

## (EU WITHDRAWAL) TEXTS, PRETEXTS AND EPIGNOSIS<sup>1</sup> IN THE UNITED KINGDOM

Dora Kostakopoulou

In the domain of politics, trial and error are frequent occurrences. Through trial and error we tend to discover that political decisions, policy choices and even customary ways of doing things are no longer sustainable and thus in need of revision. There is nothing wrong in recognising mistakes or misjudgments and changing course. The doors of perception are not always fully open for human beings; information asymmetries, errors of judgement, ideological standpoints and self-interest often lead individuals to poor visualisations of the future and thus to imprudent actions.

What is wrong, and often inexcusable, is to refuse to learn from error and to let it become irreparably destructive. In political life, inertia or the suppression of new information or a simple refusal to admit error in an attempt to save face and to maintain the illusionary hope that things might just work out in the end become manifestations of poor judgment and thus of very poor and ineffective leadership.

Both Advocate General Campos Sanchez-Bordona, who delivered his opinion on the revocability of Article 50 TEU on 4 December 2018,<sup>2</sup> and the Court of Justice of the EU which agreed with his interpretation that the United Kingdom can revoke the notification of its intention to withdraw from the European Union on Monday 10 December 2018 unilaterally,<sup>3</sup> essentially confirmed that trial and error are common in politics and that countries, like individuals, are entitled to change their mind.

Delivering the judgment a day before the scheduled crucial vote on the Withdrawal Agreement in the House of Commons, which has now been postponed, the Court of Justice suddenly opened the door for an *epignosis* and the possible abandonment of ‘cul-de-sacs’ and

---

<sup>1</sup> A Greek word meaning precise and correct knowledge, full appreciation or recognition following attentive notice. Its etymological roots are epi (upon) and gnosis (knowledge).

<sup>2</sup> Case C-621/18, *Wightman and Others v Secretary of State for Exiting the European Union*, Opinion delivered on 4 December 2018, Luxembourg. The full text is available on the CURIA website.

<sup>3</sup> Case C-621/18, Judgment of 10 December 2018. The full text is available on the CURIA website.

‘enigma variations’, that is, a no-deal Brexit, an EEA model of EU membership, a ‘Norway plus’ model and so on, in the United Kingdom’s relationship with the European Union.

Turning points like this do not happen frequently. Quite often, an *epignosis* takes place in retrospect; that is, when we experience what we have done and realise that what happened was different to what we had expected or had planned or simply had wished for. In other words, turning points occur when the consequences of decisions or actions are felt and reflected upon. In such cases, individuals could then engage in damage limitation.

Being granted the authorisation of the unilateral revocation of the notification to withdraw from the EU until such time as the withdrawal agreement is formally concluded in accordance with domestic constitutional requirements is a gift and a game changer. The Advocate General viewed it as manifestation of state sovereignty in the light of the Vienna Convention on the Law of Treaties and an expression the principle of respect for national identities enshrined in Article 4 TEU. The Court of Justice of the EU agreed that Article 50 TEU is a voluntary exit clause for its Member States and not an expulsion device.

As the Court put it, ‘the revocation by a Member State of the notification of its intention to withdraw, before the occurrence of one of the events referred to in paragraph 57 of the present judgment, reflects a sovereign decision by that State to retain its status as a Member State of the European Union, a status which is not suspended or altered by that notification’.<sup>4</sup> And ‘given that a State cannot be forced to accede to the European Union against its will, neither can it be forced to withdraw from the European Union against its will’.<sup>5</sup>

Academics and legal experts had supported the revocability of Article 50 in the past. Jean-Claude Piris had stated in *Financial Times* ‘intentions can change’<sup>6</sup> while Paul Craig had commented that a Member State could not be forced to withdraw from the EU if it changed its mind.<sup>7</sup>

In 2015/2016 political elites in the UK were overoptimistic about a future outside the European Union. They almost fictionalised it. They sought to convince the electorate by campaigning for an independent trade policy and telling people how the UK would prosper from trade deals with the US, Canada, Australia, India, China, New Zealand and other

---

<sup>4</sup> *Ibid*, para 59.

