stipulates withdrawal from a treaty either through its own provisions or by consent among the parties of the treaty; and (2) article 56, which regulates withdrawal from a treaty if there exists no provision in the treaty and if no consent can be reached among the parties involved. The core difference between these two provisions seems to be that where article 54 is based on a form of “consensualism,” this dimension is absent in article 56.<sup>14</sup>

As pointed out, article 54 of the Vienna Convention allows for withdrawal from a treaty if this is agreed by the parties. This agreement or consensus can come in two ways: first, consent of the parties with regard to withdrawal or termination can be expressed in the treaty itself through a specific clause, but must be “in conformity with the provisions of the treaty.”<sup>15</sup> As a consequence, at one point in the drafting history, the provision was removed. In the final version, however, the clause was included once again “for the sake of clarity.”<sup>16</sup> Article 50 of the TEU, the withdrawal clause of the Lisbon Treaty, is such a specific provision.

Second, article 54 of the Vienna Convention also allows for a more ad hoc termination of, or withdrawal from, a treaty. After all, a treaty can be terminated or a party can withdraw from one “[a]t any time *by consent* of all the parties after consultation with the other contracting *States*.”<sup>17</sup> The obvious question to ask for

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14. Theodore Christakis, *Article 56, 1969 Vienna Convention*, in 2 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 1251, 1252–53 (Olivier Korten & Pierre Klein eds., 2011).

15. Vienna Convention, *supra* note 13, art. 54(a), at 344.

16. Vincent Chapaux, *Article 54, 1969 Vienna Convention*, in 2 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 14, at 1236, 1238.

17. Vienna Convention, *supra* note 13, art. 54(b), at 345 (emphasis added).

the purposes of this Article is whether this provision, in light of the Lisbon Treaty, is now superfluous. With regard to termination, an argument can certainly be made that the Lisbon Treaty has no specific provisions and therefore article 54 still has its role to play.

The second provision that this Article will examine is article 56 of the Vienna Convention. The norm seems to “establish[] a general presumption against unilateral denunciation.”<sup>18</sup> The Article stipulates that “[a] treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal.”<sup>19</sup> What is firmly established is that “[t]he customary character of the ban on unilateral denunciation, enunciated as a matter of principle in the introductory phrase of the first paragraph of Article 56, is beyond doubt.”<sup>20</sup> To offer a rather extreme example: not even Hitler’s Germany invoked a right of unilateral withdrawal, but argued instead that the other parties to the Treaty of Versailles were in breach of their obligations.<sup>21</sup> However, the provision also offers two exceptions: first, withdrawal is possible if “the parties *intended* to admit the possibility of denunciation or withdrawal;”<sup>22</sup> and second, “a right of denunciation or withdrawal may be *implied by the nature of the treaty*.”<sup>23</sup>

Withdrawal based on the intention is relatively undisputed as a concept of customary law. None of the participating states at the Sixth Committee or at the Vienna Conference opposed this provision.<sup>24</sup> Also, whenever unilateral withdrawal became an issue there was no discussion of “whether paragraph 1(a) reflected the state of customary law, but the manner in which the intention of the parties was to be assessed in each particular case.”<sup>25</sup> At the same time the concept is notoriously difficult to

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18. Christakis, *supra* note 14, at 1257.

19. Vienna Convention, *supra* note 13, art. 56.1, at 345.

20. Christakis, *supra* note 14, at 1255.

21. *See id.* at 1262.

22. Vienna Convention, *supra* note 13, art. 56.1(a), at 345 (emphasis added).

23. *Id.* art. 56.1(b), at 345 (emphasis added).

24. *See* Christakis, *supra* note 14, at 1255–56.

25. *Id.* at 1256.

establish given the fact that “intention” indicates a “subjective element”<sup>26</sup> which has an exclusive internal dimension.

However, as indicated, withdrawal is also possible if it is in the “nature of the treaty.” Whether this is the case or not—at least in theory—can be established “objectively.” At the same time, the status of article 56.1(b) as a norm of customary international law seems far more questionable. This provision, which was sponsored by the United Kingdom, made it into the treaty at a very late stage of the negotiation process and was only passed by a rather narrow majority. “Given this legislative history, it is not surprising that the doctrine, almost unanimously, continues to doubt the customary character of paragraph 1(b) of Article 56.”<sup>27</sup>

The German *Bundesverfassungsgericht*, which sits in Karlsruhe and is the *enfant terrible* of European integration, upheld the right to unilateral withdrawal in its *Maastricht* decision with what seems to be a distant resemblance of the ideology of “Blood (*Volk*) and Soil (*Staat*).”<sup>28</sup> In their judgement,<sup>29</sup> the judges quite clearly articulated that “Germany is one of the ‘Masters of the Treaties’ who expressed their will to be bound by the indefinitely concluded EU treaty and in this way established a *long lasting membership*, which however can be *dissolved by an act to the contrary*.”<sup>30</sup> The judges justified their conclusion by making reference to “state-sovereignty”;<sup>31</sup> in light

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26. *Id.* at 1266.

27. *Id.* at 1256.

28. Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219, 223 (1995). For a critical discussion of the Maastricht judgment, see Jochen A. Frowein, *Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit*, 54 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1994).

29. Although, as Weiler notes, not without irony, “[r]ecently [the court] decided that its judges should be referred to in English as ‘Justices.’ Priceless!” Joseph. H.H. Weiler, Editorial, *Judicial Ego*, 9 INT’L. J. CONST. L. 1, 2 (2011).

30. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (para. 112) (Ger.) (“Deutschland ist einer der ‘Herren der Verträge’, die ihre Gebundenheit an den ‘auf unbegrenzte Zeit’ geschlossenen Unions-Vertrag . . . mit dem Willen zur langfristigen Mitgliedschaft begründet haben, diese Zugehörigkeit aber *letztlich durch einen gegenläufigen Akt* auch wieder aufheben könnten.” (emphasis added) (author’s own translation)).

