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Brexit and the security of the European project: citizenship and free movement as a case study

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Abstract

The article makes use of the notion of security as a heuristic device providing a descriptive and normative conceptual framework for the purposes of interpreting the events associated with Brexit. It claims that security can be identified as a meta-constitutional rationale of the European project. In particular, two discourses of power (security and fundamental rights) have been constitutive of the process of European polity-building, although they are characterised by ambiguities and contradictions. Brexit, and in particular the complex issues relating to free movement and citizenship rights, confirms such contradictions and enables us to consider more carefully the nature of the EU polity and the reasons underpinning its development. In other words, security emerges at the same time as an opportunity for growth and as a threat for the European project. The article suggests that, in order to safeguard EU integration, a move from a self-referential to a heterarchical form of security is necessary.

Keywords: discourses; EU citizenship; free movement; rights

1 Introduction

Following the start of the Brexit negotiations on 29 March 2017,[1] many scenarios of the relationship between the EU and the UK are being discussed. At this stage, virtually all of them, from the 'no deal' to the 'second referendum' scenarios, seem possible. A considerable degree of uncertainty and controversy permeates the public debate.

This article aims to take stock of the ongoing negotiations between the UK and the EU: in particular, the way a Member State's withdrawal affects citizens' rights reflects a broader impact on the nature of the EU as a polity and the reasons for its existence. Does Brexit suggest that EU citizenship has never really existed as a 'fundamental status of nationals of the Member States', but is rather a contingent status, as citizens and workers may at any time be converted into 'bargaining chips'? In other words, Brexit is considered as 'yet another crisis',[2] a litmus test – one among many recently – for the EU. As some

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1 On this date, the UK served its withdrawal notice to the European Council, in accordance with Article 50 TEU.

2 N Nugent, 'Brexit: Yet Another crisis for the EU' in B Martill and U Steiger (eds), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press 2018) 54.

scholars argue, this event may either encourage other states to leave the EU (the centrifugal perspective) or promote further integration among the remaining countries (the centripetal perspective).[3] As free movement and citizenship are among the main aims of the EU, the loss of related rights casts doubt on the viability of the European project.

In order to illustrate the argument above, this article maintains that European constitutionalism is informed by the security meta-constitutional rationale, a 'superior reason' supporting the existence of the EU. The descriptive and normative conceptual framework employed in the article may thus serve as a guideline for future research in the field.

Security is interpreted here broadly, as a concept that goes beyond the mere notion of stability. It is associated with the identity of a polity and thus acquires an existential connotation.[4] In other words, this 'superior reason' is pursued by the EU beyond and sometimes even against the constitutional aims and principles that are set out in the Treaties and becomes particularly evident when the EU needs to adapt to or is challenged by events that undermine or endanger its existence.[5] One of the fundamental features of the EU is self-preservation in the face of threats and the emergence of such threats – whether real or purely imaginary – is a powerful self-justifying tool. The development of the EU is thus a process, in which European integration, security and crisis are closely interrelated: in this process, two ambiguous and contradictory discourses can be detected: security and 'fundamental' or 'individual' rights.[6] Security is expressed, for example, by important principles of EU law, such as the principles of autonomy and effectiveness/uniformity,[7] which have been employed by the Court of Justice of the European Union (CJEU) to assert the authority of EU law and manage conflicts. Correspondingly, the so-called *Melloni* doctrine conveys the idea that, whenever the application of national constitutional standards of protection of fundamental rights might compromise the primacy, effectiveness and unity of EU law, national courts ought to refrain from using them.[8] Yet, security is also an ambiguous notion which is characterised by tensions and contradictions. In particular, when the security meta-constitutional rationale becomes self-referential, namely when European integration is pursued for its own sake, the risk is that the European project may be unable to deliver what it promises. Brexit, which is an effect of self-referential security, is indeed likely to

3 M Cini and A Verdun, 'The Implications of Brexit for the Future of Europe' in Martill and Steiger (n 1) 63, 66. See also P Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 29.

4 For further details, see M Fichera, *The Foundations of the EU as a Polity* (Edward Elgar 2018), where this conceptual framework is used to analyse several 'crises' of the EU. This notion is thus different from traditional characterisations of security in the field of public order, or as national security. See e.g. J Richards, *A Guide to National Security: Threats, Responses and Strategies* (Oxford University Press 2012); H K Koh, *The National Security Constitution: Sharing Power after the Iran Contra Affair* (Yale University Press 1990); K Tuori, 'A European Security Constitution?' in M Fichera and J Kremer (eds), *Law and Security in Europe: Reconsidering the Security Constitution* (Intersentia 2013) 39.

5 This concept is thus akin to the idea of '*raison d'Etat*' employed by Machiavelli, although the legal and historical context is very different. See N Machiavelli, *The Prince* (Clarendon Press 1891). One example of this is the adoption of measures during the Eurozone crisis, which were not always in line with EU law.

6 On this particular aspect see M Fichera, 'Security Issues as Existential Threat to the Community' in Fichera and Kremer (n 4) 85. I distinguish here between 'fundamental' rights and 'human' rights: see e.g. G Palombella, 'From Human Rights to Fundamental Rights: Consequences of a Conceptual Distinction' (2007) 93 Archiv für Rechts- und Sozialphilosophie 396. The EU cannot of course be compared to a human rights organisation. For the purposes of this article, I use the notions of 'fundamental' and 'individual' rights, or simply rights, interchangeably, as embracing both fundamental rights and fundamental freedoms.

7 See e.g. Case 43/75 *Defrenne v Sabena (No 2)* ECLI:EU:C:1976:56; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Joined Cases C-6/90 and C-9/90, *Francovich v Italy* ECLI:EU:C:1991:428.

8 Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

cause a 'dramatic loss of rights',[9] especially considering that the UK began the two-year time limit prescribed by Article 50 of the Treaty on European Union (TEU) without a clear agenda.[10]

It is argued here that the EU should escape the trap of self-referential security and avoid the fragmentation of the internal market in the face of differentiated integration. The EU has followed a model of integration which has systematically sidetracked concern for the social embeddedness of transnational norms. Brexit suggests that, in order for the European project to persist, a move towards a heterarchically oriented security must be encouraged, by being responsive to the demands of the complex and diversified European society/ies and enhancing the economic and social constitution.

As will be seen below, Article 50 TEU[11] is an illuminating expression of the security meta-constitutional rationale, precisely because it was created with the aim of managing potential crises. As is well known, British diplomat John Kerr[12] drafted the text that sets out the procedure for leaving the EU as part of an embryonic EU constitutional treaty in the early 2000s. At that time, the Austrian Coalition government, which included the far-right Freedom Party of Austria, led by Jörg Haider, was a cause for concern for the European institutions. The idea was thus to have a procedure allowing a government to leave the EU at any time, in order to avoid the legal chaos deriving from not being able to strike an agreement. Whether such a procedure – as a result of the type of agreement struck between the countries involved – effectively protects the rights of EU citizens as free movers remains to be seen.

The following pages will: (a) sketch the essential features of the withdrawal process; (b) illustrate the relevance of the security meta-rationale; and (c) draw some conclusions relating more specifically to the consequences of Brexit as regards citizenship and free movement.

2 The procedure for the negotiation of a withdrawal agreement

This section aims to emphasise those aspects of the withdrawal process in which citizenship rights are prioritised. As is well known, Article 50 TEU sets out a procedure for the conclusion of a withdrawal agreement between the EU and the UK, taking into account the framework for the UK's future relationship with the Union.

As far as the negotiations are concerned, the European Council guidelines (adopted one month after the UK notification of withdrawal)[13] envisaged a 'two-phased approach' to the withdrawal negotiations.

