Editorial

Extra Unionem Nulla Salus?
The UK Withdrawal and the European Constitutional Moment

It is possible that the 29th of March 2019 will be considered as the date on which the Union has ceased to be a quarrelsome community of sovereign States and has become a community of destiny.

This may well occur if, on that date, EU law will cease to apply to the UK, thus transforming the withdrawal of that State into a disorderly and ruinous retreat. This course is foretold by the insane sequence of resolutions taken by UK House of Commons on January 29. The House approved an amendment calling for re-opening the negotiations of the withdrawal agreement; it rejected an amendment to postpone the Art. 50 TEU negotiations period beyond March 29; passed an amendment to reject a no-deal Brexit in principle. An outside observer can hardly understand the route that is followed by the British Institutions less than two months from that fateful date.

However, far from revealing the fragility of the European edifice, this inauspicious outcome can turn out to magnify the Constitutional dimension of the process of integration.

A few weeks ago, *Wightman* (Court of Justice, judgment of 10 December 2018, case C-621/18) has opened a crack in this progressive *cupio dissolvi*. Awaited with feverish attention, the CJEU decision ruled that a State is entitled to revoke unilaterally its intention to withdraw, notified under Art. 50 TEU, as long as the withdrawal agreement between that State and the Union has not entered into force or the two years deadline established by that provision has not expired.

The Court did not follow the radical international law approach suggested by the AG Sánchez-Bordona in his Opinion released on 4 December 2018, but rather preferred to frame the unilateral power of withdrawal in its traditional Constitutional conception.

In para. 44, the Court said: "it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union, established, unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals".

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This sentence broadly follows the lines of previous and well know case law. Before the entry into force of the Lisbon Treaty, it would have probably included a further qualification of the Constitutional nature of Union, namely the irrevocability of the transfer of competence from the Member States. This is what the Court did in *Simmenthal* (judgment of 9 March 1978, case 106/77): "[a]ny recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community" (para. 18).

Viewed against this precedent, Art. 50 TEU seems thus to constitute a regression from the previous achievements of the case law. Of course, neither a holding of a Court nor a legal provision could prevent the splitting of a political community. However, and conversely, the inclusion in a legal text of a right to withdraw or to secede, namely the right to determine in splendid isolation its own destiny, appears to be at odds with the very idea of a Constitutional community. As indicated by the Supreme Court of Canada, (judgment of 20 August 1998, case [1998] 2 S.C.R. 217, *Reference re Secession of Quebec*, para. 90 *et seq.*), the destiny of a part of that community cannot be unilaterally determined, but it ought to be determined through a process that takes into account the part as well as the whole.

Possibly to soothe the anxieties of the Member States (MS), Art. 50 TEU departed from this logic. As recognized in *Wightman*, the unilateral power to withdraw from the Union constitutes a corollary of the enduring quality of the MS as sovereign States, entitled to self-determine their own fate (para. 50). Starting from this premise, the Court went on to determine that a MS, which has notified its intention to withdraw, has the power "to revoke that notification unilaterally in an unequivocal and unconditional manner" (para. 75).

This consequence is logical from both a sovereignty-based perspective and a Constitutional perspective.

From a sovereignty-based perspective, it seems natural to assume that a State, which is empowered to express its intention to withdraw from the Union by virtue of its sovereignty, must be equally empowered, on the same basis, to revoke this intention, as long as it does not take effect. If would be illogical that State sovereignty, unilaterally exercised at the moment of the notification of its intention to withdraw, would downgrade during the interim period of negotiation to the point that the same State cannot unilaterally revoke it.

Second, and quite paradoxically, the same conclusion is logical also from a Constitutional perspective. In four paras, from 61 to 64, the Court recalled that the entire Union – the ever closer Union –, together with its citizens, are affected by the unilateral decision of one of its MS to withdraw. The revocation thus contributes to recast the unity of

that Constitutional order. In a sense, the unilateral power of revocation is the backstop that remedies the unwarranted consequences of the establishment of a unilateral power to withdraw.

Precisely the UK could still make wise use of that backstop. Without stepping into issues touching upon deep-rooted political sensitivities, there is a case to be made that this option would not necessarily betray the free will of the British peoples expressed by the referendum of 23 June 2016. As convincingly said by the Canadian Supreme Court (*Reference re Secession of Quebec*, cit., para. 93), respect for democracy demands that, in a process of secession or withdrawal, peoples must be called to decide on a "clear question", unveiling all the consequences of a possible choice to leave a wider community. Otherwise, a referendum will be transformed into a plebiscite and the free will of the peoples transformed into a mad race towards an unknown destination.

Is that what is happening with the UK? Were the consequences of a decision to leave the Union clear to the voters of the 2016? Is it sacrilegious to assume that the seductive, yet generic idea to take back control, that played a decisive role in the 2016 campaign, ought to be re-meditated in light of a debate that did not take place before the referendum? Whilst an attempt to answer these questions appears to be temerarious, at least for the current Author, it does not seem illegitimate to ask them.

Regardless of the final outcome of Brexit, the events of these days may show that the links among the peoples of Europe have become so close that it is very difficult to untie them. They could make the prophecy of the functionalist philosophy come true, which advocated a *de facto* solidarity as the indispensable premise for the creation of a community sharing a common destiny.

It is certainly not the function of this *Editorial* to determine whether the moment has arrived to speak of Europe as a community of destiny. The relation between law and fact is ambivalent, and one should be wary of any attempt to encapsulate it in a predetermined legal doctrine. Sometimes the facts precede the law; sometime the law conditions the social facts. Who can say whether the inclusion in the founding treaties of a unilateral withdrawal clause has weighed on the decision to call a referendum on Brexit? And who can foretell whether, in spite of Art. 50 TEU, reality will disprove the realists by showing that a unilateral withdrawal from the Union, albeit permitted by the law, entails unacceptable consequence and becomes factually unbearable?

But the difficulty, if not even the impossibility, for the peoples of the Member States to part ways seems to indicate that the process of integration is becoming *de facto* irreversible and that these peoples are gradually being transformed into a full-fledged community. It is this process of transformation that heralds, in spite of the harsh present time, a Constitutional moment for Europe.

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