31. *Id.* (“Deutschland wahrt damit die Qualität eines souveränen Staates . . .”).

of the above, such a claim seems far less persuasive than suggested by the judges.<sup>32</sup>

This is not to argue that sovereignty has no role to play, but it is only relevant when a state makes a decision either to join or remain outside a treaty framework; state sovereignty makes the decision a voluntary one.<sup>33</sup> This means, however, that “there is nothing shocking in the idea that States, which are not forced to enter into a treaty regime, may have difficulty leaving it.”<sup>34</sup> If one accepts this reasoning, then sovereignty does not necessarily “impl[y] an inalienable right”<sup>35</sup> to withdraw even if unilateral withdrawal may be considered to be an expression of sovereignty. What follows from all of these considerations is that a state which decides to withdraw unilaterally acts against international law unless it can invoke other justifications for doing so. Thus, sovereignty alone does not offer a sufficient and solid enough normative basis.

What is to be concluded from all of these considerations? Sovereignty, as a concept, does not seem normatively persuasive to justify unilateral withdrawal. Therefore, the argument made by the German Constitutional Court that an *actus contrarius* is sufficient to absolve a state from the obligations under the Treaty is not convincing. Nevertheless, sovereignty has a role to play as it serves as a safeguard which guarantees that a state is either free to join a treaty or not; in other words, it injects the voluntary element at the beginning of a contractual relationship. Thus, an argument can be made that a form of *metamorphosis* takes place once a state has joined a treaty, which leads to a limitation of possibilities once joined. The following section will now move the analysis from the general provision of withdrawal under international law to the *lex specialis* of the Lisbon Treaty.

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32. Frowein, *supra* note 28, at 11.

33. DJURA NINČIĆ, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 26 (1970).

34. Christakis, *supra* note 14, at 1264.

35. Hans Kelsen, *Withdrawal from the United Nations*, 1 *W. POL. Q.* 29, 33 (1948).

## II. WITHDRAWAL UNDER EU LAW

Withdrawal from the European Union is regulated in article 50 of the TEU. What is rather obvious to notice is that the matter of withdrawal is dealt with in only one single and rather short provision. This somehow seems surprising given the significance and complexity of a potential withdrawal from the European Union. The wording of the clause can be considered ‘rather broad’ as it allows not only for consensual, but also for unilateral, withdrawal. This section will outline the structure of the provision and highlight some of its problems before it is discussed in the light of EU citizenship in the next section.

According to article 50.1 of the TEU, “[a]ny Member State may decide to withdraw from the Union in accordance with *its own constitutional requirements*.”<sup>36</sup> The problem one encounters with this provision is that it would seem that it is the European Court of Justice (“ECJ”) which would be called on to decide whether a Member State (*rebus sic stantibus*) has in fact withdrawn in accordance with its own constitutional requirements. This means, as a consequence, that “this insertion has catapulted that court [ECJ] into the role of final arbiter of a significant issue of national constitutional law.”<sup>37</sup> Needless to say, this could embroil the ECJ in questions which are highly sensitive for the withdrawing Member State.

Secondly, it remains rather unclear what the phrase means for Member States which have an integration-friendly constitution, such as Germany. The Preamble of the German Basic Law reads that “[c]onscious of their responsibility before God and man, [i]nspired 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.”<sup>38</sup> In its *Solange II* ruling, the judges of the German Constitutional Court acknowledged that provisions in

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36. TEU, *supra* note 12, art. 50.1, 2010 O.J. C 83, at 43 (emphasis added).

37. Friel, *supra* note 8, at 425. *But see* Wyrozumska, *supra* note 1, at 359 (“Friel’s [sic] fears seem, however, unsupported by the Treaty provisions and the ECJ case law. The ECJ has no competence under the Lisbon Treaty to adjudicate upon validity of the internal law procedures in similar situations, and the Court was consequently rejecting its competence in similar cases.”).

38. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, pmbI. (Ger.).

the German Basic Law need to be interpreted in relation to each other (“*normativen Sinneinheit*”)<sup>39</sup> and this includes a reading of constitutional provisions also in the light of the Preamble. Following this reasoning, it seems rather questionable how a complete withdrawal from the European Union could be justified. It appears that the German Constitutional Court either deliberately abandoned or was oblivious of this reasoning in its *Maastricht* decision.

A second condition, according to article 50.2 of the TEU, which needs to be fulfilled by the withdrawing member state, is that it has to “notify the European Council of its intention.”<sup>40</sup> What follows then “[i]n 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.”<sup>41</sup> A reading of the provision, so far, seems to suggest that a Member State can leave the European Union only in a consensual way. This finding, however, as will be shown below, needs to be qualified.

The agreement to be concluded between the withdrawing state and the Council, which acts on behalf of the European Union according to Article 50.2 “acting by a qualified majority, after obtaining the consent of the European Parliament,” has to follow the procedure as outlined in Article 218.3 of the Treaty on the Functioning of the European Union (“TFEU”).<sup>42</sup> Thus, whereas the agreement about withdrawal is to be concluded between the European Union and the respective member state,<sup>43</sup> the accession treaty, according to Article 49 of the TEU, is one “between the Member States and the applicant State.”<sup>44</sup> Again one could make reference to the concept of *metamorphosis* taking place between accession and withdrawal.

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39. Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Nov. 5, 2012, 73 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 339 (¶ 131) (Ger.).

40. TEU, *supra* note 12, art. 50.2, 2012 O.J. C 326, at 43.

41. *Id.* (emphasis added).

42. *See id.* (“[The agreement for withdrawal] shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union.”).

43. *See* Jochen Herbst, *Observations on the Right to Withdraw from the European Union: Who Are the “Masters of the Treaties”?*, 6 GERMAN L.J. 1755, 1758 (2005).