9 D Kochenov (2016) 'Brexit and the Argentinisation of British Citizenship: Taking Care Not to Overstay Your 90 Days in Rome, Amsterdam or Paris' (*VerfBlog*, 24 June 2016) <https://verfassungsblog.de/brexit-and-the-argentinisation-of-british-citizenship-taking-care-not-to-overstay-your-90-days-in-rome-amsterdam-or-paris/>.

10 Scholars have had no hesitation in pointing out that the UK's departure from the EU might cause 'the most substantial loss of rights in Europe since the break-up of Yugoslavia in the 1990s': J Shaw, 'Citizenship and Free Movement in a Changing EU: Navigating an Archipelago of Contradictions' in Martill and Steiger (n 1) 156.

11 See Consolidated Version of TEU and TFEU [2012] OJ C 326.

12 See e.g. G Campbell, 'Article 50 Author Lord Kerr says Brexit Not Inevitable' (*BBC News*, 3 November 2016) <www.bbc.co.uk/news/uk-scotland-scotland-politics-37852628>.

13 European Council Guidelines, EUCO XT 20004/17, Brussels, 29 April 2017, 4. See also Directives for the negotiation of an agreement with the UK and Northern Ireland, XT 21016/17 ADD 1 REV 2, Brussels, 22 May 2017, 4 (hereinafter 'the negotiating directives') and Resolution of the European Parliament of 5 April 2017 (concerning negotiations with the UK following its notification that it intends to withdraw from the European Union) [2017] P8_TA-PROV(2017)0102.

In the first phase of the negotiations, settling the question of citizens' rights was a priority for the EU (part III.1 of the negotiating directives).[14] Analogously, 'securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU' is described as one of the UK government's 'early priorities' for the withdrawal negotiations.[15] This is why, according to para 8 of the European Council guidelines, 'agreeing reciprocal guarantees to safeguard the status and rights derived from EU law at the date of withdrawal of EU and UK citizens, and their families, affected by the United Kingdom's withdrawal from the Union will be the first priority of the negotiations'.[16]

The prioritisation of EU citizens' rights is confirmed by the EU negotiating directives, which state that the withdrawal agreement should 'safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date as well as rights which are in the process of being obtained', both for citizens of other Member States residing (or having resided) and/or working (or having worked) in the UK, and vice versa.[17] Inevitably, a 'personal' and a 'material' scope of such rights is involved.

From the perspective of the EU, 'the personal scope' of the guarantees to be included in the withdrawal agreement should coincide with Directive 2004/38 (i.e. the 'Citizens Directive'),[18] so as to include 'both economically active, i.e. workers and self-employed, as well as students and other economically inactive persons, who have resided in the UK or EU27 before the withdrawal date, and their family members who accompany or join them at any point in time before or after the withdrawal date'. As far as 'the material scope' (the rights to be guaranteed) is concerned, the negotiating directives mention residence rights and rights of free movement as derived from the principle of non-discrimination based on nationality (Article 18 of the Treaty on the Functioning of the European Union (TFEU)), free movement of workers (Article 45 TFEU), freedom of establishment (Article 49 TFEU), and citizenship (Article 21 TFEU),[19] and as otherwise set out in the Citizens Directive.[20] The scope would thus include: residence rights based on the Treaties or the Citizens Directive and the procedural rules to be followed in order to document those rights; the social security coordination rules, including export of benefits and social security contributions made in different countries; the supplementary rights in the Regulation on free movement of workers, including workers' children's access to education; access to self-employment; and recognition of qualifications which were obtained before Brexit or which are in the process of being recognised on that date.

14 In the same vein, see Letter from Theresa May to the EU Citizens, 19 October 2017 <www.gov.uk/government/news/pms-open-letter-to-eu-citizens-in-the-uk>. As regards the negotiating directives, see n 13.

15 UK Department for Exiting the European Union, 'The United Kingdom's Exit from, and New Partnership with, the European Union' (Policy Paper, 15 May 2017) para 6.3 <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2#controlling-immigration>.

16 European Council Guidelines (n 13).

17 As regards the negotiating directives, see n 13.

18 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158 (Citizens Directive).

19 Consolidated Version of TEU and TFEU (n 11).

20 For the Citizens Directive, see n 18.

Another issue concerns social security rights.[21] In this regard, the negotiating directives underline that the guarantees to be included in the withdrawal agreement should be reciprocal and 'based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU citizens as compared to UK citizens, as set out in the relevant EU acquis' (para 20).[22]

The joint negotiation report of the European Commission and the UK and the Commission Communication on the negotiation progress, both of 8 December 2017, again focus on safeguarding EU citizens' free movement rights, as exercised in the past, as far as possible.[23]

During the second phase of the negotiations, a Statement of Intent on the EU Settlement Scheme, produced by the Home Office in June 2018, confirmed that 'safeguarding the rights of EU citizens and their family members living in the UK and ensuring reciprocal protections for UK nationals living in the EU' was the first priority in the negotiations.[24]

In particular, Part 2 of the Commission's Withdrawal Agreement[25] focuses on citizens' rights and social security provisions. Importantly, these provisions are justiciable, as Article 151 allows references for preliminary ruling to the CJEU concerning the interpretation of Part 2. Although this is only possible within eight years of the end of the transition period, the provisions should be read in conjunction with Article 152, which provides for an independent authority with the task of interpreting and applying Part 2. This body may not only exercise its powers of investigation upon receiving complaints from EU citizens and their family members, but may also conduct inquiries autonomously and bring a legal action before a UK court or tribunal.[26]

In the official documents mentioned above a clear emphasis on the need to protect EU citizens' rights can be detected. However, two fundamental questions emerge. A first line of inquiry ought to focus on what the real value of EU citizenship and free movement rights is, given that – as it seems – their status can be challenged or threatened when a Member State decides to withdraw from the EU. A second aspect that deserves attention is that the fate of EU citizens' rights in the withdrawal process illustrates the

21 Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, [2004] OJ L 166/1.

22 As regards the negotiating directives, see n 13.

23 Joint Report from the negotiators of the European Union and the UK Government on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the European Union TF50 (2017) 19; Commission to EU27, 8 December 2017; Communication from the Commission to the European Council (Article 50) on the state of progress of the negotiations with the UK under Article 50 of the TEU, Brussels, 8 December 2017 COM (2017) 784 final. See e.g. s 4(a) of the Communication: '[T]he principle underlying the Union's position are that the Withdrawal Agreement should protect the rights of Union citizens, United Kingdom nationals and their family members who, at the date of withdrawal, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date.'

24 UK Home Office EU Settlement Scheme: Statement of Intent, 21 June 2018, 5 <www.gov.uk/government/publications>.

25 European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 2018 (33) Commission to EU27, 28 February 2018 and TF50 2018 (33/2) Commission to UK, 15 March 2018.

26 As far as Part 3 (including inter alia free movement of goods) is concerned, Article 153 provides for the application of Articles 258, 260 and 267 TFEU. Moreover, without prejudice to Article 153, Article 162 includes the possibility of setting up a Joint Committee for the settlement of disputes concerning the interpretation and application of the agreement. Such disputes may in some circumstances be further submitted to the CJEU.

impact of a Member States' withdrawal on the nature of the EU as a polity and the reasons for its existence. In order to answer the two questions mentioned above, the following pages will attempt to provide the necessary conceptual framework offering both a descriptive and a normative account of the current events.

3 Brexit and the security dimensions

It is argued in this section that several security dimensions may be identified as distinctive to the EU polity: spatial, temporal, popular, ontological, epistemic and semantic (or reflexive). Each of these dimensions is expressed by a conceptual category, operates through a dichotomy and addresses one or two fundamental questions relating to European integration. While this is a general model applying to the EU, for the purposes of this article it is argued that the specific case of Brexit affects to some extent each security dimension.