<sup>5</sup> *Ibid*, para 65.

<sup>6</sup> ‘Article 50 is not for ever and the UK could change its mind’, *Financial Times*, 1/09/2016.

<sup>7</sup> ‘Brexit: A Drama in Six Acts’ (2016) *European Law Review* 447, 464.

countries. At the time of the referendum on the UK's continued membership of the EU in June 2016, nationalism and the 'taking back control' agenda had aroused strong passions in the collective soul and had narrowed both human empathy and critical reasoning. A rise in racism, xenophobia, hate crime and divisions in society ensued. As 2018 draws to its close, pragmatism, which has traditionally characterised British politics and policy, gradually, albeit slowly, returns. It has become increasingly clear that the country would be poorer and less competitive outside the EU; higher inflation, lower GDP per capita, a rise in unemployment and falling house prices are inevitable according to most economists. People's incomes and jobs are at stake and the flight of businesses to other Member States confirms this. The idea of a 'global Britain' is acknowledged to be a paradox given that the country is negotiating its exit from the regional partnership and is turning away from the world it helped create with the other Member States since 1973, including all the trade agreements the EU has concluded with many third countries around the world. A global Britain cannot be built on a policy of undoing togetherness. The invocation of 'the spirit of the nation' or 'the will of the people' becomes progressively entangled with notions such as authored destructiveness or a collective suicide.

There are other dimensions too. One has to recognise that the unrestrained operation of the principle of majority rule tends to subvert, and not to advance, democratic political processes. After all, constitutions are drawn in order to protect individuals and groups from unrestrained electoral majoritarianism. Certainly, when a 'pro-Leave' majoritarian decision, such as the outcome of the UK's referendum on 23 June 2016, results in depriving millions of people of their rights thereby effectively undermining their life worlds and the future of their families, then there is no reason for thinking that such a decision complies with the values and the rights-affirming nature of constitutional democracy. It is highly debatable whether the domestic electoral cost of aborting Brexit can outweigh the political costs of damaging democratic constitutionalism and cancelling rights which sustain lifeworlds and social worlds for millions of people. Nor can it compensate for the unnecessary stress inflicted upon millions of individuals, including 1,2 million British nationals living in the European Union.

But in every level of human activity and in all realms of politics there is the choice of changing course in the presence of more information, less ideological thinking and countervailing forces. Ideological politics, often reinforced by doctrinal commitments, is prone to de-mythologisation. To fall prey to a continuous cult of unreason and to pretend that the choice of reversing Brexit is unavailable because 'Brexit means Brexit' is an

unacceptable error of judgment. If all the plans on the table and expert evidence show that Brexit was a game that cannot be won for the benefit of present and future generations in the UK (and in the EU), the revocation of the withdrawing intention is required in the national interest. The Court of Justice's decision on Article 50 on 10 December 2018 favoured flexibility and changeability under public law and signalled that trial and error in politics are normal.

The narratives, assumptions and (false) promises that surrounded the EU referendum campaign in 2016 in the UK and its aftermath cease to matter when there are grounds capable of justifying the reversal of the notification to exit the EU supported by cogent evidence and arguments. There is nothing particularly embarrassing in changing one's mind and/or admitting mood-swings, be they personal or collective. Nor would Britain be a unique case; almost all countries have experienced them. And all countries are free to devise and revise 'ends in view'<sup>8</sup> and thus to change courses of action. Motion and change are inherent in the political process.

---

<sup>8</sup> This is a term used by John Dewey; *The Way we Think* (Lexington, MA: D.C. Heath, 1910), p. 164. For a discussion on institutional change, see D. Kostakopoulou, *Institutional Constructivism in Social Sciences and Law: Frames of Mind, Patterns of Change* (Cambridge: Cambridge University Press, 2018), pp. 68-101.