44. TEU, *supra* note 12, art. 49, 2012 O.J. C 326, at 43.

It may be worth pointing out, especially in the light of later normative considerations, that the ECJ has a role to play in examining this agreement because it forms part of EU law.<sup>45</sup> The jurisdiction of the Court comes in two ways: as judicial review and in the form of an Opinion. With regard to the former, Lazowski points out that “the decisions on signature and approval of the agreement may be subject to judicial review”<sup>46</sup> according to article 263 of the TFEU. With regard to the latter, article 218.11 of the TFEU entitles Member States, the EU Parliament, Council, or Commission to request an Opinion from the ECJ as to whether the agreement concluded is in line with Treaty requirements.<sup>47</sup>

If an agreement is finally reached, according to article 50.3 of the TEU, “[t]he Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement.”<sup>48</sup> At the same time, however, the provision also allows for a unilateral withdrawal if, two years after the notification, no agreement can be reached.<sup>49</sup> The time period, which can also be extended by the European Council in an agreement with the withdrawing Member State, has positive and negative aspects. On the positive side one could argue that a two-year period can allow for a ‘cooling off’; on the other hand, the time span leads to uncertainty and potential blackmailing.

One cannot rule out that a Member State could threaten with a form of “putative withdrawal.”<sup>50</sup> This would amount to nothing more than a theatre on the supranational stage for a national audience which, however, puts a heavy burden on the EU institutions and their capacity to solve problems. There are also concerns that the automatism at the end of the two-year time frame may undermine serious talks for an agreement because the withdrawing Member State knows that “after 2 years

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45. See Adam Lazowski, *Withdrawal from the European Union and Alternatives to Membership*, 37 EUR. L. REV. 523, 528 (2012).

46. *Id.*

47. Consolidated Version of the Treaty on the Functioning of the European Union art. 218.11, 2012 O.J. C 326/47, at 146 [hereinafter TFEU] (“Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.”).

48. TEU, *supra* note 12, art. 50.3, 2012 O.J. C 326, at 44.

49. *See id.*

50. Friel, *supra* note 8, at 426.

withdrawal will take effect in any event.”<sup>51</sup> However, invoking the “principle of sincere cooperation” in article 4.3 of the TEU as a safeguard runs into the usual difficulties of substantiating the raised claims sufficiently.<sup>52</sup>

Another crucial aspect which is addressed in article 50.4 of the TEU is the question of how to deal with the representatives of the withdrawing Member State within the institutional framework of the European Union. The provision states that “the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or in decisions concerning it.”<sup>53</sup> The provision is clear and also seems conceptually sound: according to article 10.2 of the TEU, “Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”<sup>54</sup> Members in the (European) Council thus represent the citizens/nationals of the state and therefore their primary concern, especially in the critical circumstances of a withdrawal process, is located with the state.

The provision, however, is silent about the status of MEPs from the withdrawing Member State. Hofmeister seems to be rather critical of the logical conclusion that MEPs continue to be allowed in the decision making process, even if related to withdrawal; he is also rather concerned that they may influence the decision-making process in a certain way.<sup>55</sup> However, he appears to be oblivious to the conceptual role of the EU Parliament which is to “directly [represent citizens] at Union level”;<sup>56</sup> or as Dougan phrased it: “directly elected MEPs represent the collective interests of Union citizens rather than the parochial interests of the withdrawing state.”<sup>57</sup> Despite

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51. *Id.*

52. *Cf.* Commission v. Netherlands, Case C-96/81, [1982] E.C.R. I-1791.

53. TEU, *supra* note 12, art. 50.4, 2012 O.J. C 326, at 44.

54. *Id.* art. 10.2, at 20.

55. *See* Hofmeister, *supra* note 1, at 594.

56. TEU, *supra* note 12, art. 10.2, 2012 O.J. C 326, at 20.

57. Michael Dougan, *The Convention's Draft Constitutional Treaty: A 'Tidying-Up Exercise' that Needs Some Tidying-Up of Its Own*, 27 FED. TR. CONST. ONLINE PAPER SERIES 1, 8 (2003).

Dougan's acknowledgement of the institutional role of parliament, he nevertheless argues against their inclusion in the process as he seems more concerned that "national loyalties of its MEPs . . . take precedence over the general Union interest they were originally elected to represent."<sup>58</sup> However, one will always face the problem that some representatives of an institution understand and accept the role of the institution they are serving, whereas others will not.

In turn, an argument could be made that allowing MEPs to still participate in the process of withdrawal limits the violation of a "key tenet of democratic theory"<sup>59</sup> that is "the principle of affected interests."<sup>60</sup> The principle requires that "[e]veryone who is affected by the decisions of a government should have the right to participate in that government."<sup>61</sup> The argument to be made is that because MEPs are elected by EU citizens, this allows nationals from other EU Member States who are living on the territory of the withdrawing state to have at least some representation in the political process of withdrawal; this would alleviate the problem that they may be excluded from the national political process/discourse of withdrawal.

It should be noted that article 50.5 of the TEU also allows the withdrawing Member State to rejoin.<sup>62</sup> In such a case, however, the state would have to follow the normal procedure for accession according to article 49 of the TEU. This means that, first of all, a member state has no automatic right to rejoin and, second, that it would have to take over the complete *acquis communautaire*. As a consequence, any previous opt-outs would be lost unless they can be renegotiated again.<sup>63</sup>

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58. *Id.*

59. Chris Hilson, *EU Citizenship and the Principle of Affectedness*, in *MAKING EUROPEAN CITIZENS: CIVIC INCLUSION IN A TRANSNATIONAL CONTEXT* 56, 56 (Richard Bellamy et al. eds., 2006).

60. See ROBERT A. DAHL, *AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY* 49 (Yale Univ. Press rev. ed. 1990).

61. *Id.*

62. TEU, *supra* note 12, art. 50.5, 2012 O.J. C 326, at 44 ("If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.").