Indeed, the expressions and concepts used in the negotiating directives and related documents (e.g. 'securing the status of, and providing certainty to, EU nationals already in the UK and to UK nationals in the EU', 'safeguard[ing] the status and rights derived from Union law at the withdrawal date', 'preserving the internal market') are more significant than may seem at first sight. The fact that both parties to the negotiation have placed emphasis on the priority of citizens' rights epitomises the nature of the EU polity and the reasons behind it.

In other words, the significance of the EU liberal project lies beyond the commitment to fundamental rights, the rule of law and democracy, which, of course, are all relevant values reaffirmed in the Preamble to the TEU and the Preamble to the Charter of Fundamental Rights (CFR),[27] as well as several provisions therein and the case law of the EU judiciary. The added value of the construction of the EU as a polity emerges from security, expressed by two ambiguous and contradictory discourses of power: security and fundamental rights.

Firstly, the EU liberal project, as a project aiming to ensure peace and safety across the European continent, has always relied upon a powerful and pervasive security discourse, focusing on two functions, namely both securing the smooth operation of the internal market and ensuring a secure marketplace.[28] Secondly, the emancipation of the individual from the moorings of the nation state, as an expression of the fundamental rights discourse, is pivotal to building up the EU polity. It is not by chance that Article 3(2) TEU is placed before Article 3(3) TEU. However, although the provision to EU citizens of an area of freedom, security and justice (AFSJ), where free movement is guaranteed, is prioritised over the establishment of an internal market, in practice the proclamation of the free movement paradigm is characterised by the prevalence of economic objectives over social needs.[29]

In light of the contradictions outlined above, multiple security dimensions may be identified and the Brexit negotiations are very helpful in clarifying how they ought to be viewed.

27 Charter of Fundamental Rights of the European Union, OJ C 326. See also Consolidated Version of TEU and TFEU (n 11).

28 As argued in M Fichera, 'Sketches of a Theory of Europe as an Area of Freedom, Security and Justice' in M Fletcher, E Herlin-Karnell and C Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016) 34.

29 See the discussion on the implications of Brexit later in this work.

Dimension	Conceptual category	Dichotomy	Questions
Spatial	Space	Inside/outside	Who is the Other? Where is it the Other located?
Temporal	Time	Past/future	In which direction are we moving?
Popular	People	Demos/no demos	What is constituent power?
Ontological	Nature of the EU	Federal state v loose international organisation	What is the best interpretative scheme?
Epistemic	Pluralism	One/many	How should multiple rationalities or claims of authority coexist?
Semantic or reflexive	Notion of security	Secure/insecure	What does it mean to be secure? How to be secure as a polity?

The table above illustrates how these dimensions may be articulated.[30] In the following pages an analysis of each dimension and related challenges is offered.

3.1 Semantic or reflexive security

Semantic or reflexive security concerns the question of how to be secure as a polity. As every polity attempts to ensure its own survival by devising institutions, legal principles, structures and techniques of governance that allow it to continue and expand, so the EU relies upon the security and rights discourses to avoid dissolution and chaos. These discourses are associated with threats and periods of crisis.

Change and permanence are thus interwoven in the European liberal project of integration, and this feature of adaptation to change, of permanence in the face of threats in the name of a 'superior reason', is what I call 'the security of the European project'. There exists a constant interplay between security and insecurity and, whenever the foundational values of any polity are questioned by an excessively high number of opponents, the very existence of the polity is at stake.[31] Thus, founding a polity also means attempting to secure its long-term survival. In particular, the meta-constitutional rationale of the security of the European project – which conveys the existential implications of the EU enterprise – is articulated in security and fundamental rights *as discourses of power*.

Discourses of power can in fact be constitutive of a polity, while at the same time being constantly in tension or overlapping each other. They shape meanings, condition actors' behaviour and choices, and correspond to activities, speech acts and rhetorical strategies that dominate in a given historical context. This does not happen by chance. Processes of production and interpretation of texts, as well as the social conditions within which they are generated, and other social practices, such as courts' rulings or other jurisdictional acts, are indicative of specific patterns or relations of power.[32] These discourses are constitutive of the EU as a polity because it is through them that the interaction between the EU institutions, as well as between the institutional apparatus and

30 The same table is used in Fichera (n 6).

31 Ibid 85, 92.

32 N Fairclough, *Language and Power* (Longman 1989) 26.

the citizens, takes place. They contribute to shaping a reality that is an integral part of the EU legal order. 'Discourses' are interpreted here as different from 'narratives', as the latter are (sometimes competing) forms of interpretation of reality employed to explain or justify events, and/or to support specific policies.[33]

In other words, discourses are considered essentially 'practices that systematically form the objects of which they speak'[34] and, more specifically, daily practices embedded in the very process of formation of a polity. They include all forms of formal and informal social relationships and interactions between economic and social actors (e.g. courts, parliaments, media, academic work, as well as social movements, trade unions etc.), which often clash with each other. The concept of 'discourse' employed here is thus potentially very wide and does not include merely 'groupings of utterances or statements', but 'whatever signifies or has meaning' and produces effects within a social and institutional context.[35] By observing such practices, it is almost inevitable to point out how, regardless of our personal judgement, dominance may be enacted and reproduced by subtle, routine, everyday forms of text and talk that appear 'natural' and quite 'acceptable'.[36] Importantly, attention is paid to that type of social power that is exercised by entrenched elites or specific sectors of society. A fundamental feature inherent in the notion of 'discourses of power' employed in this article is ideological and political struggle.[37]

From this viewpoint, the importance of the first foundational cases of EU law lies not only in their 'constitutional' significance, but also in the contribution they gave to the development of the intertwined security and fundamental rights discourses from the perspective of autonomy and effectiveness/uniformity. In particular, *Van Gend en Loos* and *Costa v ENEL* flow from the 'speciality' of the EU legal order, which, on the one hand (*Van Gend*), empowers individuals – the rights discourse – and, on the other hand (*Costa*), empowers the EU legal order itself – the security discourse. These rulings are part of a set of 'pre-dictions' and 'retro-dictions', from which not only the strategic moves of the main actors but also their semantic patterns have formed a judicial framework of principles that have crystallised at the foundations of the EU polity.[38] Even the principles of autonomy and effectiveness/uniformity[39] (as well as loyalty, proportionality and subsidiarity, and the notion of common constitutional traditions)[40] are expressions of the security discourse which is articulated in two directions.

First, the EU project can only be secure if EU law is capable of producing effects at the domestic level, which benefit EU citizens uniformly. As a result, national provisions, even having constitutional character, cannot undermine the unity and effectiveness of EU law.[41] Second, the autonomy claimed by the EU legal order is both normative and institutional and is often the result of the robust interpretive role performed by the CJEU, which has defended it vigorously.

33 R R Krebs, *Narrative and the Making of US National Security* (Cambridge University Press 2015).

34 M Foucault, *The Archaeology of Knowledge* (AM Tavistock 1972) 49.

35 D Macdonnell, *Theories of Discourse* (Blackwell 1986) 4.

36 T A van Djik, 'Principles of Critical Discourse Analysis' (1993) 4 Discourse and Society 249, 254.

37 M Pecheux, *Language, Semantics and Ideology* (Macmillan 1982).

38 A Vauchez, 'The Transnational Politics of Judicialization: Van Gend en Loos and the Making of the EU Polity' (2010) 16 European Law Journal 1, 5–6.

39 See e.g. Case 43/75 *Defrenne v Sabena (No 2)* ECLI:EU:C:1976:56; Case 41/74 *Van Duyn v Home Office* ECLI:EU:C:1974:133; Joined Cases C-6/90 and C-9/90, *Francovich v Italy* ECLI:EU:C:1991:428.

