

## EDITORIAL

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### EXIT

For many, the morning of Friday the 24<sup>th</sup> of June 2016 was one of those mornings where, upon waking up, you feel like immediately going back to bed. Now, months after that morning's results of the 'Brexit' referendum, a general feeling of disbelief and incomprehension still prevails. So far, it appears difficult to make sense of why so many Britons voted to 'leave'. Nobody knows where Britain's and Europe's journey lies – least of all those who campaigned for Britain to 'leave' the European Union (EU). Only one thing is certain: Brexit raises a host of political, economic and legal questions. However, while the current legal debate already focuses on the exegesis of the 262 words of the notorious Art. 50 TEU, the political and legal 'message' that the 'Brexit' vote conveys remains a conundrum.

In seeking to understand the basic mechanics underlying Brexit, the totality of events surrounding the referendum offers us an occasion to rethink Albert O. Hirschman's well-known categories of 'voice' and 'exit' in the context of the European integration process.<sup>1</sup> Hirschman uses these two concepts to describe two alternative modes of reaction towards the deterioration in performance of any kind of social, economic or political organization. Whilst the 'exit' option refers to the possibility of leaving the dysfunctional organization, the 'voice' option implies that the organization's members articulate their dissatisfaction, rather than leaving the organization, in the hope of changing and improving the organization's performance from within.<sup>2</sup> The basic upshot of Brexit is that instead of choosing the 'voice'

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<sup>1</sup> This is not the first time that Hirschman's categories have been used to offer an explanatory model in the context of the European Integration process. See for instance Weiler, Joseph Halevi Horowitz, 'The Transformation of Europe' (1991) 100(8) *The Yale Law Journal* 2403. Both concepts are, however, applied differently here.

<sup>2</sup> Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press 1970) 4.

option, which constitutes the dominant strategy of articulating discontent within a political system, the majority of British voters expressed their dissatisfaction with the EU by opting for 'exit', thus renouncing any opportunity to express their dissatisfaction, or trigger changes, from within.<sup>3</sup>

Yet the most puzzling feature surrounding many Britons' vote, lies not in their choosing the 'exit' option as such, but in the apparent irrationality of such a choice. Indeed, the outcome of the British EU referendum casts doubt upon the validity of Hirschman's model, which frames the decision between the two alternative strategies, 'voice' and 'exit', as a rational choice based on costs and reasonable expectations about future benefits.<sup>4</sup> By contrast, the United Kingdom ('UK') chose the 'exit' option regardless of its tremendous economic costs.<sup>5</sup> Moreover, the 'exit' option also appears to be inconsistent with the 'leave' campaigners' political goal to 'make Britain great again'. Paradoxically, withdrawing from the EU, while remaining in the internal market, means that the UK will continue to be subject to EU regulation, yet, without having any influence on its future content. It is perhaps this startling irrationality of the 'Brexit' vote that legal research should try to understand, for it may provide interesting insights into the current state of the EU, the UK and the potential shape of their future relationship.

An initial, simple, but nevertheless insightful conclusion that we can draw from the results of the Brexit referendum, would be that democracy does not always go hand in hand with rational decision-making, not to mention the pursuit of the general interest of a political community. Indeed, Brexit perfectly epitomizes Rousseau's differentiation between the two categories of *volonté de tous* and *volonté générale*. While the former constitutes the mere aggregation of private, vested interests, only the latter guarantees the general interest, the *intérêt commun*.<sup>6</sup> Brexit also offers us the opportunity to

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<sup>3</sup> *ibid* 30.

<sup>4</sup> *ibid* 36.

<sup>5</sup> The UK HM Treasury analysis on the economic consequences of Brexit (published 3 months before the referendum) estimated the annual (!) economic costs of Brexit to be between £2,600 and £5,200 per household depending on the terms of the free trade agreement (EEA, Canada/Switzerland, or WTO) after the UK leaves the EU.