63. See ALINA KACZOROWSKA, *EUROPEAN UNION LAW* 26–27 (3d ed. 2013).

What can be concluded is that the withdrawal clause allows for both unilateral as well as consensual withdrawal. It is clear that although the normative arguments to be made in the subsequent section are of little practical value, they are still of moral value if a Member State is determined enough to withdraw unilaterally. The normative dimension, more likely, will translate into a practice in case of consensual withdrawal executed through an agreement. These normative principles, which will be identified in the following section, describe the outer limits, or red lines, not to be overstepped in an agreement concluded by the European Union with a withdrawing Member State. In addition, the fact that the ECJ can be involved in reviewing the concluded agreement between the European Union and the withdrawing Member State may help to translate these normative principles—what ought to be—into reality—what is.

### III. *WITHDRAWAL AND EU CITIZENSHIP*

The previous section outlined the structure and some of the legal problems of the withdrawal clause, which can be described as a provision of disintegration. This section will examine the withdrawal clause in the context of citizenship—a concept that resembles integration. What is to be examined is whether this link between ‘withdrawal’ and ‘EU citizenship’ must lead to a different understanding of the withdrawal clause compared to that suggested in the previous section and literature so far. An obvious consequence of withdrawal from the European Union is a loss or change of the individual’s status as an EU citizen. Therefore in this section, a three-step argument will be developed. The first subsection examines the status of the individual in EU law. The second subsection focuses on the question of whether involuntary loss of citizenship can be normatively justified on the national level; this, it can be argued, simulates, *mutis mutandi*, the situation after withdrawal. The final subsection analyzes whether the findings made with regard to involuntary loss of national citizenship can in fact be transferred from national citizenship to EU citizenship.

A. *The Role of the Individual in EU Law*

The argument which is made throughout this section is that the individual has a role to play in the process of withdrawal. This is achieved by treating the individual like a ‘subject’ and not a mere ‘object.’ What can be observed in European integration is a continued strengthening of the status of the individual, starting almost from the very beginning, which found its focal point later, with the introduction of EU citizenship in the Maastricht Treaty.<sup>64</sup> Ever since the formal introduction of EU citizenship the ECJ has further shaped and, one could probably argue, strengthened, the concept of EU citizenship. For the purposes of this Article, there is no need to rehearse the case law history.<sup>65</sup> This subsection will focus exclusively on the role and status of the individual in EU law.

As early as 1963, the Court was already laying the foundation for later developments with regard to the status of the individual in EU law and the role of sovereignty of Member States in the famous case *van Gend en Loos*.<sup>66</sup> The Court highlighted how the European Economic Community (“EEC”) Treaty moves beyond a traditional international law agreement among sovereign states, by making reference to the preamble of the treaty “which refers not only to *governments* but to *peoples*.”<sup>67</sup> Therefore, the exercise of power of these institutions “affects Member States and . . . *their citizens*.”<sup>68</sup> Clearly, the EEC law acknowledged, from a very early point onwards, the existence of individuals as a distinct entity. What is noteworthy, however, is that while individuals were acknowledged as ‘subjects’ at this early stage of integration, citizens were exclusively defined *through* Member States and still clearly ‘belonged’ to the Member States as ‘their citizens.’

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64. Treaty on European Union (Maastricht text), July 29, 1992, art. 8, 1992 O.J. C 191/1, at 7 [hereinafter Maastricht TEU].

65. For a summary of this development, see Dimitry Kochenov, *The Present and the Future of EU Citizenship: A Bird’s Eye View of the Legal Debate* (Jean Monnet Program, Working Paper No. 02, 2012), available at <http://centers.law.nyu.edu/jeanmonnet/papers/12/1202.html>.

66. *Van Gend & Loos v. Neth. Inland Revenue Admin.*, Case 26/62, [1963] E.C.R. I-3 (English special edition).

67. *Id.* at 12 (emphasis added).

68. *Id.* (emphasis added).

What goes hand in hand with this development is a change in the understanding of the nature of EU law. The Court in *van Gend en Loos* concluded that “the Community constitutes a *new legal order of international law*.”<sup>69</sup> One year later, in *Costa*, one finds an even more daring Court that already contrasts EU law with international law: “[b]y contrast with ordinary international treaties, the EEC Treaty has created its *own legal system*.”<sup>70</sup> In Opinion 1/91, the Court went even further and held that the (then) EEC treaty “constitutes the *constitutional charter* of a Community based on the rule of law.”<sup>71</sup>

Given this change of terminology away from the ‘international’ to the more ‘national,’ it does not come as a surprise that eventually this development led to the introduction of citizenship in article 8.1 EC of the Maastricht Treaty. This provision was originally rather bold as it read that “[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.”<sup>72</sup> The subsequent Amsterdam Treaty added the sentence that “[c]itizenship of the Union shall complement and not replace national citizenship.”<sup>73</sup> This addition foreshadowed, but also should settle, potential tensions between the national and the supranational level. At the same time, an argument can be made that EU citizens were mainly defined through the nation state.

The failed Constitutional Treaty is interesting because, so it seems, citizens finally stepped out of the shadow of the Member States. The Preamble, for example, read that the Convention prepared the draft “of this Constitution on behalf of the *citizens*.”<sup>74</sup> Furthermore, article I-1 of the Constitutional Treaty spoke of the “will of the citizens and States of Europe to build a common future.”<sup>75</sup> It almost seems to be an allusion to the idea of a ‘social contract’ where there are three parties involved in

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69. *Id.* (emphasis added).

70. *Costa v. ENEL*, Case 6/64, 1964 E.C.R. I-587, 593 (emphasis added) (English special edition).

71. Opinion 1/91, 1991 E.C.R. I-6099, 6102 (emphasis added).

72. Maastricht TEU, *supra* note 64, art. 8.1, 1992 O.J. C 191, at 7.

73. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340, at 25 [hereinafter Treaty of Amsterdam].

74. Draft Constitutional Treaty, *supra* note 9, pmb., 2004 O.J. C 310, at 3.

75. *Id.* art. I-1, at 11.

the process that are presumably of equal weight: citizens, Member States, and the Union.