40 See e.g. Article 6(3) TEU.

41 Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114, para 3; Case C-409/06 *Winner Wetten* ECLI:EU:C:2010:503, para 61; Case C-416/10 *Križan* ECLI:EU:C:2013:8, para 70.

As is well known, the idea that the EU legal order has a constitutional character has been repeatedly emphasised by the CJEU in its case law.[42] However, precisely because of the concerns deriving from the tension between the transnational and the national level, from the 1970s onwards the fundamental rights discourse has been a necessary legitimacy- and autonomy-enhancing tool, as part of the CJEU's weaponry. A constant effort to boost the EU's credentials as a distinct creature of transnational law has led to an assertion of autonomy, on the one hand, vis-à-vis its Member States,[43] and, on the other, vis-à-vis international law.[44] Such autonomy implies that the interpretation of fundamental rights that lies at the core of the EU legal system is in line with the EU's structure and objectives.[45] These moves may be interpreted as part of the EU ongoing strategy of self-justification and self-empowerment accomplished *in the name of the peoples of Europe* through the security and fundamental rights discourses.

The same discourses resurface time and again, not only in the case law of the CJEU, but also in official speeches in times of crisis. The EU liberal project cannot be interrupted, because people demand it. The *finalité* of European integration – sometimes overtly federalist, often leaving little space for reflexivity – simultaneously requires further enlargement and reinforced cooperation, because any alternative solution would lead to self-destruction and 'would demand a fatal price above all of our people'.[46]

In addition, domestic standards of protection of fundamental rights cannot prejudice either the standards provided by the CFR or the principles of primacy, unity and effectiveness of EU law.[47] The reason for this, as pointed out by the CJEU, is that Article 53 CFR prescribes that nothing in the Charter is to be interpreted as restricting or adversely affecting fundamental rights as protected by EU law and international law, international agreements and the Member States' constitutions. The CFR is thus the cornerstone of the EU legal system of protection of fundamental rights: its provisions must be respected not only by the institutions, bodies, offices and agencies of the EU, but also by the Member States when they implement EU law.[48] It is in light of the interplay between the security and fundamental rights discourses that the CJEU held that the draft agreement for the accession to the European Convention on Human Rights would affect 'the specific characteristics of EU law and its autonomy' and would therefore not be compatible with Article 6(2) TEU.[49]

A first important contradiction to be pointed out is that the CJEU tends to protect fundamental rights only to the extent that their recognition is instrumental to ensuring the primacy, uniformity and effectiveness of EU law: fundamental rights may be restricted for

42 See e.g. Case C-294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166; Opinion 1 /91 Draft EEA Agreement ECLI:EU:C:1991:490.

43 Case 29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft* (n 41); Case 4/73 *Nold v Commission* ECLI:EU:C:1974:51. More recently Case C-399/11 Melloni ECLI:EU:C:2013:107.

44 Joined Cases C-402/05 and 415/05 *Kadi and Al-Barakaat* ECLI:EU:C:2008:46; C-160/09 *Katsivardas- Nikolaos Tsitsikas* ECLI:EU:C:2010:293.

45 Case 11/70 *Internationale Handelsgesellschaft* (n 41) para 3; Joined Cases C-402/05 and 415/05 *Kadi and Al-Barakaat* (n 44) paras 281–5.

46 Joschka Fischer, 'From Confederacy to Federation: Thoughts on the Finality of European Integration' (Speech, Humboldt University, Berlin, 12 May 2000) 3–5.

47 See, more recently, Case C-399/11 *Melloni* ECLI:EU:C:2013:107, paras 58–60.

48 Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105, paras 17–21.

49 CJEU Opinion 2/13 ECLI:EU:C:2014:2454, para 200.

the purposes of achieving the objectives set out by the Treaties,[50] above all the establishment of a common market[51] or the stability of the financial system.

The negotiations over Brexit and the challenges and difficulties posed by it merely confirm other contradictions of the security and fundamental rights discourses. On the one hand, despite the 'united in diversity' and the 'ever closer Union' mottos,[52] there emerges a demand for an increasingly differentiated process of integration.[53] This seems to be for many scholars the best way to preserve the internal market (the security discourse). On the other hand, while one of the principal aims of EU law has been that of strengthening individual rights to free movement and, more generally, fundamental rights (the rights discourse),[54] there is an acknowledgment that free movement of persons might not be an essential feature of the internal market and its rules may be adjusted to allow third countries (including the UK as a future, albeit special, third country) to conclude flexible agreements with the EU.[55]

In addition, the ambiguity of the security discourse has allowed a shift towards a self-referential attitude of the EU in the last decades which has weakened the social embeddedness of EU law-making. Social rights, for example, have sometimes been merely protected as a consequence of the application of the principle of formal equality (*Griesmar*; *Mouflin*)[56] or with a view to protecting the free movement of workers (*Decker*, *Elsen*)[57] or of services (*Kohll*).[58] Moreover, although there have been positive developments in the case law of the CJEU, a variety of lines ('inside' and 'outside' regimes of protection by law) have been drawn between different categories, such as workers and non-workers, or workers who benefit from secure full-time jobs and workers who do not.[59] In the face of increasing fragmentation, one may thus wonder whether and to what extent the very configuration of the EU as a polity is at stake as a result of the negotiations on the UK's withdrawal. Brexit could be interpreted as yet another warning sign of such fragmentation.

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50 Case 11/70 *Internationale Handelsgesellschaft* (n 41) para 4, where the CJEU ruled that the protection of fundamental rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structures and objectives of the Community'.

51 For example, in Case C-5/88 *Wachauf* ECLI:EU:C:1989:321, para 18, the CJEU points out that 'fundamental rights . . . are not absolute . . . but must be considered in relation to their social function', so that 'restrictions may be imposed on the exercise of those rights, in particular in the context of the organisation of a common market, provided that those restrictions correspond in fact to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'.

52 See both Preambles to the TEU and the TFEU, as well as Article 1 TEU, Consolidated Version of TEU and TFEU (n 11).

53 B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 Common Market Law Review 227; C Barnard and S F Butlin, 'Free Movement vs Fair Movement: Brexit and Managed Migration' (2018) 55 Common Market Law Review 203; K Nicolaïdis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' (2017) 70 Current Legal Problems 1.

54 D Edward, 'In Europe, History is the Unseen Guest at Every Table' (2018) 55 Common Market Law Review 251.

55 J Pisani-Ferry et al, 'Europe after Brexit: A Proposal for a Continental Partnership' (Bruegel Policy Paper, 29 August 2018) <http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/>; Barnard and Butlin (n 53).

56 Case C-366/99 *Griesmar* ECLI:EU:C:2001:648; Case C-206/00 *Mouflin* ECLI:EU:C:2001:695.

57 Case C-120/95 *Decker* ECLI:EU:C:1998:167; Case C-135/99 *Elsen* ECLI:EU:C:2000:647.

58 Case C-158/96 *Kohll* ECLI:EU:C:1998:171.

59 On this, see C O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart 2017).

In other words, if (a) the European project is to be more than a self-referential conglomeration of legal arrangements aimed at ensuring the smooth functioning of the internal market for its own sake, and (b) has an effective claim to constitutional autonomy, what should we make of the negotiable character of EU citizenship rights? How to reconcile the potential significant loss of rights associated with Brexit with the identification of EU citizenship as 'destined to be the fundamental status of nationals of the Member States',[60] a state of grace that aims to 'provide the glue to help bind together nationals of all the Member States'?[61] Can a polity be secure if it itself is not able to guarantee that at least some of its inherent features (including precisely the state of EU citizens) are preserved for an unlimited duration, until at least such time as that very polity provides a sufficiently thick reflexive layer through which its members can recognise themselves as members? The questions highlighted above point towards a powerful challenge to semantic or reflexive security. Article 50 TEU is a response to this challenge, because, as argued below,[62] it leaves each Member State free to choose whether or not it wishes to take part in the European project. In other words, the answer to the question 'How to be secure?' is provided by a particular arrangement of the polity that allows a more or less wide margin of manoeuvre to its components. Such an arrangement thus follows a 'heterarchical' form of ordering. As a result, from such a heterarchical perspective, reflexive security indicates that a transnational polity such as the EU is secure as long as its principles and objectives (including autonomy, effectiveness, uniformity, common constitutional traditions) are not imposed unilaterally upon its members. It follows that each member ought to be allowed to leave whenever it no longer shares the core ideas and values behind the project of integration.