<sup>6</sup> Jean-Jacques Rousseau, *Du contrat social* [1762] (Flammarion 2001) 68.

remember how Rousseau, who is so often invoked as an intellectual pioneer of deliberative democracy, repeatedly stressed that the people must be sufficiently well-informed, so that the results of a direct, deliberative democratic process may adequately reflect the general interest of a polity.<sup>7</sup> Now, one can legitimately question whether the people of the UK were sufficiently well-informed in the case of the Brexit referendum. Arguably, the referendum was not really about 'Europe' and the goals, prospects and challenges of the EU integration process. Instead, internal party power plays, populist scaremongering and deliberate misinformation dominated political discourse and deliberation in the run-up to the referendum.

However, a serious attempt to understand the rationale underlying Brexit should go beyond the finding that it was an uninformed and, consequently, irrational choice. Instead, it would be more interesting to understand what might have caused the shift in the perception and 'frame'<sup>8</sup> of many British politicians and voters; a shift that, to many, made the 'exit' option appear as the better alternative to more than 40 years of choosing 'voice'. While constituting the dominant strategy for articulating discontent within a political system, the choice of the 'voice' option heavily depends on the 'prospects for effective use of voice'.<sup>9</sup> Accordingly, Brexit might be understood as a reaction towards a perceived loss of influence that the UK believes its voice has experienced within the EU. The shift from unanimity to qualified majority in most of the EU policy areas, the multiplication of players as a consequence of the EU enlargement waves and the important role of the 'judge-made' law of the Court of Justice of the European Union ('CJEU'), constitute only some of the factors that might explain the UK's impression that its voice is being disregarded within the EU.

However, it is not only the way in which EU rules are adopted that has shaped the UK's negative perception of the EU during the last years, but also the

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<sup>7</sup> *ibid* 69.

<sup>8</sup> 'A player's frame is, most simply, the set of variables she uses to conceptualize the game' Michael Bacharach and Michele Bernasconi, 'The Variable Frame Theory of Focal Points: An Experimental Study' (1997) 19 *Games and Economic Behaviour* 1, 4.

<sup>9</sup> Albert O. Hirschman (fn 2) 37.

substantive content of said rules. Contrary to recent popular contestations of EU policies elsewhere in Europe, the political uproar in the UK was not directed against 'austerity'. Rather, the EU policy field that was stigmatised most in the Brexit debate was – alongside banking regulations and 'red tape' in the internal market – the free movement and social rights of EU workers and citizens.<sup>10</sup> Hence, first and foremost, Brexit constitutes a rejection of those rights which lie at the core of the 'European Social Market Economy' in its current form.

Nevertheless, Brexit has also shown us which fields of EU law continue to appeal to the UK. Britain's conviction that it could remain part of the internal market, even after its withdrawal from the EU, albeit without the free movement of workers and persons, might explain how the 'exit' option could have been perceived as a viable alternative to their membership within the EU. Yet, this same conviction shows how flawed Britain's conception of the internal market is, as it ignores how the internal market goes beyond the utilitarian calculus of a free trade area. On the contrary, the internal market also constitutes a political project based on the idea, and promise, that socially constructed categories, such as nationality, should not have a determinant impact on a person's ability to realise its way of life. The current political discourse in Britain, but also in other EU Member States, overlooks the fact that the internal market has its roots in the goal of overcoming nationalism and creating a transnational space for economic, cultural and social exchange, opportunities and interdependence. Therefore, being part of the internal market without the free movement of persons, in the end, means not being part of it at all.

Applying the concepts of 'exit' and 'voice' to the outcome of the British EU referendum also allows us to shift our focus to those individuals whose 'voice' has not been heard during the referendum. What about the 'voice' of the 48.1 percent of the British voters who opted to 'remain'? What about the young generations who will bear the long-term consequences of the UK leaving the EU? Let alone the Britons who have lived within another EU Member State for more than 15 years and those EU Citizens who have lived and worked in

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<sup>10</sup> European Council, Conclusions of 18 and 19 February 2016, 13–24.

