

Brexit, Voice and Loyalty: Reflections on Article 50 TEU

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Article 50 TEU, which was introduced by the Treaty of Lisbon (in force on 1 December 2009), regulates the process of a Member State's withdrawal from the European Union. It provides that, if a Member State wishes to disentangle itself from the Union 'in accordance with its own constitutional requirements' (Article 50(1) TEU), it shall notify the European Council of its intention. The Union will then negotiate an international agreement in accordance with Article 218(3) TFEU, which envisages the submission of recommendations by the Commission to the Council which shall adopt a decision authorising the opening of negotiations. The agreement will be concluded on behalf of the Union by the Council acting by qualified majority voting, after obtaining the consent of the European Parliament.

Following the entry into force of the withdrawal agreement, the Treaties shall cease to apply to the withdrawing state. If an agreement is not reached, Article 50(3) TEU notes that the Treaties will not apply to the withdrawing Member State two years following the notification of its intention to the European Council (Article 50(3)).¹ The withdrawing Member State will not participate in the discussions of the European Council or of the Council or in decisions concerning it, and, if it wishes to re-join the Union in the future, it would have to submit a new membership application in accordance with Article 49 TEU.

The incorporation of an 'exit clause' into the Treaty of Lisbon confirms the 'public character' of the Union² and its democratic architecture which is not congruent with the idea of perpetual

¹ Article 50(3) TEU also envisages an extension of the two year period by a unanimous decision of the European Council and in agreement with the Member State concerned.

² Paul S. Reinsch used this term in "International Administrative Law and National Sovereignty" (1909) 3(1) *The American Journal of International Law*, 1-45. 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,

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'.³ The institutional edifice of the European Union 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.⁴ 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 cooperation.⁵

Like all organisations, the associative Union of European states and peoples has fully accommodated Hirschman's well known distinction of exit, voice and loyalty.⁶ 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...'.⁷ If neither voice nor exit is pursued, for either political or legal or purely pragmatic reasons, the alternative is,

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'; *ibid*, p. 1.

³ The term is borrowed from Hamboldt; *Gesammelte Schriften*, Vol. 1 (Berlin: Behr, 1903), p. 106.

⁴ See Alexander Stubb, "A Categorisation of Differentiated Integration" (1996) 34(2) *Journal of Common Market Studies*, 283-295; S. Lavenex, "Concentric Circles of Flexible 'European' Integration: A Typology of EU external governance relations" (2009) 9(4) *Comparative European Politics*, 372-393.

⁵ The enhanced co-operation provisions are in Title IV of the EU Treaty and Title III of the TFEU. It was previously known as closer co-operation.

⁶ A. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Cambridge MA: Harvard University Press, 1970).

⁷ *Ibid*, p. 30.

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. 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 ultimata 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 license to ignore the voice and exit mechanisms existing in the Treaties would also be tantamount to authorising the Union's involvement with domestic political games and intra-party interests and agendas. But the Union 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 Union under the shadow of a public vote on a leave or remain question would breach the *acquis communautaire*⁸ and introduce a number of cracks in 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.

⁸ This term refers to the body of rules that govern the Union and everything that was agreed and decided since the establishment of three European Communities in 1957.

It should be mentioned, here, that Article 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' (Article 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 examines carefully the process of European integration, (sh)e will discern vocal opposition, crises, difficult negotiations and compromises. As it has been observed, the European Union is a community of 'antinomic co-operation'.⁹ Indeed, one could argue that it is often loyalty to a vision of Europe that propels voice(s) and a commitment to reform. But 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 European Union would cease to be a *public* Union.

Given that a lot of energy, time, hard work and commitment have been invested to designing the European Union's institutional framework and to 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, Articles 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

⁹ D. Kostakopoulou, "Democracy-Talk in the European Union: The Need for a Reflexive Approach" (2003) 9(3) *Columbia Journal of European Law*, 411-428.

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.

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 Euro-scepticism in his party and dragged the whole European Union 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 Article 50 TEU. In the light of the British referendum on EU membership, I wish to suggest the insertion of a new sentence into paragraph 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 Article 50 TEU, it triggers a process of

‘conjunctive transition’, that is, it is embarking upon a gradual process of withdrawal and that 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 European Union because it has raised a withdrawal issue or has even activated Article 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 European Union is a power-sharing and rule-setting public union governed by the Treaties which are its constitutional document.¹⁰ And as the principle of sincere co-operation (Article 4(3) TEU) has been given a constitutional quality, no Member State should act unconstitutionally.

There is an additional reason as to why the European Union needs to exercise institutional leadership by ensuring that there will be no repetition of the United Kingdom’s actions by another Member State in the future. Voice, in the form of transitional arrangements, derogations, negotiated opt outs and enhanced cooperation initiatives, or orderly exit under Article 50 TEU should be the only options in cases of ‘disloyalty’.¹¹ For even when a state withdraws from the Union, it will never be in a position of pure externality vis a 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 European Union 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 European Union, might entail.

¹⁰ Case 294/83 *Parti Ecologiste ‘Les Verts’ v Parliament* [1986] ECR 1339.

¹¹ Hirschman, n. 6 above.

Dora Kostakopoulou