However, with the Lisbon Treaty the language used by the Treaties becomes more careful again. Article 1 of the TEU once again refers exclusively to the “High Contracting Parties” which establish a Union “among themselves.” And, once again, we learn about the “process of creating an ever closer union among the peoples of Europe.”<sup>76</sup> Thus, it almost seems that the clear language of the social contract which was still applied in the Constitutional Treaty is now absent again. Nevertheless, it is interesting to note a change or sharing of “possession” of citizens takes place where they are no longer considered to belong exclusively to the Member States but also to the European Union. Of course, with Weiler one could ask whether it should not be the case that it is “Europe which belongs to citizens”;<sup>77</sup> this, however, is another discussion.

Article 3.1 of the TEU nevertheless suggests a more direct link between the Union and its citizens: “[t]he Union’s aim is to promote peace, its values and the well-being of *its* peoples.”<sup>78</sup> In addition, article 3.2 of the TEU establishes that “[t]he Union shall offer *its* citizens an area of freedom, security and justice without internal frontiers.”<sup>79</sup> Article 13.1 of the TEU prescribes that “[t]he Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of *its citizens and those of the Member States*.”<sup>80</sup> This provision clearly suggests that there is a distinction to be made between citizens on the one hand, and Member States on the other.

What can be concluded is that the individual has a rather strong and a unique role in EU law compared to international law. This finding is also confirmed by the reasoning of the Court which does not consider EU law as an element of (traditional) international law. Member States accommodated this different approach by eventually introducing the concept of EU

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76. TEU, *supra* note 12, art. 1, 2010 O.J. C 83, at 16.

77. Joseph H.H. Weiler, *To Be a European Citizen—Eros and Civilization*, 4 J. EUR. PUB. POL’Y 495, 500 (1997).

78. TEU, *supra* note 12, art. 3.1, 2010 O.J. C 83, at 17 (emphasis added).

79. *Id.* art. 3.2, at 17 (emphasis added).

80. *Id.* art. 13.1, at 22 (emphasis added).

citizenship, which somehow crystallizes this development even if the legislative history shows a certain uneasiness with the concept of citizenship on the supranational level. The next subsection will discuss the possibility of involuntary loss of citizenship on the national level which may serve as a simulation for the loss of EU citizenship after withdrawal from the European Union.

### B. *The (Involuntary) Loss of Citizenship*

The point to be made in this subsection is that “citizenship is a *Stand*, a status”<sup>81</sup> of the individual within or opposite the collective, which, because of its fundamental importance, cannot be simply taken away by the majority. In this regard the protection of the status of citizenship is rather different compared to one, admittedly extreme, example of the forced removal of citizenship within living history—the Nazi treatment of some of their citizens; Jews, for example, were regularly stripped of this crucial status before they were killed in the concentration camps.<sup>82</sup> So, an argument can be made that even the Nazis acknowledged the importance of the status as such even though they did not hesitate to carry out such acts as they did.

The US Supreme Court developed a position which highlighted the role of citizenship as conferring a status on the individual. Chief Justice Warren stated in *Perez v. Brownell* that

[c]itizenship is man’s basic right for it is nothing less than the right to have rights. . . . In this country the expatriate would presumably enjoy, at most, only the limited rights and privileges of aliens, and like the alien he might even be subject to deportation and thereby deprived of the right to assert any rights.<sup>83</sup>

The ECJ in *Grzelczyk* equally seems to acknowledge the importance of the status of citizenship; even if, given its civil law tradition, in far less prosaic words: “Union citizenship is

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81. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 62 (1992).

82. *Id.* at 167–68.

83. *Perez v. Brownell*, 356 U.S. 44, 64–65 (1958) (Warren, C.J., dissenting) (citations omitted).

destined to be the fundamental status of nationals of the Member States . . . .”<sup>84</sup> There seems to be a considerable overlap between the ECJ’s and US Supreme Court’s understanding of the role of citizenship as an instrument that establishes status.

Loss of citizenship can come in two ways: either people lose citizenship with their consent (voluntary) or without consent (involuntary). Whether both are equally permissible has been the discussion of a series of judgments by the US Supreme Court. The principles developed by the Court may be worth outlining for the purposes of this Article as they may provide a useful (normative) guideline also for the EU context. The case of *Mackenzie v. Hare*<sup>85</sup> offers aspects for both dimensions, even if, as will be seen, the judgment stretches the word ‘voluntary’ by any means.<sup>86</sup> According to the relevant law at the time, an American woman, Ms. Mackenzie, lost her citizenship as a consequence of marriage with a British man. Yet Ms. Mackenzie claimed that “such legislation, if intended to apply to her, is beyond the authority of Congress.”<sup>87</sup> One of the arguments made to support her case was that citizenship “became a right, privilege, and immunity which could not be taken away from her except as a punishment for crime or by her voluntary expatriation.”<sup>88</sup>

The US Supreme Court, however, was not sympathetic to Ms. Mackenzie and found the law which deprived her of citizenship to be constitutional because the legislature did not act arbitrarily, and also considered the loss of citizenship in this case as one to be “elected.”<sup>89</sup> In the eyes of the Court, the case therefore came under the heading of “voluntary expatriation.”<sup>90</sup> The extent to which ‘consent’ as a concept may be stretched, however, is open for discussion; one could make the argument that consent also has a role to play in the context of loss of citizenship following withdrawal, if one considers the following:

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84. *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, Case C-184/99, [2001] E.C.R. I-6139, ¶ 31.

85. *Mackenzie v. Hare*, 239 U.S. 299 (1915).

86. *Cf.* Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164, 1179 (1955).

87. 239 U.S. at 307.

88. *Id.* at 308.

89. *Id.* at 312.

90. Comment, *supra* note 86, at 1171 & n.36.

withdrawal is a consequence of a political process, and, therefore, one could argue that at least a majority has consented to withdrawal and hence their loss of citizenship.