3.2 Spatial security

Spatial security addresses the question of who 'the Other' is through the conceptual dichotomy inside/outside. A space is normally divided into inside and outside. However, the EU space is fragmented, in the sense that several *insides* and *outsides* can be identified within it. As a consequence, rights and benefits are distributed in an unequal manner. This dimension is thus characterised by the paradox of 'large space' (as explained below). This state of affairs had already become evident in the recent episodes of enlargement, which have laid bare the tension between the functional and normative claims of the European project. Brexit merely reformulates the paradox and prompts us to wonder how inclusive the EU ought to be.

In other words, the fundamental questions associated with spatial security ('Who is the Other? Where is it located?') can only be answered by drawing lines – which is fundamentally a constitutional act. As a result, the underlying conceptual dichotomy, inside/outside, becomes crucial. In fact, one of the main justifications of sovereignty is that it shields a 'secure' inside against an 'insecure' outside. The demand for security leads to the creation of a *space*, in which several states share security as a common good.[63] Such space is the *locus* of a tension between normativity and functionality. In fact, EU liberalism contains a dangerous paradox: when it proclaims its neutrality and ability to include as many claims as possible, its ambition to universality risks turning into an imperialistic

60 Case C-184/99 *Grzelczyk v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve* ECLI:EU:C:2001:458, para 31, and Article 20 TFEU.

61 C Barnard, *The Substantive Law of the EU* (4th edn, Oxford University Press 2013) 432.

62 See below, Section 3.3 on temporal and ontological security.

63 On the idea of space, see H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013) 56.

claim, thus creating a Schmittian *large space*.[64] The EU model of transnational integration and enlargement is caught in this paradox.

The paradox can be unpacked as follows. One of the key contentions of EU law is that of being able to configure citizens as individuals entitled to transnational rights claims and states as cooperative actors operating on an equal footing. From this perspective, the argument from demoi-cracy[65] often draws on both the republican value of non-domination and the liberal value of mutual recognition to promote the principles of democratic integrity, non-discrimination and equal rights.[66] Yet, while EU law proclaims the existence of a 'sacred' space, namely a privileged area, legally, politically and morally distinct from other regions of the world, characterised by universal values that can be exported across the globe,[67] in fact these values remain inevitably confined within borders and boundaries. Stating that values not borders define Europe, and that enlargement is a matter of extending the zone of European values, is a mere fiction that exposes the rhetoric of the large space.[68] Where a space is reduced to 'a collection of juxtaposed places', it fails to create 'a sense of belonging to a defined stretch of territory'.[69] A collection of places is a *u-topia*, in the literal meaning of a non-place, where, although there are multiple *insides* and *outsides*, lines are blurred and the ambiguity of fundamental rights discourses is as pronounced as ever. Precisely, when this happens, we witness the risk of the EU turning from a transnational polity into a large space. Brexit has pierced through the EU rhetoric and shown that, when a space is merely a collection of juxtaposed places, EU citizens become displaced and their identities as EU rights-holders reshaped. In other words, as a result of the uncertainty and complexity of the UK–EU withdrawal process, the promises associated with EU citizenship are highly questionable.

Arguably, a plurality of *inside* and *outside* is inevitable in a transnational polity in which multiple regimes (not only national v EU law, but also Customs Union, Schengen, Eurozone, opt-in and opt-out provisions etc.) operate within the same space. Such plurality of insides and outsides, which generate separate categories of individuals – such as the 'EU citizen' as opposed to the non-EU citizen (i.e. the 'third-country national', or the 'mobile EU citizen' as opposed to the 'non-mobile EU citizen') – allows plural claims, which vary depending on the category within which individuals find themselves. Here the ambiguous character of the fundamental rights discourse is particularly evident. To have rights *as an EU citizen* thus means not merely being entitled to a particular set of rights, but also being inscribed within a specific horizon, which is shaped by patterns of inclusion and exclusion.[70] In other words, the regime of EU citizenship not only presupposes but also produces the subjects who are regulated by EU law. The formulation of citizenship rights already assumes the exclusion of certain categories of individuals, such as, for example, those who do not circulate, or those family members

64 See, in another context, M Fichera, 'Carl Schmitt and the New World Order: A View from Europe' in M Arvidsson, L Brännström and P Minkkinen (eds), *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology* (Routledge 2016) 165.

65 See, more recently, R Bellamy, J Lacey and K Nicolaïdis, 'European Boundaries in Question?' (2017) 39 Journal of European Integration 483.

66 Ibid 490.

67 Fichera (n 28) 34, 42.

68 Olli Rehn, 'Values Define Europe, not Borders' (Speech, Belgrade, 24 January 2005): 'the map of Europe is defined in the mind, not just on the ground', thus suggesting a potentially unlimited extension.

69 K Nicolaïdis and J Viehoff, 'Just Boundaries for Demoicrats' (2017) 39 Journal of European Integration 591.

70 B Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 100.

who do not fall within the circumstances of justice prescribed by EU law. Rights discourses thus may be a vehicle for the disempowerment of individuals. For example, due to the existence of a number of exceptions to equal treatment and conditions for lawful residence, the provision of social assistance and social care for some categories of vulnerable individuals, including homeless citizens, may be very difficult. Although in theory access to social benefits and services should be ensured to citizens engaging in economic activities, the CJEU has not considered voluntary work in exchange for accommodation and maintenance by the Salvation Army (as part of a social reintegration scheme) as 'real and genuine economic activity'.[71]

Yet, spatial security can be viewed from another angle. From the point of view of self-preservation, it not only assumes but also necessitates that lines of inclusion and exclusion be drawn. This means that discourses of power are also about the empowerment of individuals as members of the EU polity, and as part of the self-justificatory conceptualisation of the EU. In fact, the ambiguity of the individual rights discourse can be interpreted as a form of openness that contains a 'democratic potential', in the sense of 'a solicitation to different groups within a polity to assert or to constitute themselves as rightful, co-equal members of that polity'.[72] However, for this emancipatory function to be performed, the act of drawing borders, both in the physical and in the normative sense, is inevitable. Otherwise, the distinction between *inside* and *outside* tends to blur: the abolition of spatial limits may then lead to the removal of the very category of 'the political'[73] and, with it, of the possibility of having a legal standing and formulating legal claims. Faced with the refugee crisis, for example, the EU as a polity and its legal system – typically, its institutional framework, built up both at the national and supranational level – are called upon to articulate and channel spatial demands through legal instruments. This type of demand, formulated by the categories of individuals generated by EU law, is inescapable and reflects both traditional, right-wing identitarian strategies and left-wing solidaristic arguments. The need for physical and normative borders can indeed also be expressed by emphasising the risk of compromising the social-democratic premises of continental Europe's *Rechtstaat*.[74]

Distinctions and refinements between multiple *insides* and *outsides* have also been produced during the negotiation on the UK withdrawal. For example, a 'special status' is conferred upon EU citizens in the UK and UK citizens in the EU who move before 'Brexit day' – 29 March 2019.[75] They will have the right to reside and work in the host state, as well as equal treatment rights. Moreover, these provisions are also addressed to spouses, registered partners, children and dependent parents or grandparents who are legally resident in the host state at the time of Brexit. Importantly, citizens' right to family reunification will be ensured, provided that the family link already existed before Brexit, even if the family member was not yet living in the host country. However, after Brexit

71 Case C-456/02 *Trojani* ECLI:EU:C:2004:488.

72 Golder (n 70) 90.

73 C Galli, *Spazi politici* (Il Mulino 2001) 170; R Esposito, *Da fuori- Una filosofia per l'Europa* (Einaudi 2016) 228.