Britain for years and were not allowed to vote. The fact that those individuals who are most directly concerned by the outcome of the referendum, had no right to make their voice heard, casts doubt on its truly democratic character. Brexit will entail the loss of important and fundamental economic, social and political rights for those individuals in particular. So far, it remains completely uncertain whether said individuals will be able to effectively invoke and protect their rights, for instance, by challenging the Brexit decision before the British or even European courts. The exponential surge in British applications for citizenship of other EU Member States in the aftermath of the Brexit vote, as well as the perspective of a second Scottish referendum, suggest that the UK will sooner or later be confronted with its own issue of a wanted 'exit', raised – perhaps in many ways quite ironically – by those same individuals whose 'voices' have not been heard during the referendum.

Yet, the most worrisome feature of Brexit is not the outcome of the referendum as such, or the consequences that it will entail, but the music that both accompanied and enabled this decision: A cacophony of chauvinistic, intolerant and sometimes even openly xenophobic voices. The message that Brexit conveys goes beyond the simple rejection of a more political, 'ever closer Union'. It also symbolizes the widespread success of voices currently advocating an 'exit' from a value space that encompasses the basic legal and political achievements of liberal democracy. This phenomenon is, however, not confined to the UK. The same Siren calls currently lure popular support all over the continent and also dominate political discourse outside of Europe. From this perspective, Brexit also poses a broader question: How can we explain the disenchantment of an increasing part of the electorate, with some of the most basic fabrics of liberal democracy – which are in the end also genuinely legal? Understanding this broader phenomenon of 'exit' will become one of the most pressing tasks for social scientists and legal scholars in the upcoming years.

## **VOICE**

While the political events of the last months stand for 'exit', this issue of the European Journal of Legal Studies (EJLS) stands, once more, for 'voice'.

First of all, it stands for 'New Voices'. In this issue our 'New Voices' section features two fascinating essays. The first one, by *Simone Marinai*, touches upon what is currently one of the most salient political and legal issues in Italy. It discusses the Italian policy regarding the registration of same-sex couples, in light of the recent Italian law that introduces civil unions for same sex-couples, and the recent development of CJEU and ECHR case law on this matter. The regulation of online platforms, which increasingly affect our daily consumption patterns, is the topic of the second 'New Voices' essay, written by *Pablo Solano Díaz*. His essay, critically reviews the policies of National Competition Authorities and the EU Commission towards price parity clauses in digital markets – one of the hot topics of EU competition law.

The 'New Voices' section, which provides a platform for young scholars to publish critical essays, to question well-accepted legal concepts and to test new ideas, best reflects the commitment of the EJLS to promote young and critical legal scholarship. Therefore, we are very happy to announce that our Journal will reward the authors of the best 'New Voices' essay of the upcoming academic year with the 'EJLS New Voices Prize' amounting to 500 EUR.<sup>11</sup> The entire EJLS team is extremely grateful for the generous and helpful support from the EUI Department of Law, without which this prize would not be possible. We encourage all interested authors to submit their New Voices essays and we are looking forward to receiving and publishing many fascinating pieces.

Second, EJLS also stands for innovative voices. Therefore, we have recently published a call for papers in the field of Empirical Legal Studies in order to provide a new forum for publications relying on this cutting-edge and promising way of conducting legal research. We are very glad that the current issue features the first article to be published by the EJLS in the field of Empirical Legal Research. In their piece, *Michael Hein* and *Stefan Ewert* empirically examine how different types of procedures affect the politicization of European constitutional courts.

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<sup>11</sup> Please find a separate call for papers setting out the detailed procedure and requirements on our website [www.EJLS.eu](http://www.EJLS.eu).