The argument, however, is not without problems for at least two groups of people. The first group consists of people who were entitled to vote, but said explicitly ‘no’ to withdrawal; in this context it seems difficult to construct a form of ‘implied’ or ‘indirect’ consent. The second category consists of either people who are excluded from the political process because they are not citizens of the withdrawing member state, but are still affected because they live on the territory; or they are simply too young to be entitled to participate in the political deliberation process.<sup>91</sup> What, from a normative perspective, is particularly problematic is that it is not only impossible to construct ‘consent’ as a justifying means with regard to the loss of citizenship but in addition for the second group of people they also experience a violation of the “principle of affectedness”;<sup>92</sup> as has been pointed out already this principle is rather crucial in democratic theory.

Originally the US Supreme Court in *Mackenzie* based its decision not only on the consent argument, but also made it clear that the US Congress has the power to revoke citizenship even against the will of a person. The Court concluded that the US Congress, in fact, has these powers, at least to the extent “as a ‘necessary and proper’ incident to its ‘sovereign’ power in the area of foreign affairs.”<sup>93</sup> The US Supreme Court similarly found that the US Congress has the power to deprive a person of the citizenship status against their will in *Perez v. Brownell*.<sup>94</sup> If this were to be the normatively convincing approach then, as a consequence, people in these two groups described above would have no case because they could be deprived of their status anyway—even against their will. The argument would end here.

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91. This is particularly problematic because it is especially young people who are more in favor of European integration. See Eurobarometer, 72 Nationaler Bericht: Österreich 32 fig. (2009), available at [http://ec.europa.eu/public\\_opinion/archives/eb/eb72/eb72\\_at\\_at\\_nat.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_at_at_nat.pdf).

92. See Hilson, *supra* note 59, at 56.

93. Comment, *supra* note 86, at 1177.

94. See 356 U.S. 44 (1958).

What is interesting to note, however, is that Chief Justice Warren, in his dissenting opinion in *Brownell* developed a rather different conceptual understanding of citizens and citizenship. He made the point that

*[C]itizens themselves are sovereign, and their citizenship is not subject to the general powers of their government. Whatever may be the scope of its powers to regulate the conduct and affairs of all persons within its jurisdiction, a government of the people cannot take away their citizenship simply because one branch of that government can be said to have a conceivably rational basis for wanting to do so.*<sup>95</sup>

What this means, in other words, is that the individual is protected against the decision of a majority. However, in *Afroyim v. Rusk*, the US Supreme Court overruled its findings in *Perez v. Brownell*, and followed the reasoning outlined by Chief Justice Warren ten years earlier.<sup>96</sup> A similar problem in a slightly different context is also to be found in the rather recent examples of separation having taken place in Europe.<sup>97</sup> The solution seems to be very much in line with the principle of “the sovereign citizen” identified by Chief Justice Warren. Despite the fact that a majority had voted in favor of separation in the case of *Czechoslovakia*, the legal framework put in place allowed for the individual to make a choice of which citizenship to adopt; article 3(2) of the Charter on Fundamental Rights and Freedoms allowed Czechs and Slovaks to choose their own nationality following the dissolution of Czechoslovakia: “[e]verybody has the right freely to choose his nationality. It is prohibited to influence this choice in any way.”<sup>98</sup> Another example would be Opinion No. 2 of the Badinter Arbitration Committee at the conference on Yugoslavia which also recommended that individuals ought to have the nationality of

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95. *Id.* at 65 (emphasis added).

96. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

97. I am grateful to Dr. James Summers for providing me with these two examples.

98. Ústavní zákon č 2/1993 Sb., Listina Základních Práv a Svobod [Charter of Fundamental Rights and Basic Freedoms] art. 3(2) (Czech), translated in Parliament of the Czech Republic, Chamber of Deputies, *Charter of Fundamental Rights and Basic Freedoms*, available at <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/2.html>.

their choice;<sup>99</sup> again, despite a majority decision, the individual should have the last say on their individual status.

If one transfers the gist of the argument from Chief Justice Warren's reasoning that "citizens themselves are sovereign"<sup>100</sup> and "a government of the people cannot take away their citizenship,"<sup>101</sup> this effectively limits the room for maneuver of a government. One reaches a similar conclusion also when drawing on examples of European self-determination. If one takes these principles out of the state context and applies them in the context of withdrawal from the European Union, what one would need to conclude is that a Member State (government) could not simply strip people of EU citizenship against their will. This, however, would mean that even if a *majority of people* in a referendum may be in favor of withdrawal from the European Union, a way would nevertheless need to be found to accommodate the right of individuals to retain EU citizenship if they wanted to. The next subsection will analyze whether it is possible to apply the reasoning made with regard to national citizenship in the context of EU citizenship.

### C. *The (Involuntary) Loss of EU citizenship*

As outlined in the previous section, one obvious consequence of withdrawal is that according to article 50.3 of the TEU (at one point) "[t]he Treaties shall cease to apply."<sup>102</sup> As such, article 20 of the TFEU, which confers on the individual person EU citizenship, shall also "cease to apply." This, however, means that a person will lose the status which is conveyed on them through EU citizenship. This subsection will analyze whether a similar reasoning as with national citizenship ought to apply or whether different principles are at stake here. In order to be able to address this question, the relationship between national and EU citizenship needs to be analyzed. The specific aspect which needs to be discussed is whether EU citizenship has the potential or capacity to somehow stand alone.

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99. See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 *EUR. J. INT'L L.* 178, 184 (1992).

100. *Perez*, 356 U.S. 44, 65 (1958).

101. *Id.*

102. TEU, *supra* note 12, art. 50.3, 2012 O.J. C 326, at 44.

A starting point for analyzing the relationship between national and EU citizenship is to be found in the conclusions of the Edinburgh Council Meeting of December 1992, where it was highlighted that EU citizenship gives ‘additional rights’ but does not replace national citizenship.<sup>103</sup> How is this to be interpreted? Denmark in the Annex to the Treaty made the following declaration: “[c]itizenship of the Union is a political and legal concept which is *entirely different* from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system.”<sup>104</sup> However, it seems that not much is to be gained apart from the conclusion drawn from this declaration, other than that EU citizenship differs from national citizenship.