74 A J Menéndez, 'The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration' (2016) 22 European Law Journal 388.

75 See e.g. Communication from the Commission to the European Council (n 23) 6.

day the strict requirements imposed by UK law will apply, thus removing the privileges associated with the status of EU citizen. To mention a few examples:[76]

(a) citizens who decide to live together as partners or marry after Brexit day do not benefit from EU citizenship rights;

(b) non-economically active migrants (such as those who renounce working to look after their children, or disabled and elderly individuals) may find it difficult or impossible to meet the requirements to acquire either 'settled' or 'pre-settled' status;

(c) there is uncertainty as regards the status of so-called '*Zambrano* carers' (non-EU citizens who are primary carers of EU citizens), who in some situations acquire the right to residency on the ground that their care is irreplaceable and would prevent genuine enjoyment of the substance of EU citizenship;[77]

(d) the margin of protection of UK citizens' free movement rights across Europe, children's rights or the migrant's right to return to the home country with his/her family members is either null or unclear. Importantly, 'any restrictions on grounds of public policy or public security related to conduct after the specified date will be in accordance with national law'.[78]

One may wonder to which extent the principle of non-discrimination on grounds of nationality can be respected as regards the provision of this 'special status'.

This state of affairs shows that concern for the social embeddedness of transnational norms is not necessarily present in the documents produced during the negotiations, which do not necessarily capture the complexity of the situations directly and indirectly covered by Brexit. Once again, the social constitution appears to be sidetracked or marginalised in the process of European integration.[79] In other words, from the point of view of spatial security, Brexit confirms that, while the EU portrays itself as a polity pursuing the liberal project of ensuring the privileged status of EU citizen uniformly, in practice, situations of discrimination and loss of rights are concrete possibilities. It is by pointing out such contradictions that the 'democratic potential' of citizenship rights (the empowerment aspect of rights), as 'the ability of different groups to assert themselves as co-equal members of the polity', may be brought to the surface.[80]

3.3 Temporal and ontological security

The temporal and ontological dimensions of security are closely interrelated. The former addresses the question of the direction of the EU polity through the conceptual category of time; the latter is about the nature of the EU.

76 On these issues, in particular the distinction between 'settled' and 'pre-settled' status, see 'EU Settlement Scheme: Statement of Intent' (UK Home Office, 21 June 2018) <www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>; D Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) Journal of Common Market Studies 1. A 'settled' status depends in most cases upon continuous residence in the UK for at least five years.

77 For more information, see Case 34/09 *Zambrano* ECLI:EU:C:2011:124.

78 Joint Technical Note on the comparison of EU–UK positions on citizens' rights, TF50 (2017) 17, 28 September 2017, para 27 <https://ec.europa.eu/commission/publications/joint-technical-note-eu-uk-position-citizens-rights-after-fourth-round-negotiations_en>.

79 K Tuori, *European Constitutionalism* (Cambridge University Press 2015).

80 This 'democratic potential' may also be expressed by claims that are not directly related to EU rights as such, e.g. the right to a free, fair and lawful vote: 'British Expats in EU Launch Brexit Legal Challenge', *The Guardian* (London, 14 August 2018).

Temporal security is a fundamental dimension of the European project. Its relevance goes beyond the mere idea of continuity. Just as space is stretched in the sense of a potentially unrestricted extension – thus producing the paradox of large space – so time is presumed to be infinite because Member States have limited their sovereign rights 'by creating a community of unlimited duration'[81] – thus generating the paradox of 'large time'. Temporal security is inherent in the very claim of autonomy and primacy of the EU as a legal order that is distinct from international law. Precisely because the European project stands above and beyond the national legal systems and purports to emerge as a unity that is more than the sum of its parts, it cannot admit of an end. The transfer of sovereignty to the EU polity and the binding force of EU law are necessary *for the very survival of the European project*, which is not a provisional arrangement for the achievement of a specific immediate objective. Yet, simultaneously, if time is extended indefinitely and integration is pursued for its own sake, the principle of self-determination of Member States as constituent parts of the European project is compromised.

Temporal security is in fact being challenged by Brexit. As shown in the table, temporal security addresses the question: 'In which direction are we moving?' There will be a 'before' and an 'after' Brexit day and this temporal *caesura* risks producing further inequality and ambiguity, in particular as regards personal situations, which fall in between the two phases. For example, the draft of the Withdrawal Agreement might be interpreted as incorporating the logic followed in *Lounes*,[82] so that naturalised migrant citizens continue to enjoy their EU rights, in addition to the rights they possess as nationals of the host state.[83] As seen earlier in this article, the result would be a 'special status' conferred upon a privileged category of individuals who exercise their free movement rights.[84] While this 'special status' may be justified by the need to encourage integration in the host state, one may still remark that a difference in treatment exists between free-movers and those who do not exercise free movement rights. Thus, from the perspective of temporal security, one may observe that rights associated with the status of EU citizen are not conferred for an indefinite period of time: they are still very much parasitic on the status of national citizen and, consequently, on whether or not the state of nationality retains membership of the EU. Ultimately, the answer to the question 'In which direction are we moving?' seems to be that further integration is for the moment very difficult to achieve.

Ontological security (addressing the question: 'What is the best interpretative scheme to understand the EU?') is also challenged by Brexit. The notion of ontological security is fundamental for a polity: its premise is that 'states and other political actors seek to promote not only material and strategic interests but also some form of self-identity in their interactions with other actors in the international arena'.[85] What the EU is and how it represents itself is crucial for its development, because it is indicative of the type of

81 Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, para 3. See also Case 7/71 *Commission v France* ECLI:EU:C:1971:121, as well as Articles 53 TEU and 356 TFEU: 'This Treaty is concluded for an unlimited period.' Similarly, the failed European Political Community (EPC) was declared 'indissoluble' (Article 1 EPC Treaty). By contrast, the Treaty of Paris (1951) setting the European Coal and Steel Community (ECSC) had a limited duration of 50 years.

82 Case C-165/16 *Lounes* ECLI:EU:C:2017:862.

83 Article 9(1)(a) and (b): citizen rights apply to citizens who exercised their right to reside in either a Member State or the UK in accordance with EU law before the end of the transition period and continue to reside there thereafter.

84 On the 'special status' conferred upon EU citizens in the negotiations, see Communication from the Commission to the European Council (n 23).

85 V Della Sala, 'Homeland Security: Territorial Myths and Ontological Security in the European Union' (2017) 39 Journal of European Integration 545, 548.

values that are expressed over a period of time and are subject to threat in specific circumstances. From this perspective, it may be argued that a true constitutional community should be able to preserve the rights associated with EU citizenship to their full extent even where one of its Members States withdraws. The argument would rely on the almost 'missionary' nature of EU citizenship as an independent and fundamental status.[86] However, quite apart from the political feasibility of this teleological interpretation of EU law, it has been noted above that the nationality of a Member State is a condition not only for the acquisition but also for the retention of EU citizenship, with the result that the latter is lost once that state is no longer a member. Inevitably, these considerations affect our configuration of the EU as a polity. Would the normative force of citizenship and the values protected by Article 2 TEU, as well as the structure of general principles and fundamental rights expressed by EU law, warrant an extensive or rather a narrow interpretation of citizenship rights? The answer is that constitutional principles related to the integrity of the EU legal framework are at stake: for example, it is not entirely clear whether and to what extent the transitional provisions contained in the agreement will have direct effect. It is also not clear whether, at the moment of adjudicating on the possibility of individuals relying on those provisions, the integrationist mind frame (and related principles, such as effectiveness, uniformity of EU law etc.) will still inform their interpretation.