Third, EJLS also stands for polyphony, inviting a plurality of submissions in International Law, Comparative Law, European Law and Legal Theory. In this issue, the reader will once again find articles covering a broad spectrum of topics and salient legal issues. While the concern about EU's democratic deficit has dominated academic and political discourse in the last decades, *Michael Rhimes*, in his contribution, tackles the EU's 'judicial deficit'. He takes issue with the CJEU's restrictive interpretation of the rules on standing for direct actions under Art. 263 (4) TFEU, which also continues after the reforms of the Lisbon Treaty hindering private litigants from making their voice effectively heard before the EU courts. *Armin Steinbach*, in his contribution, sheds light on the range of different legal instruments to incentivise the implementation of structural reforms available under the current regime of EU macroeconomic governance. Alongside the measures available under the regime of the Stability and Growth Pact, he analyses in particular the legal questions surrounding the recent proposal to use contractual agreements as alternative means to promote the implementation of structural reforms within the EU. In turn, *Auke Willems*, in his article, unravels the different legal and social meanings and roles of the concept of 'mutual trust' as fundamental principle underlying EU criminal law. The final article, by *Michele Mangini*, tries to achieve something that many might currently consider impossible: identifying a base for transcultural consent between Islamic and Western societies. By exploring Islamic law and ethics, he takes the reader on a fascinating intellectual journey and identifies in the Islamic tradition of virtues a potential foundation of human rights in Islamic societies.

Fourth, the European Journal of Legal Studies also provides a critical review of current developments in academic legal literature. In this issue's book review section, *Jotte Mulder* critically reviews two recent books on EU state aid law. Both, *Francesco de Cecco's* 'State Aid and the European Economic Constitution' and *Juan Jorge Piernas López's* 'The Concept of State Aid under EU Law' constitute attempts to shed a new, more contextualised light on this highly technical field of EU law. *Graham Butler*, in his review, discusses *Marise Cremona's and Anne Thies's* (eds.) 'The European Court of Justice and External Relations Law: Constitutional Challenges' which constitutes one of the few

publications, so far, to focus exclusively on the CJEU's role as a key player in the development of EU external relations law.

Despite the diversity of voices and topics present in this issue, there is something missing. Unfortunately, the reader will not find a single woman amongst the authors of this issue. This is, of course, by no means a deliberate outcome of our editorial policy, and we would like to seize the opportunity to specifically encourage female legal academics to submit their articles for publication.

### EXIT

Unfortunately, as an academic journal run entirely by doctoral researchers, EJLS is confronted each year with the 'exit' of its members, due to long-standing editors having to complete their theses or starting their professional careers. After many years of excellent work, Afroditi Marketou and Mikhel Timmerman leave their positions as Heads-of-Section for Comparative and European Law, respectively. Moreover, Marita Szreder, who has been responsible for the editing and layout of the journal, will pass on her position as Executive Editor. On behalf of the entire EJLS editorial board, I would like to thank all three of them for their outstanding work. Moreover, I would like to thank all internal and external reviewers whose critical, thoughtful and timely reviews constitute the heart of the EJLS.

This summer, the EJLS will also face an unusual 'exit'. After 40 years, the EUI law department leaves Villa Schifanoia, where the EJLS has been edited for the last nine years. Moving from Villa Schifanoia means leaving a very special place steeped in century-long history. If we are to believe historical sources, Villa Schifanoia was part of the setting of Giovanni Boccaccio's *'Decamerone'* – one of the masterpieces of Italian Renaissance literature. Leaving Villa Schifanoia offers us the occasion to evoke Boccaccio's voice, as an homage to the unique spirit of this place. As an epilogue, the reader will find the story of *Melchizedek*, which is one of the most beautiful accounts in *Decamerone*. In 1779, this story also stood model for the *'Ring Parable'* in Gotthold Ephraim Lessing's play *'Nathan the Wise'*, which went down in the history of literature as a call for religious tolerance. The message of *Melchizedek's* story of the three



rings – an appeal for tolerance that is not necessarily confined to religion, but valid with regard to all sorts of beliefs and truths – has not lost any of its relevance in our turbulent times.