In *Rottmann*,<sup>105</sup> Advocate General Maduro found that national and EU citizenship “are both inextricably linked and independent.”<sup>106</sup> Lippolis, in turn, argues with regard to their relationship that they are “interlinked and not separable”;<sup>107</sup> and he continues that “[t]he national citizenship is the primary and original status, whereas the European citizenship which derives from it, is a secondary citizenship. This means that being a European citizen *does not entitle one to become* a citizen of one of the Member States”;<sup>108</sup> one could argue that this understanding of EU citizenship exclusively defined through national citizenship upholds ideas of state-sovereignty.

This finding is relatively unproblematic and coincides with the wording of article 20 of the TFEU: “[c]itizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.”<sup>109</sup> Clearly this provision focuses on the creation of EU citizenship, which seems closely related to national citizenship. However, the

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103. Edinburgh European Council, Conclusions of the Presidency, E.C. BULL., no. 456, at 53 (1992).

104. Denmark and the Treaty on European Union (Annex 3) art. 1, 1992 O.J. C 348/1, at 4 (emphasis added).

105. *Rottmann v. Bayern*, Case C-135/08, [2010] E.C.R. I-1467.

106. Opinion of Advocate General Maduro, *Rottmann v. Bayern*, Case C-135/08, [2010] E.C.R. I-1452, ¶ 23.

107. Vincenzo Lippolis, *European Citizenship: What It Is and What It Could Be*, in 3 EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 317, 318 (Massimo La Torre ed., 1998).

108. *Id.* (emphasis added).

109. TFEU, *supra* note 47, art. 20, 2012 O.J. C 326, at 56.

problem of this Article is not so much the ‘creation’ but the ‘loss’; and here the Treaty as well as the literature seems to be rather silent. This may not come as a surprise as withdrawal from the European Union (and therefore loss of EU citizenship) has (deliberately) remained unaddressed, specifically when EU citizenship was introduced by the Maastricht Treaty.

The closest EU law and the ECJ have come to dealing with the specific question on the loss of EU citizenship was in the case of *Rottmann*. Rottmann, originally an Austrian citizen, lost Austrian citizenship as a consequence of taking up German citizenship, which he subsequently lost as he failed to disclose on-going criminal investigations of serious fraud in Austria during his naturalization in Germany; for Rottmann this would result in loss of his status as an EU citizen.<sup>110</sup> The German Federal Administrative Court sent, with another question, the following query to the ECJ:

must the Member State . . . which has naturalised a citizen of the Union and now intends to withdraw the naturalisation obtained by deception, having due regard to Community law, refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would have the legal consequence of loss of citizenship of the Union (and of the associated rights and fundamental freedoms) . . . , or is the Member State . . . of the former nationality obliged, having due regard to Community law, to interpret and apply, or even adjust, its national law so as to avoid that legal consequence?<sup>111</sup>

All the Court had to say in this context was “that the withdrawal of naturalisation acquired by the applicant in Germany [had] not yet become definitive, and that no decision concerning his status [had] been taken by the Member State whose nationality he originally possessed, namely, the Republic of Austria.”<sup>112</sup> However, even if the Court had developed more on this question it would still somehow differ from the withdrawal situation: if a Member State withdraws from the European Union, the question is not necessarily what happens to national citizenship, but instead to EU citizenship. In other

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110. *Rottmann*, [2010] E.C.R. I-1467, ¶¶ 22–27, 46, 59.

111. *Id.* ¶ 35.2.

112. *Id.* ¶ 61.

words one could argue that *Rottmann* only describes an indirect loss of EU citizenship (through the loss of national citizenship), whereas withdrawal potentially leads to a direct loss of citizenship. The question is, however, whether an argument can be made that EU citizenship has an element of independence?

The first draft of article 5 of the Constitutional Treaty—ironically called in German, “*das Gerippe*” or the skeleton—originally spoke of “*dual citizenship*,”<sup>113</sup> which subsequently changed during negotiations to “Citizenship of the Union shall be *additional* to national citizenship and shall not replace it,”<sup>114</sup> a wording which was also kept in article 20 of the Lisbon Treaty. The word “additional” means “added,” “other,” “more,” but also “another”;<sup>115</sup> but it also means that both “entities” at one point can exist independently from each other. Kostakopoulou comes to a similar conclusion when she argues that “the true meaning of ‘additionality’ or ‘complementarity’ or ‘existing alongside’ [delineates] a degree of relative autonomy and, by no means, [implies] that A and B cannot function apart.”<sup>116</sup>

It comes as a surprise when reading the highly controversial *Maastricht* decision of the German Constitutional Court, which clearly stated that unilateral withdrawal is possible through an *actus contrarius*, that the same court found that, “as a consequence of EU citizenship introduced by the Maastricht Treaty a *durable* legal bond is to be established amongst nationals of the Member States.”<sup>117</sup> It is interesting to note that the Constitutional Court uses a different wording in the context of citizenship compared to withdrawal, where it invoked the

113. Preliminary Draft Treaty Establishing a Constitution for Europe art. 5, 2002, CON 369/02 (never ratified) (emphasis added).

114. Draft Constitutional Treaty, *supra* note 9, art I-10, 2004 O.J. C 310, at 13 (emphasis added).

115. NEW OXFORD THESAURUS OF ENGLISH (2000).

116. Dora Kostakopoulou, *European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?*, EUDO CITIZENSHIP, <http://eudo-citizenship.eu/commentaries/citizenship-forum/citizenship-forum-cat/254-has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law?showall=&start=5> (last visited Sep. 19, 2013).

117. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (¶ 97) (Ger.) (“Mit der durch den Vertrag von Maastricht begründeten Unionsbürgerschaft wird zwischen den Staatsangehörigen der Mitgliedstaaten ein *auf Dauer* angelegtes rechtliches Band geknüpft . . .” (emphasis added) (author’s own translation)).

somehow ‘weaker wording’ of the Treaty itself from article Q of the TEU, which stated that the Treaty is concluded for *auf unbegrenzte Zeit* or ‘an unlimited time.’<sup>118</sup>

In turn, when the German judges discussed the nature of citizenship they used a different terminology to emphasize that citizenship is a ‘durable’ or ‘permanent’ bond (*‘auf Dauer’*). Any references to termination are missing but what is found instead is a remark that EU and national citizenship differ only in the “density of the bond.”<sup>119</sup> It almost seems as if the German Constitutional Court acknowledged the importance of the status conveyed through EU citizenship. The possible (unintended) consequence of this difference is that EU citizenship appears to be more robust than the Treaty which established this concept.

The argument to be made in this section was that one has to distinguish between conditions under which one is entitled to national citizenship and therefore EU citizenship, which is still very much in the autonomous hands of Member States, and circumstances where one loses EU citizenship either because of loss of national citizenship (as was the case in *Rottmann*) or because of withdrawal (national citizenship is retained but is no longer considered a nationality of a Member State). None of the Member States were forced to confer the status of EU citizenship on their citizens but once they have, according to this argument, they cannot simply withdraw this status.

Furthermore, EU citizenship, like national citizenship, conveys an important status. After all, EU citizenship “is required in order to preserve the link between the citizen and the Union and his/her place in the European community of citizens.”<sup>120</sup> Thus, this means that the normative reasoning employed in the context of national citizenship also applies with regard to EU citizenship. If this is so, then one of the fundamental principles established in this section, that citizenship cannot simply be taken away through a majority decision, especially against the will of the individual, must apply unless the entity of the Union would cease to exist, in which case, the ‘link’ would no longer be needed.

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118. The German word *unbegrenzt* still has the word ‘boundary’ in it (as has the English word ‘limit’)—even if negated.

119. *Cf. Maastricht*, 89 BVERFG 155 (¶ 97) (Ger.) (author’s own translation).

120. Kostakopoulou, *supra* note 116.

## CONCLUSION

A consequence of the argument developed in this Article is that one needs to distinguish between the individual and institutional level when it comes to the matter of withdrawal; whether this is at all possible will be addressed (at least cursorily) in this final concluding section. In this context, attention should be drawn to two examples: the ‘EU-Swiss model’ and the European Economic Area (“EEA”).<sup>121</sup> Over the years, the EEA served as a form of “ante-chamber to EU membership for Austria, Sweden and Finland.”<sup>122</sup> Therefore it seems in a way plausible to make an argument that the EEA could serve as an ‘exit-chamber’ for Member States which only want to participate in the internal market. Given the fact that there exists some sort of relationship between the European Union and members of the EEA, it appears de facto possible that individuals who do not wish to join their member state’s downscaling in membership, could remain in a closer relationship with the European Union.

The EEA model follows the logic one-size-fits all, whereas the ‘EU-Swiss model,’<sup>123</sup> is more tailored to the individual needs of the EU partner. Given the European Union’s experiences with the EU-Swiss model, however, it seems less likely to be an option in the future.<sup>124</sup> Switzerland could be considered a “‘quasi’ member state,”<sup>125</sup> which has concluded several bilateral agreements with the EU; these agreements even go so far as Switzerland’s participation in the sovereignty-sensitive issue of immigration, asylum, police and judicial cooperation.<sup>126</sup> Again, what one finds here is institutional cooperation without full-fledged institutional integration; this, in turn, amounts to evidence that one can separate the institutional from the individual integration. The situation described in this Article, of course, would be the other way around. In this context, it would

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121. Lazowski, *supra* note 45, at 534–39.

122. *Id.* at 534.

123. *See id.* at 536 (discussing the bilateral relationship between a former member and the European Union).

124. *Id.* at 539.

125. Sandra Lavenex, *Switzerland’s Flexible Integration in the EU: A Conceptual Framework*, 15 SWISS POL. SCI. REV. 547, 548 (2009).

126. *Id.* at 567.

be the individual who remains integrated and the institutional level which disintegrates. This certainly would make things less easy but it would necessarily mean that such an approach of divided integration could be possible.

There might be a certain reluctance to understand citizenship and the political community detached from territory. One should not forget, however, that political communities in ancient Greek, the polis, were not first and foremost perceived as a community on a specific territory, but rather as a community of people. Therefore, as Ottmann points out, it was possible for Themistokles to relocate Athens on the ships; its identity was not to be found in its soil but constitution.<sup>127</sup> One is strongly reminded of Habermas' idea of constitutional patriotism.<sup>128</sup> I think it would be quite apt to understand EU citizenship in this de-territorialized way; after all, countless wars have been fought for territory and in order to overcome and defend boundaries. The idea of European integration, however, is a reaction to the fatal consequences of the nation state that is built around these ingredients.

In the 1960s, Leonard B Boudin's article in the *Harvard Law Review* about the "Involuntary Loss of American Nationality" began with the following paragraph: "The relatively new concepts of nationality and nationalism may some day give way to systems of world law and world government. Until that time, problems of nationality, statelessness, and the rights and obligations of citizens will continue to arise in a world of independent nation-states."<sup>129</sup> European integration itself has always been at the forefront of changing our understanding of international law, and, once again, it could be the case that we, the citizens of Europe, may witness the next step in international law.

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127. Henning Ottmann, *Grenzen in einer Welt, die immer grenzenloser wird*, in *GRENZEN UND GRENÜBERSCHREITUNGEN* 334, 334 (Wolfram Högbe ed., 2004).

128. Cf. Jan-Werner Müller, *On the Origins of Constitutional Patriotism*, 5 *CONTEMP. POL. THEORY* 278 *passim* (2006).

129. Leonard B. Boudin, *Involuntary Loss of American Nationality*, 73 *HARV. L. REV.* 1510, 1510 (1959–1960).