A reference for preliminary ruling from the District Court of Amsterdam addressed some of these questions.[87] However, the Higher Court has in the meantime decided that the parties' claims were too general and hypothetical and could be dismissed without having recourse to preliminary questions.[88]

Although the preliminary ruling procedure has been interrupted, those questions can still be answered from a broad perspective.

In fact, threats to temporal and ontological security point towards a number of flaws in the European liberal project. In other words, the idea of the irreversibility of the process of European integration is now, for the first time, strongly disputed (the paradox of 'large time'). Just as in the other security dimensions, here too Brexit may thus reveal important contradictions or ambiguities of the EU polity.

In particular, Brexit seems to signal the failure of the programmatic nature of the 'ever closer union' provisions in the Treaty of Lisbon.[89] Nevertheless, the formulation of Article 50 TEU does not necessarily go against – and may actually be interpreted as bolstering – the security of the European project. In other words, Article 50 TEU may be configured as a compromise provision. It is precisely by allowing Member States to leave, according to explicit guidelines and within the framework of EU law, that the European project is reinvigorated, for those states which decide to remain may have a stronger reason to foster integration. Article 50 TEU is, in this sense, also a coming-of-age provision, which consolidates the claim of autonomy of EU law, as general international law on the right of withdrawal (such as *rebus sic stantibus*, impossibility of

86 Case C-184/99 *Grzelczyk* (n 60).

87 The preliminary questions were the following: a) does the withdrawal of the UK from the EU automatically lead to the loss of EU citizenship of UK nationals and thus to the elimination of rights and freedoms deriving from EU citizenship? b) If the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship? See C/13/640244/KG ZA 17–1327 Rechtbank Amsterdam.

88 ECLI:NL:GHAMS:2018:2009.

89 As noted earlier (n 52).

performance or material breach of the Treaty)[90] may be interpreted as inapplicable, in light of the exclusive jurisdiction of the CJEU.[91]

Article 50 TEU may also be read in a new light, if considered from the perspective of differentiated integration.

In the recent Rome Declaration, a cautious version of the formula of differentiated integration was rendered as follows: '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.'[92] This statement echoed a bolder version of the option of differentiation presented by the European Commission in its White Paper on the Future of Europe published on 1 March 2017.[93] Among the five possible scenarios for the EU's future, one was identified by the Commission as '[t]hose who want more do more': this scenario envisages the creation of several 'coalitions of the willing' that would carry forward new cooperation projects in areas such as defence, security and justice, taxation, and social policy; and the other Member States would be able to join those projects at a later stage, as soon as they would be ready or willing to do so. This scenario seems to be much more in line with the passage from self-referential to heterarchical security as suggested in this article.

Of course, it may also be argued that the very fact that Brexit 'will be conducted through Article 50 TEU is to accept the continuing political and legal authority of the EU until withdrawal has occurred'.[94]

However, despite the considerations above, there are no guarantees that principles and values underpinning European constitutionalism will be fully respected during the Brexit negotiations. Hence, even in the context of temporal and ontological security, the ambiguity of the security and fundamental rights discourses can be observed.

3.4 Popular and epistemic security

Popular security is about the *demos*. This is a well-known and controversial theme, which does not need to be reprised here. It may be noted briefly that *demos* (or the absence thereof) speaks to the security of a constitutional arrangement because of its deeply entrenched identitarian connotations. People(s) and *demos* are strictly interrelated concepts, although they do not necessarily coincide, as the latter may also be understood in a narrow sense, embracing those individuals who take part in the democratic process of a polity.[95] However, when conceptualised as *demos*, the idea of people(s) is often associated with 'a sense of social cohesion, shared destiny and collective self-identity

90 See, in particular, Articles 60 to 62 (and related Articles 54 and 56) Vienna Convention on the Law of the Treaties, 23 May 1969, UNTS vol 1155, 331, as well as customary international law.

91 Article 344 TFEU, referring to Article 259 TFEU. For this argument, see e.g. J A Hill, 'The European Economic Community: The Right of Member State Withdrawal' (1982) 12 Georgia Journal of International and Comparative Law 335, 351.

92 Rome Declaration of the Leaders of 27 Member States and of the European Council, the European Parliament and the European Commission, 25 March 2017 <www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/pdf>.

93 European Commission White Paper on 'The Future of Europe' COM (2017) 2025, 1 March 2017.

94 K A Armstrong, *Brexit Time – Leaving the EU: Why, How and When?* (Cambridge University Press 2017) 210.

95 M E Jolly, *The European Union and the People* (Oxford University Press 2007) 68.

which, in turn, result in and deserve loyalty'.[96] Be that as it may, whether viewed as a source of law, as an almost mythical 'nation',[97] or as an exclusionary category, subject to the principle of the constitutive outside – in such a way that it is always bound to exclude certain categories and include certain others[98] – popular security lies at the foundations of a polity. For, despite all potential and actual contradictions that can be found in the tautology of the people(s),[99] the evocative power of this imagery is one that binds together and brings to unity what is initially not unified.

Yet, the popular dimension of security is being challenged by the idiosyncratic mechanisms of governance in recent decades, which have dismissed many of the democratic tenets practised by the Member States: recent events have essentially confirmed both the deficiencies which were denounced by the critics and the disaffection in the population at large with the way decision-making takes place.[100]

The waves of left-wing and right-wing populism in many European countries are but one symptom of this 'political' turmoil.[101]

The failure of the EU machinery to embrace the complexity of the people(s) and the extent to which, for better or worse, they are a fundamental construct of European integration, speaks to the need to delve deeper into the importance of the popular dimension. In order to do so, it is useful to engage with the epistemic dimension, too.

Epistemic security is also being challenged by Brexit. In this context, the dichotomy 'one–many' is central and allows us to understand better the failure of the one-size-fits-all model that has at times resurfaced in the official rhetoric of the EU (i.e. a model of integration that does not take sufficiently into account national idiosyncrasies). The crucial question of epistemic security is to what extent multiple rationalities or claims of authority can co-exist. How can we ensure the survival of a transnational polity in which the conflictuality among several levels is not only visible but is also growing? This has turned into a recurring theme not only among EU law scholars, but also beyond their inner circle.[102] Although Brexit in itself does not increase multi-level conflicts, it indicates that such conflicts exist and may resurface, sometimes unexpectedly, as occurred with the

96 J Weiler, U Haltern and F Mayer, 'European Democracy and its Critique' (1995) 18 West European Politics 4, 11. On the debate on the no-demos thesis, see also inter alia D Grimm, 'Does Europe Need a Constitution?' (1995) 1 European Law Journal 282; J Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision' (1995) 1 European Law Journal 219; W Streeck, 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 1 European Law Journal 31; A Moravcsik, 'In Defence of the Democratic Deficit: Reassessing the Legitimacy of the European Union' (2004) 40 Journal of Common Market Studies 603.

97 E De Sieyès, *Qu'est-ce que le Tiers état?* (Editions du Boucher 2002) 53: 'La nation existe avant tout, elle est l'origine de tout. Sa volonté est toujours légale, elle est la loi elle-même. Avant elle et au-dessus d'elle il n'y a que le droit *naturel*.' (original emphasis)

98 B Bosteels, 'Introduction: The People Which is Not One' in A Badiou et al (eds), *What is a People?* (Columbia University Press 2016) 1, 2–3.

