

# Brexit, Voice and Loyalty: Reflections on Article 50 TEU

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☞ keywords to be inserted by the indexer

Article 50 TEU, which was introduced by the Treaty of Lisbon, regulates for the first time the process of a Member State's withdrawal from the EU. The incorporation of an "exit clause" in primary law confirms the "public character" of the Union<sup>1</sup> and its democratic architecture which is not congruent with the idea of perpetual membership without options. The Member States have always had the freedom to negotiate transitional arrangements, derogations, opt-outs and enhanced co-operation arrangements internally in accordance with the Treaties, but they were also endowed in 2009 with the option of voluntary withdrawal from the Union. Accordingly, the Member States have the freedom to act in a "variety of situations".<sup>2</sup> The institutional edifice of the EU has accommodated intergovernmentalist interests, national anxieties and domestic concerns over the decades and, by so doing, it has acknowledged that no union is perfect, that is, entirely coherent or fully optimal.<sup>3</sup> At the same time, it has displayed flexibility and institutional innovation; one cannot disregard the adoption of the novel institutional mechanisms of differentiated integration since the 1990s and the carefully crafted provisions on enhanced co-operation.<sup>4</sup>

Like all organisations, the associative Union of European States and Peoples has fully accommodated Hirschman's well-known distinction of exit, voice and loyalty.<sup>5</sup> If "voice" (or "voices") by a Member State fails to yield the desired effect, it is free to exercise its right to exit. In ordinary organisational environments, this dualist strategy is translated into either fight or flight. Voice is thus the strategy of procuring change. As Hirschman put it,

"to resort to change, rather than exit, is for the customer or member to make an attempt at changing the practices, policies and outputs of the firm from which one buys or of the organisation to which one belongs. Voice is here defined as any attempt at all to change, rather than to escape from, an objectionable state of affairs ...".<sup>6</sup>

If neither voice nor exit is pursued, for political, legal or purely pragmatic reasons, the alternative is, of course, loyalty. In public (or associative) unions, which are based on a community of interests and values, there exists limited room for rebellions or the unrestrained and uncontrolled pursuit of sectoral interests.

<sup>1</sup> P.S. Reinsch used this term in "International Administrative Law and National Sovereignty" (1909) 3 *American Journal of International Law* 1. He stated inter alia that "the public unions which have been formed by the action of states and which are now operating as public agencies of international interests, indicate the extent to which the national authorities have come to realise the importance of interests and activities that transcend in their operations the boundaries of the national state ... The interests which they represent and administer can be understood only when we consider the human world as a totality of interrelated forces and activities": at 1.

<sup>2</sup> The term is borrowed from W. von Humboldt, *Gesammelte Schriften*, Vol.1 (Berlin: Behr, 1903), p.106.

<sup>3</sup> See A. Stubb, "A Categorisation of Differentiated Integration" (1996) 34 J.C.M.S. 283; S. Lavenex, "Concentric Circles of Flexible 'European' Integration: A Typology of EU External Governance Relations" (2009) 9 *Comparative European Politics* 372.

<sup>4</sup> Title IV TEU Treaty; and Title III TFEU.

<sup>5</sup> A. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Cambridge, MA: Harvard University Press, 1970).

<sup>6</sup> Hirschman, *Exit, Voice, and Loyalty* (1970), p.30.

This is because the latter contradicts the public nature of the union and the institutional framework that governs the organised plurality.

When this is said, it is plain to see that, irrespective of its power, population or founding membership status, a Member State cannot, and should not be allowed to, disregard either the public union's institutional framework or its history or both, since the former is anchored on the latter. The presuppositional framework on which public unions are premised does not include the simultaneous combination of voice and exit in the sense of issuing an ultimatum, such as "if you do not listen to us and give us what we want, we will exit". If such ultimatums were seen to be permissible and legitimate, the union's integrity would be amputated and its role and functions would be devitalised.

Giving a dissenting Member States the licence to ignore the voice and exit mechanisms existing in the Treaties would also be tantamount to authorising the EU's involvement with domestic political games and intra-party interests and agendas, but the EU can only be guided by the "collective good". It cannot operate in the service of a certain Member State or of the ideology of its (transient) ruling elites. In this respect, it could be argued that the UK Government's "renegotiation" of its membership with the EU under the shadow of a public vote on a leave or remain question would breach the *acquis communautaire* and introduce a number of cracks into the orderly functioning of the Union. Threats of a Brexit (or a Grexit) contravene the voice and exit provisions of the Treaty and result in subjugating the Union into domestic political games and exigencies.

It should be mentioned, here, that art.13 TEU outlines the values, objectives and interests of a collective union: it states that the institutional framework of the Union,

"aims to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."