99 J J Rousseau, 'On the Social Contract, or Principles of Political Right' in J J Rousseau, *Basic Political Writings* (D A Cress tr) (Hackett 1987) 147: 'before examining the act whereby a people chooses a king, it would be well to examine the act whereby a people is a people. For since this act is necessarily prior to the other, it is the true foundation of society'.

100 Armstrong (n 94)98; A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) 159; C Dupré, 'The Unconstitutional Constitution: A Timely Concept' in A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Constitutional Arena* (Hart 2015) 351, 368.

101 S Champeau, 'Populist Movements and the European Union', in S Champeau, C Closa, D Innerarity and M P Maduro (eds), *The Future of Europe: Democracy, Legitimacy and Justice after the Euro Crisis* (Rowman & Littlefield 2015) 195.

102 M Avbelj and J Komarek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

2016 referendum. Moreover, it may represent a precedent for the future. Ultimately, it may be observed that challenges to popular and epistemic security confirm once again the flaws deriving from the self-referential character of security.

4 The consequences of Brexit

In light of the conceptual framework adopted in the previous pages, which has shown how Brexit affects all dimensions of the security of the European project, it is argued in this section that Brexit points towards the need for further differentiated integration in the EU. The phenomenon of differentiated integration was formalised by the Treaty of Maastricht, which created areas, such as the Economic and Monetary Union (EMU), including only a selection of Member States. In particular, the UK adamantly opposed the creation of the EMU and the transferral of new competences to the EU in the area of social policy. In the case of the EMU, an opt-out was agreed for the UK and Denmark. In the case of social policy, a special Protocol enabled 11 Member States to opt in to a separate Social Policy Agreement laying down new competences for the EU. Once again, the UK was excluded.

In the Treaty of Amsterdam, a new opt-out regime (concerning free movement and immigration and asylum law) was set up, while at the same time incorporating the Schengen regime in the Treaties. The opt-out provisions concerned both the UK and Ireland. The Lisbon Treaty added a further layer of differentiation: in the field of police cooperation and criminal justice; in return for the adoption of the Community method in that policy area, the UK was entitled to an opt-out from future developments, as well as from existing Third Pillar legislation.

Finally, an agreement between the EU Member States and the UK concluded in February 2016 (but never entered into force) increased the degree of flexibility by allowing the implementation in the UK of special provisions, in particular concerning the free movement of persons.[103]

Following the start of the Brexit negotiations, a few options are currently open.

1. the Norwegian Approach, which implies joining the European Economic Area (EEA), including the provisions on the free movement of goods, services, people and capital;
2. the Swiss model, which involves the negotiation of a series of bilateral treaties governing relations with the EU in specific areas of common interest, especially free trade. In particular, the UK may rejoin the European Free Trade Association (EFTA), although technical barriers to trade in goods and services and free movement of persons are not covered by EFTA rules and would have to be the subject of separate bilateral agreements. While losing voice, the UK would retain significant financial obligations to the EU;
3. the World Trade Organization model which has no free movement of labour provisions and few provisions on the liberalisation of trade in services;
4. a Customs Union following the Turkish model; or
5. a modern generation trade and investment agreement following the Canadian model.

103 Draft Decision of the Heads of State or Government, meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, EUCO 4/16, Brussels, 2 February 2016; Draft Declaration of the European Commission on issues related to the abuse of the right of free movement of persons, EUCO 8/16, Brussels, 2 February 2016.

Whatever option is finally chosen, one should bear in mind that Brexit is the outcome of decades of short-sighted policies which should not have ignored the deep challenges associated with UK membership (as with other countries). Consequently, the solution would be to embrace diversity as a fact of life and at the same time push the European project forward, but only for a core number of Member States which share common values and ideas for future action. This would, on the face of it, represent a mere reformulation of 'multi-speed Europe' or of the 'concentric circles' model.[104] The Eurozone countries could thus form a selected group and operate in specific areas of cooperation, such as the Internal Market, social policy and the AFSJ. The remaining countries would instead cooperate with each other, but would remain free to join in at a later time. Yet, differentiation should not come at the expense of the economic and social constitution. Self-referential security (whether it has pushed for more unification or for more diversification) has promoted a model of integration which has systematically sidetracked concern for the social embeddedness of transnational norms. While this was by no means the only factor behind Brexit, it is certainly a major aspect that should be taken seriously into account when evoking any 'future of Europe' scenario.

5 Conclusions

The events associated with Brexit may provide relevant elements to assess the nature of the European project and the reasons behind it. The argument detailed in this article is that security can be identified as a meta-constitutional rationale, namely a 'superior' reason that operates beyond and sometimes also in contrast to the explicit provisions of EU constitutional law. Security is expressed by two discourses of power (security and fundamental rights) which have been constitutive of the process of European polity-building and yet are characterised by ambiguities and contradictions. Brexit confirms this consideration in the specific case of EU citizenship and free movement rights, which normally have an important role in creating bonds between the members of a transnational polity and are thus a key element of these discourses. However, they seem to be easily removable or at least endangered in the case of withdrawal of one Member State.

In particular, it is possible to observe how all six dimensions of security – spatial, temporal, ontological, popular, epistemic and reflexive – have been affected to some extent by Brexit. Reflexive security addresses the question of how a polity can be secure. In the particular case of Brexit, the challenge consists of guaranteeing that at least some of the EU polity's inherent features (including the status of EU citizen) are preserved. By leaving each Member State free to choose whether or not it wishes to take part in the European project, Article 50 TEU responds in part to this challenge, although there is considerable uncertainty as regards the status of EU citizens. Spatial security looks at the question of the 'Other' through the conceptual dichotomy 'inside/outside'. Brexit confirms that, behind the drive for the implementation of relevant principles of EU law (e.g. unity and effectiveness), situations of discrimination and loss of rights are concretely possible, for example when an unpredicted event, such as the withdrawal of a Member State, takes place. Highlighting these situations is very important because it enhances, at least in theory, the ability of those groups that are affected by Brexit to assert their rights as co-equal members of the polity. Temporal and ontological security (addressing, respectively, the questions of the direction of EU integration and the nature of the EU polity) are challenged by the failure of the programmatic nature of the 'ever closer union'

104 See e.g. J A Usher, 'Variable Geometry or Concentric Circles: Patterns for the European Union' (1997) 46 International and Comparative Law Quarterly 243.

provisions in the Treaty and again it is useful to point out the constitutional relevance of Article 50 TEU as a security-oriented provision. The popular dimension of security may help us to emphasise the failure of the EU machinery to embrace the complexity of the people(s) and is intimately connected to the recurring debate on the *demos*. Epistemic security, relating to the question of the extent to which multiple rationalities or claims of authority can coexist, must deal with the degree of conflictuality between different levels of governance, which Brexit, as well as other 'crises' currently undermining the European project, have highlighted.

In addition to the descriptive analysis mentioned above, security may also provide a normative conceptual framework to understand Brexit and its relationship with EU law: such a framework emerges simultaneously as an opportunity for growth and as a threat to the European project. Brexit should be considered a lesson for the future, because self-referential, navel-gazing security (i.e. pursuing the European project for its own sake – whether pushing for more unification or for more diversification) has promoted a model of integration which has not necessarily taken into account the diversified needs of the Member States. In other words, although the EU should make more effort to avoid the fragmentation of the Internal Market, differentiated integration should not be dismissed too easily, and future policies and regimes should take the economic and social constitution more seriously. The hope is that both conceptual frameworks employed in the article – descriptive and normative – will provide a starting point for future research in the field.