In addition, the negative duties entailed by the principle of "sincere cooperation", namely, the duties to "facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives" (art.4(3)(3) TEU), prevent the non-observance of the Treaty's provisions on voice and exit and the making of "new deals" which are then put to the public to vote on.

Loyalty to the Union, its values and the collective good of citizens and states is not tantamount to silence. If one examined carefully the process of European integration, one would discern vocal opposition, crises, difficult negotiations and compromises. As it has been observed, the EU is a community of "antinomic co-operation".<sup>7</sup> Indeed, one could argue that it is often loyalty to a vision of Europe that propels voice(s) and a commitment to reform. However, in the light of the British EU membership referendum, it might be argued that if another Member State in the future were allowed to force a renegotiation of its contractual obligations under the threat of exit, to cause a disruption in the ordinary operation of the Union and to impede the implementation of its activities, the EU would cease to be a *public* union.

Given that a lot of energy, time, hard work and commitment have been invested in designing the EU's institutional framework and in adopting provisions which accommodate the different opinions, views and concerns of the Member States within a Treaty-based framework that caters for the citizens and residents of the Union as well, arts 4(3), 13 and 50 TEU must be respected. In contemplating withdrawal and referenda, the Member States cannot appease themselves that they engage in *actio in distans*. Their actions as well as official discourses in national arenas affect their partners, the citizens and residents of the Union here, now and in the future. If they do not follow the voice or exit provisions contained in the Treaties, their actions essentially undermine the integrity of the EU's institutional framework and can easily lead to a decline in trust and confidence in the EU.

<sup>7</sup>D. Kostakopoulou, "Democracy-Talk in the European Union: The Need for a Reflexive Approach" (2003) 9 *Columbia Journal of European Law* 411.

And of course, there exists the symbolic horizon, too. No Member State can be seen to believe that it has all the rights and none of the obligations. It is the case that, in the eyes of its partners, the UK has behaved in a selfish way. Mr Cameron failed to tame the resurgence of nationalism and its corollary euroscepticism in his party and dragged the whole EU into a theatre of national political games and domestic party politics. In some ways, the UK has behaved like Narcissus, the character of the Greek mythology who was so self-absorbed that he disregarded everything outside himself. Interested in his image, absorbed by his illusional self-grandeur and caring for nothing apart from the picture of himself he had created in his mind, Narcissus turned his back on reality with a tragic end. Evidently, narcissistic behaviours do not advance the interests of public unions. A Union of narcissistic Member States is incomprehensible.

In the post-referendum landscape, it seems to me that the agenda of the next intergovernmental conference has to include the amendment of art.50 TEU. In the light of the British referendum on EU membership, I wish to suggest the insertion of a new sentence into para.50(1) TEU. The latter would read as follows:

“Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. In so doing, it shall respect the Union’s institutional framework and the principle of sincere co-operation under Article 4(3) TEU.”

The insertion of the latter sentence would remind any Member State contemplating withdrawal that it cannot ignore its obligations under the Treaties and behave as if it possessed unlimited rights. For when a Member State decides to activate art.50 TEU, it triggers a process of “conjunctive transition”, that is, it is embarking upon a gradual process of withdrawal, and its obligations, including the obligation to respect the *acquis communautaire* which flows from its EU membership, continue until the withdrawal agreement enters into force. A Member State, therefore, should not assume that it is disjunctively related to the EU because it has raised a withdrawal issue or has even activated art.50 TEU by notifying its intention to the European Council. Nor should it assume that it could force a renegotiation of its obligations under the shadow of a national referendum. It continues to be a member of the European collectivity because the EU is a power-sharing and rule-setting public union governed by the Treaties which are its constitutional document.<sup>8</sup> And as the principle of sincere co-operation (art.4(3) TEU) has been given a constitutional quality, no Member State should act unconstitutionally.

There is an additional reason as to why the EU needs to exercise institutional leadership by ensuring that there will be no repetition of the UK’s actions by another Member State in the future. Voice, in the form of transitional arrangements, derogations, negotiated opt-outs and enhanced co-operation initiatives, or orderly exit under art.50 TEU, should be the only options in cases of “disloyalty”.<sup>9</sup> For even when a State withdraws from the Union, it will never be in a position of pure externality vis-à-vis the Union. It will become a third country, but will also continue to be next to its neighbours and to be tied in a loose or looser way to the other European States in a Union. As such, it cannot ignore the EU for there is nothing between itself and Europe. It will be next to “Europe” and in Europe. The treaty it will negotiate with the EU will not sever all the webs of entanglement and, for this reason, it would have to think carefully about the type of relationship that being in Europe and next to “Europe”, that is, the EU, might entail.

<sup>8</sup> *Parti Ecologiste Les Verts v Parliament* (294/83) [1986] E.C.R. 1339; [1987] 2 C.M.L.R. 343.

<sup>9</sup> Hirschmann, *Exit, Voice, and Loyalty* (1970), p.30.